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THE SUPREME COURT OF NEW ZEALAND [2016] NZSC Tra

SC 61/2015
[2016] NZSC Trans 2

JUSTIN AMES JOHNSTON
Appellant

v

THE QUEEN
Respondent

Hearing: 9 February 2016

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: R M Lithgow QC and N Levy for the Appellant
A Markham for the Respondent

CRIMINAL APPEAL

MR LITHGOW QC:

If the Court pleases, I appear with my learned friend Ms Levy.

ELIAS CJ:
Thank you Mr Lithgow, Ms Levy.

MS MARKHAM:
If the Court pleases, Ms Markham for the respondent.

ELIAS CJ:
Yes Ms Markham. Yes Mr Lithgow?

MR LITHGOW QC:
Well there's been an awful lot of churning in the cases, they go round and round in the academic work, and perhaps in our submissions as well. But the guts of what has to be determined about propensity and attempts is that thousands of Judges have tried to find out what the guts of it is, and hundreds of appellate Judges have tried to find out what the guts of it is, and there is, in my submission, no clear line that can be followed, that can make this Court achieve something which other Courts have failed to do.

ELIAS CJ:
Well there's no test, is there?

MR LITHGOW QC:
Well so many of the cases perhaps suggest a test but when you read their reasoning you wonder whether they said it for decoration because what they actually do is often quite different. You say there's no test, and at the expense of sounding over simplistic, the best place to anchor all this is in the section itself, and that's where our submissions attempt to say that the section divides the responsibilities between Judge and jury, does that by the mechanism of saying, or deeming, or pronouncing that something is a question of law, which many Judges have identified really is a question of fact, so saying that it's a question of law is no more and no less than saying the Judge is going to decide that. And when the Judge decides that, that is the proximity, whether it's close enough, whether it's gone beyond preparation, it is already an ingredient that the Judge has that the Crown have produced evidence, sufficient evidence, that the jury could find intention, if they accept it, if they believe it. Now that's nothing unusual about that in the criminal law. A lot of people's lives in very ambiguous circumstances depend on their assertion of what they thought they were up to. In fact that's the foundation of the English law, if it can be put so simply,

in its departure from the Roman law, which is where you're punished for what you did. In the Christian Judaic law that you were guilty even if you just thought it. If you thought of committing adultery you were guilty. The English law has always been what are you doing and what did you think you were up to? And so, in that sense, attempt is just like that. The only difference is the Judge is given a, not that keen on the expression, gate keeping, because that opens the whole question of whether or not it's a preliminary provisional question, and leave for that has been refused, or whether it is determinative but proximity is established. Not that it just might be established, but that it is established.

But that's not unusual. There's other parts of the law that do that, or used to do that. Provocation for example, where the Judge determined the preliminary question and the jury made the ultimate decision, largely about matters relating to intention. So if you do it that way, if you – and *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909, does anyone know whether it's Harpur or Harper? I don't know. *Harpur's* language is deferential to *R v Wilcox* [1982] 1 NZLR 191 (CA) in many ways and keen to ensure us that nothing much is changing, but the way it was interpreted in *Johnston* number 1 obviously our submission is that that's wrong because the Judge is putting his finger on the scales and getting into intention to shift where proximity would fall where immediacy or proximity would fall.

ELIAS CJ:
What is the jury question in the end here? Is it more than does the jury have to decide, for example here, was he on the property for the purpose of sexually violating the complainant?

WILLIAM YOUNG J:
That night?

ELIAS CJ:
That night, yes, all right, if you must. I know that that's where it comes but I'm not sure myself.

MR LITHGOW QC:
Well that's where the question was declined leave and I can see exactly why it's declined leave because close examination of *R v Ostler and Christie* [1941] NZLR 318 is pretty explicit on that but are the juries in New Zealand, like the juries in

England and as in some cases is, would it be better and is it the case? We don't know what's in the benchbook because the judiciary won't release it.

ELIAS CJ:
Well, what is the answer, though, to the question I have asked?

MR LITHGOW QC:
Surely they should also be just asked, but it's their decision whether they think an attempt was underway. But that's – I'm telling you, as a Judge, it's close enough to be an attempt.

ELIAS CJ:
Why do you even need to tell them that?

MR LITHGOW QC:
Well, I think Justice Tipping said in *L v R* [2006] NZSC 18, [2006] 3 NZLR 291, that you don't need to really tell them that, and you can see in this case where the Judge, in the second trial, Justice Mallon, wanted to tell them something about the shape of the offence that she did start to talk to them about things like that, but I don't know what they were supposed to do with it because she was constrained simply by the way that the catechism that the Court of Appeal put in the first case, namely for an attempt, you only needed to be on the property, and that's how she put it, didn't put any more detail than that. She directed them that that question was determined by her and it was sufficient for the attempt that he was …

ELIAS CJ:
So the answer to the question I asked, "Is it sufficient to say was he on the property for the purpose of sexually violating the complainant that night?" is, "Yes, that is the jury question."

MR LITHGOW QC:
If – that's the jury question if proximity's been fixed.

ELIAS CJ:
So we're concerned only with the passing the Judge question.

MR LITHGOW QC:

Yes, because that's the brutal beginning and end that Justice Hammond was concerned about. A history of the English law interest in fixing proximity can bring a case to a sudden end, even though you've got heaps of evidence of intention.

ELIAS CJ:

Yes, so that's the question for us, the relationship between intention and the act relied on.

MR LITHGOW QC:

Well, the jury has still got to consider the acts and whether they believe them, et cetera. So if you just take an example in this case, and I do not wish to be disrespectful to any of the people involved but let's say, because we know from the story that this young woman had only just been allowed to go back to the sleep-out because she's been sneaking out and was punished. So let's say the father hasn't got a clue who it is lurking. He suspects it's one of her mates. He has a very indistinct view, other than he wants to see what they're up to. Now, that person is just as proximate as Mr Johnston and if he is proximate then he'll have to – or she – rely on the intention being examined by the jury. But that's not unusual. So we have, for example, and examples rather drown everybody in this discussion but take for example the doctor. A nurse comes in unexpectedly and is seen in circumstances that are ambiguous. Now, in the old days we had a whole range of people who would have the benefit of the doubt, doctors, priests, nice people, important people, et cetera but we're over all that now. If the circumstances are ambiguous, and if they do not get knocked out by 347 because this is under the old rules then the doctor, along with everybody else, has to take his or her chances with intention.

ELIAS CJ:

Well, look, I'm reluctant to interrupt your illustrations but we're a mile away from that, Mr Lithgow. Don't you have to concentrate on the evidence which clears up or answers any suggestion of ambiguity? Is it really useful to look at other cases without starting with this one and saying what your argument – well, developing, if you want to develop it, because we've read your submissions, your argument on this case?

MR LITHGOW QC:

Well, my submission is that all this rehashing of the minutiae of what happened in what order is not appropriate to this case because that’s not what happened in the second hearing. Justice Mallon took the fixed proposition from the first appeal and simply repeated that to the jury. She didn't give a decision that she agreed with it. She didn't give any reasoning for how she figured it and if you go back to the original Court of Appeal they considered it a finely-balanced thing. And the Crown, then, Mr Mander at the Crown Law Office, said that it wasn’t as strong as *Harpur*, but they were relying on statements made to cellmates and imagined friends, and his previous convictions to make it proximate and the Court of Appeal accepted that and that’s the basis on which it’s put to the jury, so in my submission it’s not appropriate for this Court to say, well we would have, I thought it looked pretty proximate, I’m not concerned about any of that, because that’s the way it was done. The trial Judge wasn’t given an opportunity to express her opinion on proximity based on any nuances or differences in the evidence between the first and second trial. So the Crown position was, and is, that they needed propensity and prior statements to cellmates to make it proximate. So the intensity –

ARNOLD J:

I just don’t understand that because let’s assume that the activity was simply scoping out, you know, all the earlier steps that had been taken in terms of keeping a watch on the place, and trying to suss it out. Now all of that was done with the intention that we’re talking about, and yet I don’t think there’s any claim that that would have amounted to an attempt. The difference in this occasion was in the way it was put to the jury was that he was, in fact, going to carry out his plan that very evening, that’s why he was there. But absent that factor there wouldn’t have been an argument that there was an attempt, would there?

MR LITHGOW QC:

Well that’s got two answers. One is because under the Act the Judge has to assume that will be the jury’s answer because –

ELIAS CJ:

Sorry, what will the jury’s answer be?

MR LITHGOW QC:
That they will accept the Crown analysis that he's going to do it that night, because that's the wording of the Act.

ARNOLD J:
Well they have defined that as a fact but the Judge says if you find that then I rule that that is sufficiently proximate.

MR LITHGOW QC:
Yes, they could have said that about any of the nights.

WILLIAM YOUNG J:
But the Judge hadn't made the ruling that it was at any of the nights was sufficiently proximate, so it wouldn't have got to them.

MR LITHGOW QC:
Well that's correct but you're asking about the scoping nights and the Judge did actually ask the jury to be sure that wasn't just scoping. I don't know why she said that but –

GLAZEBROOK J:
That was because of the first Court of Appeal decision. To be honest I think, as I think the Chief Justice said, that I'm not certain that the first Court of Appeal decision is right, and that it isn't an attempt, if it is that night or a reasonably proximate night.

MR LITHGOW QC:
That would widen it rather but all –

ELIAS CJ:
Well if not this night, tomorrow night. If things don't work out tonight then I'll come back, that sort of thing.

MR LITHGOW QC:
Well that would be a general attempt to get what he wanted in any scenario, and you just keep going back until you find it, whether it's –

GLAZEBROOK J:

Can I take you back to your example of the mate coming to either give the girl a fright in the sleep-out or to help her sneak out. Doesn't that indicate that the intent with which something is done, decides whether it's going to be an attempt or not? you can't separate out, because somebody could have been walking into the sleep-out, or past the sleep-out for perfectly innocent reasons, well not innocent in terms of the families concerned, but innocent in terms of any criminal offence, and doesn't that actually show that you have to link intent to the actions?

MR LITHGOW QC:

But who's going to decide –

GLAZEBROOK J:

But nobody's going to be charged just for being on the property if there's absolutely no question that there could possibly have been an intent.

MR LITHGOW QC:

Well that's, with respect, not correct because section 29 of the Summary Offences Act 1981, now this was a big change in the New Zealand law and it started with lengthy Parliamentary hearings in the '70s but took to '81 to be all sorted. It was previously an offence to be in a building or an enclosed yard, full stop. Section 29 and this is perhaps a different era but the proposition was that homeless people or intoxicated people or people merely seeking shelter should not be criminalised just for sleeping it off in your garage or your wash house. Now these days it would be unlikely Parliament would do that but that was the theory, it's just as scary for the old ladies and the householders. Now what this section –

ELIAS CJ:

Sorry, section 29 was that –

MR LITHGOW QC:

– Summary Proceeding, Offences Act, Summary Offences Act.

GLAZEBROOK J:

I'm not sure why this is relevant to what we're saying, they're not going to be charged with an attempted sexual violation if they're on the property to help her sneak out?

MR LITHGOW QC:

Well just, if we just hold that for a minute. There is, the proposition is everyone is liable to imprisonment who is found without reasonable excuse in any enclosed yard or any such area. There's vessels, trains, vehicles, buildings et cetera. "It is not necessary in a prosecution under this section for the prosecutor to prove that the defendant had the intention to commit any other offence but it is a defence if the defendant satisfies the Court that he or she had no such intentions." So it's a very unusual section. So it appears to make it an offence to be in someone's backyard but it is a defence if you can establish that you didn't intend to commit any other offence plus, plus you have the general offence that you don't have a reasonable excuse and the third proposition there is that any, "If any constable finds a person in any place referred to without reasonable excuse but in circumstances that do not cause the constable to suspect the intention to commit any other offence, a constable may instead of arresting him for an offence against subsection 1, which is an imprisonable offence, warn that person to leave the place and if they refuse to do so they're liable to a fine of $500." So there are provisions related to that circumstance. Now if we look at the friend who is approaching the sleep-out that the father chases and grabs their proximity must be the same –

ELIAS CJ:

But proximity isn't an element of section 29 – they just have to be –

MR LITHGOW QC:

No we've gone back to the text now –

ELIAS CJ:

I see. How does section 29 bear on this at all?

MR LITHGOW QC:

Well Her Honour I thought asked me that this person who has gone there for some teenage purpose –

ELIAS CJ:

Well he's clearly not going to be charged with an attempted sexual violation.

MR LITHGOW QC:

Well but he may be 17 and she may be 15, there may be charges.

ELIAS CJ:

Well then he might be.

MR LITHGOW QC:

Right –

GLAZEBROOK J:

Well not sexual violation if it's consensual.

ELIAS CJ:

No.

MR LITHGOW QC:

Right.

GLAZEBROOK J:

Whatever the age of the girl is.

MR LITHGOW QC:

Yes but that's why we are prepared to shape shift the legislation –

ELIAS CJ:

We're not shape shifting the legislation, we're looking simply, I think, at section 72(1).

MR LITHGOW QC:

Yes. Now how can proximity, how can that be different when you've got two, you've got two people in the same proximity. One is a sex offender since the year dot and the other one is an amiable friend –

ELIAS CJ:

Separate – proximity is not the actus reus of this offence, it's –

MR LITHGOW QC:

Of which offence?

ELIAS CJ:

Of any act with intent to commit the crime that's alleged.

MR LITHGOW QC:

Well it's any act that can be called proximate.

WILLIAM YOUNG J:

Or ordered by way of preparation for an offence. It's got to be by way of preparation for an offence.

MR LITHGOW QC:

Well, all preparation has intention and most of the intention probably resides in the preparation.

WILLIAM YOUNG J:

Yes but the teenage friend will not be prosecuted because intention can't be established. Now, intention is material to mens rea, obviously, but it's also material to whether the character of the act, whether the act was by way of preparation for an offence, so the actus reus hasn't been committed, either.

MR LITHGOW QC:

The actus reus with the teenage friend?

WILLIAM YOUNG J:

Yes.

MR LITHGOW QC:

Well, the Judge has to determine whether or not it's sufficient for an attempt assuming intent.

WILLIAM YOUNG J:

But also assuming that the Crown can show that it was by way of preparation for an offence. Now, I agree that that is likely to come back to intent but it is part of the actus reus, isn't it?

MR LITHGOW QC:

Which part is part of the actus reus?

WILLIAM YOUNG J:
That the act relied on is of a particular character, namely, by way of preparation for an offence.

MR LITHGOW QC:
Right. So on this basis, the sex offender sitting in the bus stop is proximate but the worker waiting for his bus or her bus is not proximate.

WILLIAM YOUNG J:
Well, it's nothing to do with proximity. It's to do with whether it's by way of preparation for an offence.

GLAZEBROOK J:
If one's waiting for a bus, then one's waiting for the person to get off the bus that they intend to pull behind the bushes, then it might be proximate enough in the case of the sex offender but not the worker waiting for the bus.

MR LITHGOW QC:
But isn't both of them – what, then, does the jury decide?

ELIAS CJ:
Well, I think the jury decides section 72(1). Now, I'm not sure that it is anything to do with proximity or preparation. It's just doing an act for the purpose of accomplishing his object, the Judge having decided that the act is sufficient.

MR LITHGOW QC:
Well, that's what Justice Chambers identified from previous cases. He didn't invent this. That's a pretty wide section, subsection (1), and on the face of it would include preparation but we know from the history of the common law of attempt that it makes the distinction between preparation and doing something. So the methodical preparer, who keeps lists and tick lists and buys the necessary equipment to perfect an abduction, that person, we say, is in no different position from the other person that's found in the same circumstances who's kept his mouth firmly shut and keeps it all in his head. Their protection lies in either the obvious intention, which means they're not charged and that is part of daily life, obviously. Not everyone found in odd positions are charged with anything. But when it comes to the jury, unless it can be discharged under section 347 the Judge has to say to them – and the Judge can give

them the tail wind as much as he or she likes – but that's a jury decision, not a Judge decision.

ELIAS CJ:
Sorry, what's a jury decision?

MR LITHGOW QC:
The fact that he's a sex offender and has made lists and all that sort of thing or whether he's private, she's private, makes no lists, and acts purely on their private thoughts, whether that, whether the mens rea has been established, whether the Crown theory is established beyond reasonable doubt.

ELIAS CJ:
But there's no problem with that in this case, is there? I mean, there's no problem in terms of what was left to the jury.

MR LITHGOW QC:
Well, the jury obviously, if they did what they were told, decided that he intended to sexually violate that night. Yes. They're not asked whether they thought the attempt was all on because that's taken off them and the Judge says –

WILLIAM YOUNG J:
What do you mean by that, "The attempt was all on"?

MR LITHGOW QC:
Well, because we've got this situation, some of you are indicating that you would have been happy to find him proximate any night.

GLAZEBROOK J:
Well not any night but I'm just saying that I'm not totally convinced that the Court of Appeal was right, that it was the intention that night or in a closely proximate night was wrong but that in any event, now we're looking at it being that night. So let's not get distracted by that.

MR LITHGOW QC:
Well it is interesting in this case because he had been there previous nights and hadn't done it.

GLAZEBROOK J:
But the jury decided – was to decide whether he had the intent that night. That's what they were asked to decide.

MR LITHGOW QC:
Yes, so he had the intent to do it that night. So it's critically important as to whether or not he's going to – there's so many formulations to this but let's say he's going to give it a go that night, right?

WILLIAM YOUNG J:
It's a condition, I mean, it could be a conditional intent, as the Chief Justice pointed out. I will break in and rape the girl providing the security lights don't go off or providing there isn't a party on at the house or providing the neighbours aren't all having a huge barbecue outside. Now that would probably be enough wouldn't it? I mean because most crimes must have – intentions must be conditional to that extent, that I'll go for it but only if the circumstances are auspicious.

MR LITHGOW QC:
Well, yes. All crimes will have an element of that, either in the purely spontaneous and idiotic but I've still got the problem with just thinking through the time thing because what if he hadn't done it that night? Would he have been guilty of an attempt because on the Crown's adoption of various criticisms of *Wilcox* where the car was stopped one kilometre from the bank in Napier or Taradale or something, the Crown didn't put it –

ELIAS CJ:
If it was impossible because her father was in there talking to her or something like that?

MR LITHGOW QC:
Well, impossibility is specifically covered. That doesn't change things either.

WILLIAM YOUNG J:
Impractical.

ELIAS CJ:

Yes, impractical, sorry.

MR LITHGOW QC:

Just while we're in this horrible mess of contemplating all this, there's two things. One is there was clearly other charges he could've been charged with.

WILLIAM YOUNG J:

Trespass.

MR LITHGOW QC:

Trespass, unlawfully on a property, arguably it could be attempted burglary if he got closer to the outbuilding and the crime alleged could be burglary with intent to commit sexual violation or, yes, sexual violation. But what if he hadn't done it that night, would he be guilty because we replayed the tape?

WILLIAM YOUNG J:

As entirely a matter of practicality, so it might depend on why he didn't.

MR LITHGOW QC:

Well, that's the other part of this. Now we're wanting to – we don't like people who dream and scheme horrible things but the law, in general, with one or two exceptions, does not criminalise that. Now why the law doesn't criminalise that is a series of nuances, evolutions and decisions made over the long period relating to the sanctity of what people think. A lot of regimes don't concern themselves with that and think it's perfectly natural to prosecute people if they admit to bad thoughts.

WILLIAM YOUNG J:

Or dreaming different dreams as in North Korea.

MR LITHGOW QC:

For imagining the death of the monarch.

WILLIAM YOUNG J:

Yes.

MR LITHGOW QC:

Now, we've got a guy who's been a sex offender and seems to like talking about it. That seemed to be that was the evidence. Now you don't want him to do it again. You want to stop that. But remember a whole lot of things have happened to him which are meant to stop him as well like the idea that he will say harbour these thoughts and feelings, but that he's given strategies to, in the end, not do it. So that's a good process, we don't want to, we want him to sort it out himself, we don't want him to do it, we're not going to carry on punishing him for fantasising, but how, but someone's got to draw a line between his preoccupations and him actually doing it, and in this case whether it's scoping, or whether he's going through something which in the past has been a great excitement, or adrenaline rush to him, inconceivable to us but he's got this life that he's led and he, he's scoping things and looking. We've decided, everyone seems clear that we don't want to get him for just thinking about it. We don't want to just get him for talking about it. We don't want to get him for just scoping it. So, and there's no answer to this other than all those examples. It's very, it's not an answer to this. When is it that under our law of attempt we can make him guilty of that offence. It's the offence of attempting, not the offence that he's going to do it, the offence of attempting to do it, and all this case is about is whether the point at which he can no longer say in a way that the Judge or jury will accept, this is a Judge alone, or a jury, will accept and it's got past that point, shouldn't change depending on whether he's a, that preliminary question shouldn't change on whether he is a terrible person, or what was thought to be a good person here for the first time in their criminal career. That's all jury stuff.

ARNOLD J:

To some extent this, your point is simply linguistic, isn't it? If you have a situation where somebody embarks on committing some crime but there is no independent evidence of intention and the conduct that they perform leading up to it is equivocal, it's subject to a number of explanations, the reality is you won't be able to convict them with attempt really until they get to the point where the actions really do indicate strongly an intention to commit a particular offence. That's just the practical reality.

MR LITHGOW QC:

Yes but whose job is that?

ARNOLD J:

Well, all –

ELIAS CJ:
The jury's.

WILLIAM YOUNG J:
Well or the Judge –

ARNOLD J:
And I think all that *Harpur* is saying is that in some circumstances where there is clear evidence of the intention, then you don't need to rely on the Act as much to establish the intention. In other words although there's the prohibition – although there's the provision in subsection (3) that you can have an attempt if it's immediately proximately connected whether or not there's any act unequivocally showing, that's a general proposition of law, but in particular circumstances, particular sets of facts, you may need an act which shows very, very strongly the intention because that's the only proof of intention. All *Harpur* is saying is that where there is proof of intention, then the act need not be as strong. That seems to me is a practical matter to be just about self-evident.

MR LITHGOW QC:
Well there's cases where the facts are both a chain of events and evidence of intention aren't there, for example, drug dealers who ring up and see if there is any, can we come in, will you be there, drive in knock on the door. Now that will be recycled as intention but that's a chain of events that also explains something.

ARNOLD J:
Mmm.

MR LITHGOW QC:
Now in this case it's propensity that the Crown persuaded the High Court and the Court of Appeal, it's propensity reasoning, that is the strength and determination of its predisposition that can tell us, that that can show us the intention.

ARNOLD J:
But that's a given isn't it, we're not sort of arguing about that.

MR LITHGOW QC:

Exactly, no that we are, that's exactly what we're arguing about, it's – the fact that that is the Crown proposition and the Judge's assumption that the jury will find that to show that he is committing an act with the intention to commit an offence you know, the Judge just has to assume that.

GLAZEBROOK J:

I'm sorry, isn't the propensity evidence just showing what the offence was because there were a number of possible offences that he could have been contemplating and in fact he said that it was burglary, a true burglary rather than...

MR LITHGOW QC:

Well he said that but the Crown position was and they also had a go at his burglaries and reminded the jury that they didn't have detail and what he was planning to burgle for but – well let's just think about this. If the Judge said to the jury, the Crown case is that there are what is otherwise a man in a backyard is in fact an attempt to have unlawful sexual connection with the person in the sleep-out, they have given three reasons why you will accept that that was his intention when he was there in the, in the back yard. If you – I'm assuming you're going to accept that so I tell you that the – his positioning on the property is sufficiently close to be what the law calls "an attempt" so don't worry about that but I'm directing you to that, now you go and consider whether you believe that he was on the property and that you believe that that was his intention while he was there, right so that's what was said. Now what if the Judge then says, however if you only accept one of the Crown, one of the Crown ingredients making up intention, that is previous convictions, you don't accept anything the father says because he's invested and you don't accept what the cell-made confessions et cetera, we're not interested in them, we're only interested in his previous conviction, you better get back to me because I'll have to reassess proximity because that might alter things because those convictions were 20 years ago, so I'm going to have to –

WILLIAM YOUNG J:

Yes but there's something in the middle.

MR LITHGOW QC:

Mmm?

WILLIAM YOUNG J:

There was something in the middle wasn't there?

MR LITHGOW QC:

Yes I know, but the point being that if the decision about proximity depends on what the Judge thinks –

WILLIAM YOUNG J:

But you don't break it, we don't break cases down like that –

MR LITHGOW QC:

Yes why not though?

WILLIAM YOUNG J:

Because it's not practical, because some juries may accept some parts of the evidence, others may accept others, the real issue is were they satisfied; the real issue, as the Judge saw it, and at least for the moment I'm not persuaded she was wrong, were they satisfied that he was there for the purpose of committing sexual violation that night. Now why some of them thought, if some placed more evidence on the propensity evidence and others place more evidence on the cell-made discussions, well so what? We can't dissect that.

MR LITHGOW QC:

Absolutely, that's precisely correct. Therefore why is the Judge allowed to determine proximity not assuming that the jury will find beyond a reasonable doubt intention in their own way but shifting the launching point on the assumption of what the Crown says is intention. So if the Judge – if the only evidence had been that he had previous convictions it seems unlikely that on the way it's been reasoned that they would have found proximity and the Crown didn't suggest they'd have proximity without all the features being accepted by the jury.

ELIAS CJ:

Does your submission really amount to saying that the Judge, in determining the question of proximity, is limited entirely to questions of space and timing?

MR LITHGOW QC:

Well, space and timing and the nature of the offence. The sniper may be miles away. Certain things attempt to import drugs may – the die may be cast miles away and weeks away, so that will depend. But it is peculiar to these sorts of cases that homosexual liaisons seem to be able to be proved –

ELIAS CJ:

Well, those are pretty old. Those are pretty old cases.

MR LITHGOW QC:

Yes and it's unsatisfactory that we have to look at them but that's part of our legal history.

WILLIAM YOUNG J:

But if they were dealings with an adult man and, say, a 12 or 11 year old girl that might well be applicable.

MR LITHGOW QC:

No, I just deal with the homosexual liaison cases. There is a logic to it, even though there's unsatisfactory aspects to it, because those offences are a long way down the track by the enticement notes, "Come with me," letters, "Carry my bag," et cetera. So we all, hopefully, well, I feel uneasy reading them but it's not that they're completely aberrant but it does illustrate the danger when we decide that certain sorts of cases we can shift proximity. Now, strangely the cases of killing wives, you seem to have to be in the back of the car with a shotgun right up to their ear or in the street screaming, "I'm going to kill you."

WILLIAM YOUNG J:

Those are the English cases?

MR LITHGOW QC:

Or Canadian.

WILLIAM YOUNG J:

I don't think I took quite that view in a case in *R v B* HC Christchurch T19/01, 7 September 2001, did I?

MR LITHGOW QC:
I'm sorry, I've forgotten *R v B*.

WILLIAM YOUNG J:
It's *R v B* that's referred to, although it's not in the material.

MR LITHGOW QC:
But it relates to the ingredients of the offence. They all do. Now, what Mr Johnston was going to do if confronted in various situations or he got through the door or the door was locked and he couldn't get in and lots of things, my submission is that that type of offence, it's not surprising that the Crown tried to make it imminent and close. Because if you accept the Crown's submissions and their repudiation of *Wilcox* and the criticisms of *Wilcox*, Mr Johnston was guilty the moment he parked the car a kilometre away and started walking towards the scene.

WILLIAM YOUNG J:
Well, maybe. The trouble is the word "proximity" or "proximate" is elastic. It's a word that's not susceptible to definition other than by way of what Justice Chambers would have said similarly fuzzy words. So in the end it's an irreducible problem that one has to deal with on its terms. Is this conduct sufficiently proximate?

MR LITHGOW QC:
Well, exactly and it's a factual analysis called a question of law when it's not really.

ELIAS CJ:
So can I just ask you on this, because I think the really interesting part of this is working out the difference between the role of the Judge and jury, is your argument that the jury should be directed in this sort of case, if you accept he had the intention, "I direct you that the act of being in the enclosed yard was sufficient to be an attempt." Do you – is that what you'd have to do to answer your concern that otherwise the Judge is contingently saying that the actions are proximate when the question of intent and the reliance on the other evidence as to intent, is really for the jury?

MR LITHGOW QC:
Yes, well, quite a lot in that, Your Honour. The direction that – you'd start from – there's several possibilities. Justice Tipping's idea would be, and this is in *L v R*.

Now L was a woman holding a boy's penis and, as everyone had said, "Don't even know why we're talking about proximity. We've got proximity," yes, and so the Judge says, "Don't tell the jury anything about proximity. They won't enquire because –

ELIAS CJ:
Well, you don't need to use the word proximity to the jury even on the basis that I've put to you. You would be saying that the Act was sufficient if you accept, on the evidence, that he had that intent.

MR LITHGOW QC:
Well, you've just got to remember that it's become a bit of a fashion to give juries copies of sections and this is where, and people – and the counsel may start abusing this language but on Justice Tipping's, if proximity is just not even an issue, don't even tell them that proximity is in the – they don't even have to worry about that. But if proximity is likely to be a natural enquiry of the jury as – Your Honour, we've heard this evidence. We know what he wanted to do but tell us again what an attempt is? And is it correct to simply say to them well, an attempt is an act done or not done for the purpose of accomplishing the object which you've already told us that you accept, his object because the other two bits are part of the law of New Zealand as well.

ELIAS CJ:
But who are they directed at? I mean it's obvious that subsection 2 is directed to the Judge. It may be more debateable that subsection 3 is.

MR LITHGOW QC:
Well, it is directed to the Judge –

ELIAS CJ:
Yes.

MR LITHGOW QC:
But it's an answer for the jury isn't it? So the Judge tells the jury about this. He says or she says, "With cases you've got to do something and you've got to have intention and you've got to be close enough for the law to call that an attempt. I decide whether it's close enough for the law to call that an attempt and I direct you that it's close enough for the law to call it an attempt."

WILLIAM YOUNG J:
But why does the Judge have to even do that? Why can't the Judge shield the jury from the law and just say, "If you're satisfied that this act was done for the purpose of committing an offence and with intent to do so, then find him guilty. If you're not satisfied, don't." Now – and that's what the Judge – the Judge effectively did that. Not quite in my terms.

MR LITHGOW QC:
No well it started to but then she added in about this, she added in about this scoping business.

ELIAS CJ:
That can't have prejudiced you.

WILLIAM YOUNG J:
That's just by way of information.

MR LITHGOW QC:
No, no, no but it is interesting that her temptation was to say something about the fact that we've all seen strangers in inappropriate places.

GLAZEBROOK J:
But wasn't that because the Court of Appeal said it couldn't be a scoping exercise that night. It had to be intent to commit that night. So all she was doing was saying it has to be he was on the premise so, "You have to be satisfied that he was on the premises," and there really was not dispute about that so far as I can gather. That he was on the premises and that it was with that intent that night.

WILLIAM YOUNG J:
But it was the purpose of committing a rape that night.

GLAZEBROOK J:
Yes, and that it wasn't just a scoping exercise because had it been a scoping exercise it would have been outside of the first Court of Appeal decision.

MR LITHGOW QC:
Well, why would scoping be outside of the Court of Appeal decision?

GLAZEBROOK J:

Because they said it had to be that night, not some time in the future and a scoping exercise is clearly saying in the future, unless you mean a scoping exercise, "Oh, I'll do it tonight if all falls into place well."

MR LITHGOW QC:

Well, exactly. It was all a bit complicated.

GLAZEBROOK J:

But then that's not what she was talking about in terms of the scoping exercise was it?

MR LITHGOW QC:

But she took the jury into that and that's the problem –

ELIAS CJ:

Well maybe, maybe we should, maybe we should indicate that that is not necessary but it doesn't really bear on the appeal whereas I think you are trying to argue something that we should be grappling with which is that if the Judge in determining that acts are not preparation and are sufficiently proximate is relying on evidence of intention then it maybe that the jury should be instructed in terms of that contingency.

WILLIAM YOUNG J:

In a sense the Judge has done that because her finding of proximity which is really the Court of Appeal's finding, is predicated on a assumption that the Crown can prove an intention to commit a rape that night.

MR LITHGOW QC:

Well that's because the section says that. He has to do it on the presumption so why is he looking at his own thoughts and feelings about whether or not he takes it that far.

WILLIAM YOUNG J:

But it doesn't matter because the Judge doesn't make a finding of fact as to whether the actions were proximate, the Judge is making a finding as to whether the actions

as contended for by the Crown if a, if satisfied, if established the satisfaction the jury would be proximate.

MR LITHGOW QC:
No I think –

WILLIAM YOUNG J:
The Judge has to put to the jury the assumptions as to proximity which have been critical to the finding that the case can go to the jury.

MR LITHGOW QC:
Who's he putting these to?

WILLIAM YOUNG J:
The jury and those findings are –

MR LITHGOW QC:
No he's not, he doesn't put any assumptions to the jury about the finding of proximity.

WILLIAM YOUNG J:
Yes they are.

GLAZEBROOK J:
He puts the, no, no but in this case it's probably a bit because there was no question that he was on the property and I don't think that was ever contested. But say there'd been a question whether he was on the property, the first question would have been: are you satisfied that this man was on the property, if so are you satisfied that was the intent to commit sexual violation that night?

MR LITHGOW QC:
That that was an act –

GLAZEBROOK J:
Here probably to –

MR LITHGOW QC:
– for the purpose of.

GLAZEBROOK J:

No. Because the Judge has already decided that being on the property would be enough, therefore the only question for the jury is one whether he was on the property, if that was in contention, which it wasn't here, as I understand it, at trial. So the only question for the jury was whether he was on the property with that intention. Why should it be anything else?

MR LITHGOW QC:

Well...

GLAZEBROOK J:

And anyway leave wasn't granted on that question but...

MR LITHGOW QC:

Well it's not just, that's the question I put it in terms of whether it was proximity, but the question which perhaps Mallon J and perhaps sort of sits there in a case, particularly where he's done it these other times, being in the, possibly being in the same position on previous times; the jury might be interested in whether he was going to do it that night, not whether he intended that outcome but whether he was actually going to do because intending something and attempting something are obviously different propositions and we don't, we don't convict people for intending to do things. We do convict them for attempting to do things.

ELIAS CJ:

But the section, the section explains what an attempt is.

MR LITHGOW QC:

Only by the time you've got to the end of (3) not just in (1).

ELIAS CJ:

No. Well – yes but that's sort of built into it.

MR LITHGOW QC:

Evolved over the years.

ELIAS CJ:

It's nothing to do with attempt – you're not – it explains what an attempt is and what's wrong with the direction that I suggested that if you accept he has that intention, being on the property is sufficient to constitute an attempt, so that – because in this case all the jury had to consider was the intention with which he was on the property that night.

MR LITHGOW QC:

Well this is, this is – better something sufficient to constitute an attempt, are the jury allowed to say we can see immediately why it might be but we don't think it is. We know –

GLAZEBROOK J:

Well it's not their decision.

MR LITHGOW QC:

We know what, we absolutely agree he intended.

GLAZEBROOK J:

But it's not their decision under section 72 is it?

MR LITHGOW QC:

Well...

GLAZEBROOK J:

Isn't that the point about...

MR LITHGOW QC:

It is in Britain.

GLAZEBROOK CJ:

Well unless you say it's just a provisional decision of the Judge and the jury gets to decide it all over again, but where do you get that out of the section?

MR LITHGOW QC:

Well, things like may –

ELIAS CJ:

What about "any act"?

MR LITHGOW QC:

Any may show – and that would be consistent with other such sections where the Judge has a gatekeeping role and because some Judges have said that, including in *R v Wilcox* but anyway –

WILLIAM YOUNG J:

But in cases where Judges have a gatekeeping role the statute doesn't say the question is for them, the ultimate question is for them. The question for them is whether there's evidence to go to a jury but here section 72(2) says that whether the act was only preparation, which I suspect is the other side of the coin from insufficiently proximate, is determined and directed to be a question of law, which the Judge decides, not one which the Judge exercised a gatekeeper role on and leaves to the jury.

MR LITHGOW QC:

Well, just like, for example, self-defence. It's not the best example because self-defence is, in fact, not a defence but a proposition of justification but the Judge makes a conventional – and we would call it legal – decision whether there was sufficient to put to the jury.

ELIAS CJ:

But that isn't the way it's expressed here, which is really what's being put to you. It's not expressed as a gatekeeper role leaving the question to the jury.

MR LITHGOW QC:

Well, in *R v Wilcox* it was expressed in those terms and in –

WILLIAM YOUNG J:

Isn't what the statute says more important?

MR LITHGOW QC:

Well, you could say that that's what I've said from the beginning, that the statute doesn't mention taking into account intention when determining proximity.

GLAZEBROOK J:

The real question is whether – so even saying you don't take into account intention, so if the Judge says it is sufficient to be on the property then the question for the jury would be if there's a question about whether it's sufficient, whether the person was on the property, whether they're satisfied beyond reasonable doubt they were on the property, and then whether they were there with the requisite intention.

MR LITHGOW QC:

Yes because the counsel and the Judge can say all kinds of …

GLAZEBROOK J:

But it's not for the jury to say, "Oh, no, but we don't think – we think it's not proximate enough for him just being on the property so we're going to decide differently," or on the wording of section 72(2).

MR LITHGOW QC:

Well, they might not want to get into proximity but they may have the simple reaction, "We don't reckon he was going to do it. We know he wanted to do it."

WILLIAM YOUNG J:

Then they'd acquit him.

ELIAS CJ:

Yes, because he didn't have the intention.

MR LITHGOW QC:

He did have the intention. He did have the intention. He's had the intention every day in his cell and the intention every day he's talking to his friends and an intention all the times he's come into scope but he didn't give it a go. He didn't give it a go. Now, if you look at subsection (3) because this is the mystery word and all that. "An act done or omitted with intent to commit an offence may constitute an attempt." It's giving a sufficient condition that on the normal statutory interpretations it isn't a complete …

WILLIAM YOUNG J:

But isn't that just really a way of overruling *R v Barker* [1924] NZLR 865 (CA)? Isn't this language directed to overruling *R v Barker*?

MR LITHGOW QC:

Yes. The answer is yes, but ...

WILLIAM YOUNG J:

Just to take a different example, the offence of manslaughter by negligence, whether there's – that depends on whether the defendant was guilty of a major departure, which is not an easy term to sum up to a jury and is sometimes summed up by way of saying, "Well, was the departure so significant as to be properly considered to warrant the sanction of criminal law?" Now, that's a value judgement that, rightly or wrongly, is left to juries to determine because that's a question for them and isn't there – doesn't that really highlight the point I've been trying to make, that this is a question that is one of fact and degree, is one perhaps of impression but which is directed by the Statute to be dealt with by the Judge.

MR LITHGOW QC:

No problem with fact or degree because everybody's at least said that, that it's a matter of fact or degree. The question is whether you can shift the boundary line of preparation over to proximate enough –

ELIAS CJ:

But what –

MR LITHGOW QC:

– by taking into account intention, but can I ask I simply don't know I'm sorry, is it possible to be charged with attempted manslaughter?

WILLIAM YOUNG J:

Probably. No I'm not talking about attempted manslaughter, I'm talking about the offence of manslaughter –

MR LITHGOW QC:

Right.

WILLIAM YOUNG J:

– you see if you can’t have regard to intention, if you can’t have regard to what the Crown can prove the defendant actually intended to do, why what stand point, by what reference point is proximity to be determined?

MR LITHGOW QC:

By the assumption that they can prove it because that’s what the Act says, you just assume they can prove intention.

WILLIAM YOUNG J:

But don’t you have to approve, but isn’t – you're talking about intention in the round, mightn’t one have to look at what the defendant actually intended to do on the particular day, on the particular fact, whether driving the car past the site of the intended robber was to do with a robbery or perhaps the bank was on the way to school or something. Isn’t it something that, doesn’t intention necessarily come into it in terms of what the defendant actually wanted to do that day or in the immediate future?

MR LITHGOW QC:

Well we’re running a criminal law system by statute, that hasn’t been the history always but we are and that so it has boundaries and there’s always bits at the edges that are made to look a bit funny. Criminal lawyers can sit in a callover Court and they can guess 90 percent of the time what a person is charged with as they walk up. Ms Levy can tell what her son’s planning to do the moment he stands up while he’s watching TV and walking towards the kitchen, what he’s going to go for. But that, but the law has got to criminalise some people on an even-handed basis and it’s particularly, it’s particularly pernicious when two people in the same circumstances are given a different threshold depending on their previous convictions. Now –

ELIAS CJ:

But that’s a different argument.

MR LITHGOW QC:

Well it’s not because –

ELIAS CJ:

Well I mean that's an argument that the legislation overcomes because it allows evidence of propensity to be given.

MR LITHGOW QC:

For who though? That's for the jury to decide whether they accept or –

ELIAS CJ:

Well but it still is for the jury to decide because the jury. It's open to the jury to say we're not satisfied that there's sufficient evidence of intent to commit the crime alleged and in cases where the only evidence as to intent is the Act, of course they are going to consider whether it's, it unequivocally shows that – the intention and it doesn't matter that it's past the Judge, that's still a jury question. In a case like this they also have other evidence to consider when concluding intent.

MR LITHGOW QC:

Good, well why don't we leave it to them, that's the whole point, leave it to them, the Judge's decision – because all these grubby intentions –

ELIAS CJ:

But the intent is left to the jury, entirely.

MR LITHGOW QC:

Yes but the Judge is shifting, the Judge is shifting by *Harpur* and *Johnston*, the Judge is shifting the gateway point to the jury to have a look at it based on his or her views as to intention, not the intention, not the assumed intention sufficient to carry the day.

ELIAS CJ:

Can you just follow that up by showing me the passage in *Harpur* where you say they impermissibly shift to the jury? Shift to the jury or shift away from the jury?

MR LITHGOW QC:

Shift away from the jury.

ELIAS CJ:

Yes.

MR LITHGOW QC:

Well this would be in say starting at page 22 of volume 1, so this is the first Court of Appeal decision in *Johnston* talking about *Harpur*, starting with the Crown –

GLAZEBROOK J:

Sorry, can you give me a second. Sorry, the first Court of Appeal?

MR LITHGOW QC:

Page 22 of volume 1 of the case on appeal. Starting at paragraph 25. This is the Crown telling the Court of Appeal that the Judge's decision was correct applying *Harpur*. Although the intention is less explicit than *Harpur*, there was enough evidence if accepted by the jury to infer a level of intent that would render the act in question sufficiently proximate.

ELIAS CJ:

This is just the argument.

MR LITHGOW QC:

They go over and they accept that.

ELIAS CJ:

What's this statement that you say?

MR LITHGOW QC:

So 26, accordingly, Mr Mander submitted that the totality of Mr Johnston's conduct, if submitted by the jury, indicated as strong enough that the act of being on the property was sufficiently proximate, so you had the act of being on the property had to be linked to the intensity of the intent and then the Court discussed it starting at page 24. "The issue is finely-balanced but we consider Mr Johnston's acts were proximate," and they then give their reasons. In *Harpur* the Court agreed with Professor Roach that a more remote actus reus would be accepted if the intent is clear. Mr Horsley's argument – that's for the defence – rests on the fact that unlike *Harpur* there's no direct evidence of intent and they –

WILLIAM YOUNG J:

It's all there was sufficient evidence if accepted by the jury. I mean, the issue – they're not taking away the jury's role, are they?

MR LITHGOW QC:

They're not taking away the jury's role but they are accepting the Crown proposition that the point of proximity is determined by the seriousness of his intent.

WILLIAM YOUNG J:

Maybe that goes too far. Maybe it's sufficient if there is an intent. If they're satisfied the act was for the purpose of committing an offence and there was an intent to do so, then providing the Judge is satisfied that on the case as postulated by the Crown it was proximate, then it's for the jury to convict.

MR LITHGOW QC:

The whole case was on the basis that they were shifting the boundary of proximity. Everybody accepted that –

ELIAS CJ:

I'm not so sure that really, reading the cases, that they are so very different, myself, but …

MR LITHGOW QC:

What is so very different?

ELIAS CJ:

Well, you say it's shifting the boundaries. I'm not so sure that it does really shift boundaries.

MR LITHGOW QC:

Well, it adopts both in *Harpur* and *Johnston* Professor Roach's proposition that the more remote actus reus will be accepted if the intent is clear –

WILLIAM YOUNG J:

But isn't that just a statement of common sense?

ELIAS CJ:

Common sense.

ARNOLD J:

Why isn’t this just accepting – if you look what the Court says at *Harpur* at paragraph 25, which is your casebook at page 9, isn’t the Court simply saying, “Look, there’s a link between the mental element and the physical element. As a practical matter, you can’t divide them in some sort of analytical purity.” The example I put to you earlier is an illustration of it. If evidence of intention is utterly equivocal, you’re not going to be able to convict of an attempt until the perpetrator gets to a point where it becomes obvious what his intention was and if you assume that there are six steps before you get to the crime it’s going to be reasonably close to the crime before it becomes clear what his intention was. All it’s saying in *Harpur* is that if the intention is independently verifiable you may be able to say proximity comes earlier. Now, it’s not saying that in the first case I gave you proximity only emerges at step 5. It is simply saying you’re not going to be able to give a conviction because you haven't got evidence of intention. But where you have got evidence of intention that’s utterly independent, the proximity boundary might be crossed step 3 or 4 or whatever it is. I don’t see this as shifting proximity, it’s just recognising the reality of the state of the evidence in particular cases.

MR LITHGOW QC:

Well isn’t Your Honour simply describing attempt occurring at the point where unequivocality can be achieved. So –

ARNOLD J:

No, no, not at all. In some cases the act will have to speak for itself, pretty much, because there won’t be any other evidence of intention. But where there is other evidence of intention, you don’t have to go to that point.

MR LITHGOW QC:

But there’s two stages. What you’re describing is whether it’s going to make it with the jury, and they’ve got their own ways of looking at things, and they accept things, and reject things. Why is the Judge concerning him or herself with anything other than the assumption in the Act that the jury will decide that. He doesn’t tell the jury that obviously, but that’s the Act’s proposition.

WILLIAM YOUNG J:

But don't you have to look at what the defendant, on the Crown case, the defendant actually intended to do, so you can have a rough idea as to what had been done and to the extent to which its necessary, what was still to be done?

MR LITHGOW QC:

Well Your Honour started to look at this in *Ah-Chong v R* [2015] NZSC 83, you gave an example, and perhaps, I'm not saying I understood it perfectly, but perhaps you were saying that if we don't do it the *Harpur* way then we're not protecting people who shouldn't even be there. So you've got two husbands hanging around or two domestic partners hanging around the house hoping and seeking the former partner with a view to reconciliation. Both want a reconciliation and both want it to end with sexual intercourse. One has never had sexual intercourse with their partner, without their consent, and would be mortified to think that for one moment that anybody thought that he had, or that he misunderstood the partner's acceptance. The other one is a person who hasn't concerned themselves too much with modern ideas and doesn't concern himself too much with the niceties of that and he reckons that if you up the pressure, we can have sex whether she understands that she wanted it before or after that's tough luck. Now, in Your Honour's scenario you're suggesting, I think in *Ah-Chong*, that using the *Harpur* analysis would protect the innocent man in a way that would be useful because it will, you'll have a look at everything that's been said about intention, and the Judge will decide that, bearing in mind everything we knew, he's unlikely to suddenly change his character now, so he's not proximate. Particularly interesting with domestic relationships because there's always going to be proximity, but you'll decide on a threshold basis that he's not proximate because he's a thoroughgoing nice person. But the other guy, whose intention and attendance at crazy meetings of overseas speakers, indicates an entirely unsatisfactory approach to consent, and he'll have to take his chances with the jury. Our submission is that we've, if the last 30 years have taught us anything, that we don't know that. We don't know who's naughty and who's nice. If they're in the same circumstances, and it survives a 347 application, the jury decide whether these intentions in the tapestry that the Crown weave and the defences that have been inserted where the truth lies and that is the way the Act intends, so even as a protector – put it the other way, the way Your Honour is perhaps suggesting in *Ah-Chong* as a protective mechanism so we let the obviously innocent go free by shifting the proximity boundary and we just leave the dodgy to the jury. Now, that's

not what the law of attempts intends, nor does it have any practical use because it is proven to be an unsatisfactory way of doing things.

ELIAS CJ:
Mr Lithgow, where do you want to take us? Have you really covered everything that you wanted to say orally to us or is there more that you want to say?

MR LITHGOW QC:
Well, everyone in every case has attempted examples and where it gets anyone – and I think we can safely predict there will be examples in any decision because I don't think there's ever been any case ever been published without them.

ELIAS CJ:
Perhaps people should be discouraged from treating examples as if they provide some sort of checklist.

MR LITHGOW QC:
Well, the checklist appealed to Justice Kós, that is the model American federal code, and we can see things in there, particularly the proposition of lying in wait has a sort of attraction, but again that would be an example of why it's very important that the Judge sticks to their knitting. The Judge just deals with the one question based on the proposition the Act gives them, and that is that assuming that the Crown's theory somehow or other is going to carry the day. All I am deciding was, was he close enough? Now, whether that's an abstract concept of close enough or a timorous one or a geographical one has never been determined in law but we can understand that it just doesn't simply mean standing next to me or in the same bed or in the same room. But is it close enough? That's all the Judge decides and –

ELIAS CJ:
But close enough for what? Because it seems to me that it must be close enough to allow the jury to answer the essential question of intent.

MR LITHGOW QC:
It's close enough to make –

ELIAS CJ:
So it bears – it's to support the conclusion as to intent.

MR LITHGOW QC:
No. It's close enough to take us from the safe zone of only preparation because rightly or wrongly –

ELIAS CJ:
But why is it safe? It's safe because you can't rightly draw the inference or securely draw the inference as to intent.

MR LITHGOW QC:
No, because it's simply because the law, rightly or wrongly, has not criminalised preparation. A lot of people would like it to, and I'm sure there's a lot of federal offences on preparation, but the New Zealand law doesn't have many preparation offences and they're not to be moulded out of the attempt provision because the attempt provision says unless everybody can see the rightness of Your Honour's decision that it's gone beyond preparation, only preparation, the English call it mere preparation and some of our Judges do but it's just preparation, it's lots of horrible things but it is not the criminal offence of attempt. It is the criminal offence of other things, and there are other things in this case, but it is not the criminal offence of attempt and that's all. That's just black-letter law business.

ELIAS CJ:
All right, well, we'll take the morning adjournment now. Is there anything more you want to cover or shall we move on to Ms Markham at this stage?

MR LITHGOW QC:
I better talk to Ms Levy about that.

ELIAS CJ:
Yes, thank you. We'll take the adjournment.

COURT ADJOURNS:11.30 AM
COURT RESUMES: 11.46 AM

MR LITHGOW QC:
Every issue raised from the Bench, and everything that I have attempted to say, is contained either in Margaret Briggs article in the Common Law World Review which

is set out, and/or Simester and Brookbanks 4th edition and not having read it in the authorities for the appellant, that seems to have got rather mangled in the e-copies. I don't know whether Your Honour's have already accessed better copies, but we photocopied some better copies, but if you read it online that's a matter for Your Honours, if Your Honours want a nice, clean easier to read copy. And I just invite you to test out all these propositions because in the area of attempts everything has been tried before and nobody appears to have achieved certainty and revert to worldwide to propositions such as applying common sense and things like this.

ELIAS CJ:
We don't seem to have the Briggs article, do we, or is that coming?

MR LITHGOW QC:
That's coming. It's in the bundle, it's just that that particular re-print came out very badly in the bundle.

ELIAS CJ:
I see, yes.

MR LITHGOW QC:
That is the reason for that. It is in the bundle, it's just hard to read. Towards the end of that it actually sets out equivocality, last step, the *Harpur* test et cetera, just trying out ideas. But of course our central proposition is that the Judge should not take account his or her own views of intention in order to shift the placing of the marker of proximity. So that's the key proposition. But the law is that, the black letter law is that the law criminalises attempts and it specifically does not criminalise preparation, not by inference but by name, because if it is only preparation it's not captured by the attempt provisions. And just because preparation, which will always have an element of intention, but just because preparation has structured preparation, disgraceful and disgusting preparation, or chaotic and ambiguous preparation, doesn't alter where that, decision as to where that point comes. Some people will make lists and other people will just know what to do. And so there is, the Courts and the Judges will always be able to point to preparation accompanied by intention. So the stalkers of this world will have that intention and that preparation as they get on the plane to fly down to Wellington to do the thing that they are not, they have been told not to do. And we know what he's going to do, we think we know what he's going to do, that might be why he's got an ankle bracelet on, all kinds of things, but that can't change

the point at which the law requires an attempt to be identified, of course I say provisionally, that that doesn't matter whether it's provisionally or determinatively, to the jury and it's just a matter of traditional trusting of the jury to make the decision as to whether all that means what the Crown says. So the Judge's decision under the section 72 of New Zealand Crimes Act 1961, it is premised on the assumption that the jury will be convinced of, sufficient to the Crown theory, to accept it beyond reasonable doubt. It doesn't vary because of the Judge's quantitive assessment as to how strong intention is.

Are there any particular cases or other matters that you would like me to…

ELIAS CJ:
No, thank you.

MR LITHGOW QC:
Thank you Your Honour.

ELIAS CJ:
Yes Ms Markham?

MS MARKHAM:
If I could just have a couple of moments.

ELIAS CJ:
Yes.

MS MARKHAM:
If the Court pleases, I took from my learned friend's discussion earlier that he wasn't suggesting that the *R v L* had things wrong when it dealt with the issue of the roles, the respective roles between the Judge and jury. So I wasn't intending to really address the Court on that point. That was, of course, where leave was initially declined. Apart from simply to highlight that the English approach is essentially what my learned friend wanted to contend for and in England there's a preliminary sort of threshold evidential sufficiency gatekeeping function that the Judge has but the overall question of proximity is then left to the jury to determine and that's under section 1 of the Criminal Appeal *[sic]* Act which is set out in the Crown's material, the

Crown's written submissions at footnote 77. And I should add there that the English –

ELIAS CJ:
Sorry, section 1 of the?

MS MARKHAM:
Criminal Appeals Act in England. Yes, and the text, Criminal Attempts Act 1981 sorry, yes, Criminal Attempts Act. And the text of that is set out in footnote 77. Now that approach, whereby the jury sort of has a second bite, if you like, at the proximity issue, has been criticised by commentators in England, particularly Glanville Williams, who's very scathing about it, and Christopher Clarkson, and both of those articles are in the materials before the Court. And in fact the Law Commission most recently has recommended switching to the New Zealand approach of having proximity determined by the Judge.

So unless there were any questions on that aspect of the argument I would move to the substantive appeal ground. Thank you.

In summary the Crown's submission is that *Harpur* was correctly decided, both on its facts, which I think my learned friend accepts, and in terms of its statements of law, and it doesn't, as some commentators appear to characterise it, it doesn't represent a seismic shift in the case law, but it simply corrects, if you like, the problematic and controversial decision in *Wilcox* and brings the law back into realignment, in my submission, with decisions like *R v Bateman* [1959] NZLR 487 and *Police v Wylie and Another* [1976] 2 NZLR 167 (CA), both of which are inconsistent with *Wilcox* in some respects.

In terms of the inter-relationship between intent and the actus reus, the Crown submission is really that that inter-relationship is an uncontroversial one. It doesn't, it wasn't invented for the first time in *Harpur*. It is something that follows from the legislature's rejection of the unequivocality ruling 1961 because of course an aspect of that theory was that you had to focus simply on the acts themselves and put to one side any extrinsic evidence of intention when assessing proximity and Parliament saw that that had the potential for injustice in cases and abolished that.

It also follows from *Police v Wylie* the 1976 I think it was decision of the Court of Appeal in the attempts area where the trial Judge in that case was held to have been in error for not taking into account the evidence of intent when assessing the proximity of the alleged acts. And the inter-relationship was also, in my submission, confirmed by the judgments of this Court in *Ah-Chong* the majority judgment at paragraph 74 and I think Your Honour Justice Young's judgment at paragraphs 185 and 190.

My learned friend is right in a sense that this is an appeal from the first Court of Appeal decision in practice, even though it's not a direct appeal from that decision, and I did want to simply clarify the, or elaborate on the way in which the appellant's argument was advanced in that forum because it was quite different to what my learned friend is contending for now. Certainly there was a challenge to proximity made by the defence in that forum but it was on a different footing. Mr Horsley, on that occasion, accepted that the appellant's presence in the back garden could be sufficiently proximate to constitute an attempt, but only in circumstances where there was direct compelling evidence of intent. So his argument focused on what he said was the dual possibilities. This was equally, in his submission, consistent with an opportunistic burglary as it was with the Crown case. So Mr Horsley in that forum his argument very much focused on intent and to that extent the Crown submits that it was, that he was correct to do so.

Where, I suppose, the Crown would part company is with the distinction that he suggested between direct evidence of intent and circumstantial evidence of intent. In my submission a case such as the present, where we have propensity evidence from a number of sources, coupled with evidence of a planned abduction and rape after his parole conditions expired, coupled with all of the contextual features of the offending, the cigarette butt evidence, the extended surveillance, the timing evidence of his approach to the back garden, and so forth, it really is a very compelling circumstantial case of intent, and while it is not as explicit as the intent in *Harpur*, which was manifested by the text messages in that case, it is just as compelling, in my submission.

In terms of the first Court of Appeal judgment, there is a passage there where the Court talks about the clarify of intent versus the strength of the evidence of intent, and it's a slightly, I suppose, enigmatic passage but –

WILLIAM YOUNG J:

Whereabouts?

MS MARKHAM:

That is in the first Court of Appeal judgment, I think it's at paragraph –

GLAZEBROOK J:

31?

MS MARKHAM:

I'm sorry Ma'am?

GLAZEBROOK J:

Is it 31?

MS MARKHAM:

31.

ELIAS CJ:

Sorry the Court of Appeal?

MS MARKHAM:

Yes of the first Court of Appeal decision. Yes it starts at paragraph 29. "It is in our view however important to draw a distinction between the clarity of the intent and the strength of the evidence." With respect I found that passage slightly difficult to –

ELIAS CJ:

Sorry I haven't found it. Paragraph 29?

MS MARKHAM:

Paragraph 29 which appears on page 24 of the case.

ELIAS CJ:

Yes, I'm sorry.

MS MARKHAM:

And I suppose the Court was addressing the argument Mr Horsley made about the distinction between direct and circumstantial evidence and so forth. But to the extent that the Court was saying that the Judge under subsection (2) of 72 conducts the proximity assessment on the basis of the Crown evidence if accepted, that that is the correct position and that's as set out in *Bateman* and the earlier authorities under section 72.

ELIAS CJ:

I wondered whether this really puts it the wrong way round. If the emphasis really is on intent it's that the acts thereon intent, I'm not quite sure what was meant by that unless proximate actus reus will be sufficient. Yes I suppose – I don't know that it is actus reus actually but anyway.

MS MARKHAM:

Yes well I suppose one –

ELIAS CJ:

I suppose it is actually.

WILLIAM YOUNG J:

I think it is.

ELIAS CJ:

Yes I think it is, yes.

WILLIAM YOUNG J:

The Parliament, there are three elements. There's an intention to commit a crime, there's an act that is committed for the purpose of committing that crime and there's the proximity preparation dichotomy. And to all of them the intention of the defendant is material, it's fundamental to the intent to commit a crime. It's fundamental to whether the act was carried out with the purpose of committing a crime because you don't know that unless you know what sort of crime the particular details, I mean, was intended. And then proximity, I do find it difficult to see how you can look at that without knowing what the plan was.

MS MARKHAM:

Exactly, and that's why I've said that inter-relationship between the two elements is an uncontroversial one rather than some novel invention –

WILLIAM YOUNG J:

But I, for a –

MS MARKHAM:

– that *Harpur* came up with.

WILLIAM YOUNG J:

Let's come back. It would be the, if the evidence is sufficient to just get over the line as to an intention to commit a crime then probably doesn't make any difference, the underlying act is still proximate, it doesn't become more proximate because the evidence is stronger because there are three separate pieces of evidence as opposed to just a confession say or something of that sort.

MS MARKHAM:

Yes and that's why perhaps the Court of Appeal's reference to clarity versus strength is slightly beside the point in some ways because –

WILLIAM YOUNG J:

Well the more you know or can infer as to what the plan was, the more concrete the proximity assessment can be.

MS MARKHAM:

Yes. Which comes back to Arnold J's point about that being a matter of evidence and practicality in a given case; that the acts might need to speak more loudly when there isn't independent evidence of intention but that isn't such a case here. I also tentatively suggest that my learned friend's position that intend to somehow assumed and therefore put to one side in that you have to assess proximity by reference to other factors, I would suggest that that's unhelpful to the defence in the general run of cases. Presumably my learned friend's example of the mate who was outside the sleep-out would not be happy to find that he's committed the actus reus for an attempted sexual violation on my learned friend's argument.

WILLIAM YOUNG J:
Well I would say there was no actus reus because the act was not one that was for the required purpose –

MS MARKHAM:
Precisely.

WILLIAM YOUNG J:
– I treat purpose as part of the actus reus.

MS MARKHAM:
And that is exactly what the Crown's position is but my learned friend would have it that intent is assumed and put to one side essentially and that he's committed the actus reus and the only issue is one of intent but in my respectful submission it follows not only from the rejection of the unequivocality theory from W*ylie*, from *Ah-Chong* and other decisions, that it is perfectly legitimate to take into account circumstances of intention in assessing proximity.

My learned friend was also somewhat critical of the lying in wait analogy, and this is in the first Court of Appeal decision in paragraph 33, so that's the next page of the case, page 25. That was where the Court said by reference to the facts of *Bateman* and *Harpur* that there was really little basis to distinguish the appellant's position, he was essentially lying in wait for the complainant. Now I suppose that the point being made is that if arranging to meet somebody at a particular location as per *Bateman* and *Harper* is sufficient for proximity purposes then why not the appellant who has essentially arranged to meet the victim in a known location but without telling her that that was his intent and he's followed her out to that location on the timing evidence after a period of extensive surveillance, so if anything, in my submission, that the conduct at issue in the present case is more proximate because unlike the invitation or the solicitation cases, it doesn't require the complainant's co-operation, he didn't ask to meet her there, he's going there by stealth in essence. So that the Court was correct, in my submission, to find that the situations were analogous for those reasons.

In terms of the giving of examples, now this wasn't sort of touched on in any length in my learned friend's argument but I would I suppose suggest that one of the criticisms that might be made and is made by the Briggs author in her article of *Harpur* is that

there is this sort of uneasy status of the American model code, because on the one hand the Court is saying we're not going to give examples, that's too difficult and problematic but on the other, here's this code which may be of some assistance.

ELIAS CJ:
Well interest I think they say.

MS MARKHAM:
Interest. And what Justice Kós, said not exactly a ringing endorsement but that it does leave this code sort of tacked on the judgment in a slightly sort of awkward manner and I would submit that there, well there may be a reason to be somewhat cautious of the American model given that the different statutory context but in particular the American Code has a specific defence of abandonment. I think that's in subparagraph (4) of the model provision and that's seen by some commentators in that jurisdiction as a necessary corollary of the fact that the attempt crystallises at an earlier stage under the American Code. And in New Zealand, in contrast, there is no such provision, at least according to the Adams commentary. So that's material to this question of scoping out, I suppose, and the –

WILLIAM YOUNG J:
I suppose it's possible on the basis that withdrawal mightn't be a defence?

MS MARKHAM:
Well there hasn't been a recent case that looks at that but –

GLAZEBROOK J:
But if one can imagine the circumstance where somebody decides they are going to do something, that they come up quite close to doing it and then say I couldn't do it, I absolutely couldn't, I ran away and that was the end of it. Well for a start it's very unlikely they'd be charged with an attempt in those cases because it was quite clear they weren't going to go on with it and even if they were it was likely the jury would not convict in those circumstances because they would see it as a provisional intent which wasn't actually carried right through. Or alternatively it could be withdrawal might be a defence.

ELIAS CJ:
Well, except that the intent must be –

GLAZEBROOK J:

Related to the initial –

ELIAS CJ:

Exclude the – yes –

GLAZEBROOK J:

But as a practical matter –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– one can imagine –

ELIAS CJ:

Yes, but if a jury reasoned, I'm not sure that he would have carried this through in the end, well they have to acquit.

WILLIAM YOUNG J:

Maybe. Well maybe, because it might depend on why. He might not have done, carried through –

ELIAS CJ:

Oh I see.

MS MARKHAM:

And this brings in, yes, the conditional –

GLAZEBROOK J:

Because of withdrawal reasons rather than because of…

WILLIAM YOUNG J:

In *Beveridge*, which was a case rather like that, a case which went to the jury. Where he, on the Crown case, he intended to murder his wife and in the end changed his mind. At the very later stage –

MS MARKHAM:

After some ordeal on her part. Yes, and that, so that comes back to the first Court of Appeal judgment and whether that was correctly decided. Obviously one of the factors influencing the Court on that occasion was that the defence was essentially ambushed by the suggestion that it might have been, he might have intended to rape the complainant on a different night. So that, that sort of dynamic where it was part of the Court's reasoning. But the difficulty that the Crown has with it is it posits an either/or situation where either the appellant has a fixed intent to sexually violate that night, or he has a fixed intent to sexually violate on a different night and only intends a scoping –

WILLIAM YOUNG J:

But isn't a conditional intent enough?

MS MARKHAM:

Well exactly and that is my difficulty with the Court of Appeal's reasoning because it doesn't factor in –

WILLIAM YOUNG J:

But wouldn't it allow for, I mean it doesn't really arise here, but wouldn't it allow a conditional intent to rape that night if the circumstances were right?

MS MARKHAM:

If the opportunity presented itself, and that would be the Crown's submission, that ought to have been sufficient, whereas I think the way in which the jury was directed was slightly more favourable to the –

WILLIAM YOUNG J:

Come hell or high water –

MS MARKHAM:

Mmm, he is intending to do it tonight. So, yes, the Crown submission would be that – I'm not suggesting that merely scoping a property is sufficient proximity. It arguably is under the American Code, but that's obviously not necessarily reflecting our law. So I'm not suggesting mere reconnoitring or mere scoping is sufficient but in my submission the conditional intent to rape that night, or shortly thereafter if the circumstances weren't right that night, would suffice in my submission.

O'REGAN J:
But the first Court of Appeal case really was more about the fact that the Judge added that possibility in when it hadn't been raised in argument.

MS MARKHAM:
Yes, that was the ambush angle that was very much determinative of the reasoning there.

Reconnoitring, as I've said, is a sort of a subparagraph in the American Code which suggests that on its own it would be sufficient in that jurisdiction. In England the working party in 1979 initially recommended adopting the American Code, and of course the Law Commission decided that went too far and the Law Commission was specifically quite critical of the reconnoitring subparagraph as going too far and not reflecting the English case law. And likewise the most recent suggested examples that the Law Commission has come up with in that jurisdiction, albeit that nothing's come of it, those examples likewise don't include reconnoitring as a stand-alone trigger for attempt liability.

I guess one of the concerns that certainly manifests in the Briggs article on which my learned friends rely, is the thought police over criminalisation concern, but the Crown submission would be that really there's no evidence of any over-reach in New Zealand in that respect and it's interesting that the cases are few and far between. *Wilcox* was 1982 and *Harpur* was 2010 and in between times there was very little appellate consideration of the issue. I think *R v Towgood* [2007] NZCA 359 and *R v Yen* [2007] NZCA 203 were the only two cases that Briggs identifies. The other point I'd like to make is that really the present case is very unusual. It's certainly not suggested that in the usual run of things a person found in someone's garden would be facing charges of attempted sexual violation. It is the particular combination of circumstantial evidence in the present case that leads to that conclusion.

Another point that I think my learned friends make in their written submissions and which is echoed in the Briggs article is, well, why don't we have a lesser offence or split the offence and have an offence of preparation and an offence of attempt? The splitting proposal in the United Kingdom was a very untidy and problematic one and it was roundly criticised by academics and it's languished for very good reason. It's one of the ironies, in fact, that in that jurisdiction the debate about over criminalisation

has very much focused on the development of piecemeal, inchoate mode offences that deal with specific contexts like terrorism and so forth. So really the argument about creating one or two offences is really a distraction, in my submission. The reason that the UK went down that route is because of *R v Geddes* [1996] Crim LR 894 and *Tony Campbell* (1991) 93 Cr App R 350 and those decisions were viewed by the Commissioner as essentially taking the law down the wrong path. They thought that the conduct in issue in those decisions ought to have fallen within section 1 of the Criminal Attempts Act and the Court of Appeal took an overly narrow view. So they recommended splitting to essentially remedy that problem which doesn't arise in this jurisdiction because we've never gone down the *Geddes* or *Campbell* route.

In terms of the language of the section, I don't really have anything to add on top of what was really said in *Harpur*. It does paint a broad canvas. There's a lack of prescription. Subsection (1) is expressed very broadly. The language overall is quite elastic. The operative provision is, I suppose, subsection (2) for our purposes and it's notable that the language there is only preparation so it does contemplate that acts may be preparation as well as executory, if you like, as long as they're not only preparation. And it also, again, refers to conduct that's too remote. So some degree of remoteness is contemplated as sufficient.

In terms of the test, I think we all seem to be agreed that there is no overarching test. It does seem to be a multifactorial assessment that's an evaluative question of degree and obviously you look at the nature of the intended offence, the nature of what was done, the nature of what remains to be done, evidence of intent, evidence of planning, and questions of proximity in time and location, albeit it that those aren't necessarily determinative and I'm not really sure that the position can be much advanced in terms of the test.

The only other matter I wanted to address briefly, given my friend's reliance on the Briggs article, I mean, it certainly provides a very useful collection of the materials but the Crown's essential submission is that the author, with respect, overstates her case in describing *Harpur* as, I think in one part of the article, as an unbridled extension of the law. To an extent the argument is circular because if you take *Wilcox* as an authoritative statement of the law then certainly it does represent a change but our submission is really that *Wilcox* was something of an outlier, even in its own time, in the early '80s and as I've said the author is simply wrong in characterising what

Harpur said about the inter-relationship between mens rea and actus reus as something new or fresh.

Unless the Court has any questions, those would be the Crown's submissions.

ELIAS CJ:
Thank you Ms Markham. Yes Mr Lithgow.

MR LITHGOW QC:
Just dealing with a few matters. The first thing is that *Wilcox* is not an outlier. It was the decision that was given by Justice Woodhouse in the Court of Appeal but as commentators have observed, the Court was actually concerned about the underlying reality of whether it was all going to happen, even though it was given in a certain language. *Wilcox* was the leading case. *Wylie* is a Magistrate's Court case and when the, by the time it got to the Court of Appeal the Judge's were talking about – sorry, the Judge is making both decisions and classically making them in one go, not separating out of step and addressing himself as though he was a jury. So *Wylie* has the ambiguity of what the Judge has to do is the Judge has to do everything in that case. This is a submission which we've both addressed but it's radically different. *Harpur* does not signal a wholesale change in the law of attempt, says the Crown, and it says perhaps. Justice Chambers in the way that he expressed it graciously. Our position, Mr Johnston, is that yes it did signal a wholesale change in the law of attempts, and that's not just our submission and Mr Johnston's wish, that is also the position of Simester and Brookbanks long-time careful commentators on the law of New Zealand, and they say at page 253, and for that reason we think –

WILLIAM YOUNG J:
Sorry, what number page?

MR LITHGOW QC:
Page 253 of Simester and Brookbanks, which is the, I've given you the page by page version, and we look at the final paragraph and the last couple of sentences of the final paragraph. For that reason, they disagree, that it must be rejected as one commentator has observed, "If any act were a sufficient actus reus for attempt, when combined with the presence of mens rea, the non-criminal preparation/criminal attempt dichotomy would disappear, because all acts of 'preparation' would suffice for an attempt. This would effectively amount to punishing for mens rea alone – "

WILLIAM YOUNG J:

Well that may be right in the conclusion but it's wrong as a matter of lit – strict logic because the act of preparation is the actus reus. It might not be a very demanding requirement for actus reus but there is still one.

MR LITHGOW QC:

But as both Simester and Brookbanks and the article by Margaret Briggs makes clear, and the Act makes clear, preparation with bad intentions is not criminalised in New Zealand.

GLAZEBROOK J:

But where in *Harpur* does it say any act is sufficient?

MR LITHGOW QC:

Well this is because *Harpur* follows Professor Kent Roach's –

GLAZEBROOK J:

But he doesn't say any act is sufficient, does he?

MR LITHGOW QC:

Well he does really by the time he gets to it because after he has said the passages that are quoted there he carries on and says, "And then if the intended crime is sufficiently heinous that you can shift…"

GLAZEBROOK J:

But does *R v Harpur* say that?

MR LITHGOW QC:

Well, it doesn't adopt that – it doesn't refer to that bit of it because it is poisonous to the – I submit that it wouldn't adopt it because it's poisonous to the overstated proposition that Kent Roach gives and it shows its essential flaw so that in other words –

GLAZEBROOK J:

All I'm saying – can you point to somewhere in *R v Harpur* that says anything done whatsoever with a bad intent is now going to be an intent?

MR LITHGOW QC:

No, it doesn't say that but that's the effect of it, the principal effect of the intensity of what the Judge's decision can be on intention then that can shift the point at which proximity is determined.

GLAZEBROOK J:

But it doesn't mean that it's going to be anything whatsoever so I'm going to do this and I put a toe outside my front door and that's going to be sufficient, is there anything in *R v Harpur* that suggests that that is what was meant?

MR LITHGOW QC:

Sorry, you put a toe outside your front door in what circumstances?

GLAZEBROOK J:

I've got a very bad intention and I put a toe outside my front door, is that going to be sufficient on *R v Harpur*?

MR LITHGOW QC:

Well, it could be because if you have stated and confessed that if you can just get that – create enough room to get the barrel through that door you're going to kill somebody and they're going to get it then putting your foot in the door may be exactly sufficient under *R v Harpur* but not sufficient, probably, depending – you've given just one slice of an example but you keep the door open with your foot or your toe and you've created the space for the thing you confess and have plotted and schemed. The moment those religious canvassers come to your door again, they're going to get it. Then that would be – that could be an attempt.

GLAZEBROOK J:

So you say just as a consequence of *R v Harpur* that this position at 2.53 would be the case, is that what you're saying?

MR LITHGOW QC:

Yes.

GLAZEBROOK J:

But you're not pointing specifically to anything in *R v Harpur* that says that?

MR LITHGOW QC:

No, because the grace with which *R v Harpur* is just as the Crown puts it, that they toned down the significance of what they're doing, so when the Crown say it doesn't signal a wholesale change to the law of attempts, so does *R v Harpur*, but it does, I've got no idea why they overruled *R v Wilcox* on the facts. It scarcely makes sense since the issue was the question of law as to where proximity came about. It doesn't make sense to overrule it on the facts anyway because whatever else the facts did it gave very clear indication as to why the Judges were very unhappy with the conviction and the second proposition that the Crown give that the principle is not new, and is plainly correct. There had been various attempts here and in different jurisdictions to make up for a shortfall in proximate acts by converting fixed predisposition or obsessive or fixated thoughts, to inflate the significance of acts. When the Crown say it's a clear and welcome corrective, they mean more people can be put before a jury of the Crown's choice of charge, because it's simply not true that there are not charges. They just don't like the ones that are available. And so simply saying that doesn't make it so, and detached observers say that it is not so.

I have also, when I was scrambling to give a proposition, I think, Your Honour the Chief Justice asked me about *Johnston v R* [2012] NZCA 559 Court of Appeal one, could I ask you to look at my submission, submissions for the appellant, paragraph 20? I refer to the crossing the Rubicon reference and this is related to whether the Court, in fact, did as the Crown sought and it says there that it's Court of Appeal volume 1 page 23 at 26 and I invite you to cross that out. It's page – other way round – 32 and it's paragraph 54. That's the reference in *R v Harpur* to shortly thereafter needs to be read in the factual context of the case where the implementation of the intent was imminent. As Mr Mander acknowledged – so the Court are agreeing with it – intent to commit rape days later would not have been sufficiently proximate. It had to be established Mr Johnston had crossed the Rubicon. In *R v Harpur* the appellant was awaiting delivery of the children. In this case we're saying he was lying in wait but they are saying that is sufficient because of the earlier propositions of what it was that the intention showed.

We've both put in our submissions about some sort of public policy proposition related to the archetypical, quintessential, theoretical policeman waiting to intervene. Nobody's raised that matter and we've made the submissions, both of us, but my submission is that policy argument doesn't lead anywhere useful and anyway, as I've set out, there are sections in the Police Offences Act that had in fact a policeman

been anywhere nearby they could have perfectly well prevented the event. All the point of no return, crossing the Rubicon, and the various other tests are all well traversed in the academic materials and all I suggest responsibly and can't be dismissed, as the Crown suggest, but in my submission it is appropriate to look at a simple example of a person the Judge thinks crossed fingers if he gives him a tail wind will be acquitted by a jury and a person the Judge thinks is going to be convicted that the Judge can't muddle that by shifting where preparation ends and commencement of the offence begins because if he does that then all preparation can be called into play if the evil thoughts are harsh enough and obvious enough.

Thank you. Is there any other matter?

ELIAS CJ:
No, thank you, Mr Lithgow.

MR LITHGOW QC:
Could I just ask, Ma'am, has the Court issued a Practice Note or a view on what we do if we're refused part of leave but we sort of think, well, we have to discuss it a little bit, we're not trying to be defiant but some Members of the Court might think, well, we have to just clear that away or get something sorted.

ELIAS CJ:
It's not the sort of thing you can really cover in a Practice Note. We have sometimes relented in hearings if it seems to us that we need to deal with a matter that wasn't formally granted leave and I think we have occasionally.

GLAZEBROOK J:
We have granted extra leave, yes, and on occasion adjourned the hearing so that more submissions could be made on that particular leave ground if it was unfair and people weren't prepared.

MR LITHGOW QC:
So counsel could either say we need to talk about it for five minutes or attempt to change your mind and they just take their chances, respectfully, and if the Court don't want to they'll tell you at the beginning or issue a minute saying "no, we're not having that".

ELIAS CJ:

It's really for the Court to raise, I think, having ruled adversely to an application for leave but sometimes when we get into a hearing it's quite clear that it's inextricably linked with the ground on which appeal has been given and it isn't intended to be rigid in terms of the grounds of leave, the questions.

MR LITHGOW QC:

Thank you, Your Honour.

ELIAS CJ:

Thank you, counsel, for your help. We will reserve our decision.

COURT ADJOURNS: **12.36 PM**