IN THE SUPREME COURT OF NEW ZEALAND SC 57/2011

[2011] NZSC Trans 27

MAHANA MAKARINI EDMONDS

Appellant

v

THE QUEEN

Respondent

Hearing:	6 October 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	A R Laurenson and H A Froude for the Appellant D B Collins QC, M J Inwood and P D Marshall for the Respondent

---

CRIMINAL APPEAL

MR LAURENSON:

May it please the Court. Counsel's name is Laurenson. I appear for the appellant with my friend Ms Froude.

ELIAS CJ:

Thank you Mr Laurenson, Ms Froude.

SOLICITOR-GENERAL:

Mr Inwood and Ms Marshall with me this morning.

ELIAS CJ:

Thank you Mr Solicitor, Mr Inwood, Ms Marshall. Yes Mr Laurenson.

MR LAURENSON:

Thank you ma'am. May it please the Court. Submissions have obviously been filed by both the appellant and on behalf of the respondent and I don't intend to trawl through my submissions in that respect. But I suspect the real question is, to get to the heart of the matter, is whether or not the trial Judge in the High Court was required to give direction necessitating the need for the appellant to have known that the person inflicted the fatal injury, Mr Pahau, had a knife. It's obviously the appellant's contention that he did and the respondent's contention is that he did not. This argument was raised –

ELIAS CJ:

Sorry, the contention is as to the fact or the knowledge? I'm sorry. I do understand what you're saying.

MR LAURENSON:

The contention for the appellant is that the appellant needed to know that Mr Pahau had a knife and that the Judge should have directed that accordingly.

ELIAS CJ:

Yes.

TIPPING J:

A knife as opposed to not being armed at all or some other weapon?

MR LAURENSON:

Well on the facts I would submit that there was no evidence that the appellant knew that Mr Pahau had any weapon whatsoever but the Judge directed that it was sufficient that the appellant knew that Mr Pahau had a weapon.

TIPPING J:

And you say it had to be, he had to know the specific weapon?

MR LAURENSON:

Yes I do, but with the qualification as in some cases, such as *Rameka v R* [2011] NZCA 75, that had he had a hatchet or a knife, then I wouldn't argue with that. It is really, in my submission, the lethality of the weapon which is important. So in this particular case there is evidence that one of the co-accused had a blunt instrument but I submit there was no evidence that any of them knew that Mr Pahau had a weapon whatsoever.

BLANCHARD J:

Well the blunt instrument was a baseball bat wielded in a fight. That's perfectly capable of causing death.

MR LAURENSON:

It could in circumstances, Sir, yes. However, in my submission, you would need to look at the facts of the cases and the particular facts of each case and it seems that the common law decisions and, in my submission, the decisions that have been made in the Court of Appeal, particularly in this country, have looked at the particular facts of the case. Now if we look at the facts, we have three men chasing, I think, three or four others down a driveway. Now, one of the attackers had a baseball bat. You're following three people who are going to their dwelling house where other weapons such as knives or blunt instruments could be readily available –

BLANCHARD J:

And it's accepted that they were intent on serious violence.

MR LAURENSON:

Indeed and serious violence and they pleaded guilty under section 98A to a serious violence offence.

WILLIAM YOUNG J:

What was the gravamen of the offence they pleaded guilty to? What was the – was it an offence that focused on the situation as it was at 1A Squire Place or was it a more generic focus?

MR LAURENSON:

Sorry, Sir, I don't quite understand your question.

WILLIAM YOUNG J:

Well if the plea of guilty to the unlawful – sorry, what –

MR LAURENSON:

Serious – organised criminal group.

WILLIAM YOUNG J:

Okay if the plea of guilty to being a member of the organised criminal group, was focused on the situation as it was just before the pursuit began, then the plea of guilty is a very serious factor in the case because it's a confession to an intention to use serious violence which has got a rather sinister definition in the Crimes Act.

MR LAURENSON:

Well the definition under section 98A and the following definition in 2A, in fact I'll read that from the respondent's –

ELIAS CJ:

But Mr Laurenson, do you understand, the question that's being put to you is what was the actual offence? What were the particulars of the section 98A offence? Were they simply membership of a gang that habitually carried out serious violence or was it membership of this group that was, on this occasion, bent on serious violence?

MR LAURENSON:

Well I think that they have, in this particular case, to accept that they were a member of a criminal group and that they, if you're following through the participation – the definition of participation of an organised criminal group, that three or more people share one or more objectives.

ELIAS CJ:

Were any particulars given?

MR LAURENSON:

No, no particulars were given.

ELIAS CJ:

No particulars were sought?

MR LAURENSON:

No and the serious violence offences over the seven years can be, can vary widely between property damage where harm may ensue, to something far more serious.

ELIAS CJ:

But we're concerned with this particular case.

MR LAURENSON:

Yes.

ELIAS CJ:

There weren't any particulars. Was there a summary of facts upon which this plea was entered?

MR LAURENSON:

There would have been a summary of facts, yes, and the summary of facts was that they entered Squire Place, that they –

BLANCHARD J:

So it was related to the particular occasion –

MR LAURENSON:

Yes.

BLANCHARD J:

– not to their wider membership of Black Power?

MR LAURENSON:

No, no I accept it was to this particular case.

TIPPING J:

So the common purpose, if you like, for the purpose – its common intention for the purpose of 66(2) was to wreak serious violence on the opposition?

MR LAURENSON:

Yes, well that's what the section 66(2) –

TIPPING J:

Yes, but there is that linkage?

MR LAURENSON:

There is that linkage.

TIPPING J:

Right.

MR LAURENSON:

However, in my submission under the section 98A and the following interpretations of the serious violent offence, they can range from a loss of life to a serious damage to property –

WILLIAM YOUNG J:

Yes, but just be realistic here. The definitions are in the Crown supplementary bundle, tab 1, and the third page of that has got the definition of serious violent offence.

MR LAURENSON:

It does Sir.

WILLIAM YOUNG J:

And it's really only been 1 and 2 that could be material here because there's no suggestion that they were going to trash the house, although possibly they might of but that's not the obvious purpose –

MR LAURENSON:

I'd agree with that, Sir.

WILLIAM YOUNG J:

– and it's got nothing to do with 4, so –

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

– they are conceding that they, their purpose was the loss of someone's life or the serious risk of someone's life, serious injury to someone or a serious risk of serious injury.

MR LAURENSON:

I accept that, yes. And the serious injury can be something which is well short of life threatening. It can be perhaps more than a breakage of skin but under –

TIPPING J:

But isn't –

WILLIAM YOUNG J:

Well, it's got to be more than seven years, it's got to be –

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

– seven years or more. Isn't that the wounding, and what are the offences at seven years?

MR LAURENSON:

I was looking at section 188, 188(1) and 188(2), which is –

WILLIAM YOUNG J:

Right.

MR LAURENSON:

– wounding with intent or injuring with intent to cause grievous bodily harm or wounding, and then section 188(2) is the reckless disregard thereof.

WILLIAM YOUNG J:

Okay, though a pretty serious concession.

MR LAURENSON:

It is, and –

WILLIAM YOUNG J:

I mean, it's inevitable on the facts perhaps, but…

MR LAURENSON:

But the definition of the grievous bodily harm is something which impairs the person, effectively, which doesn't necessarily have to be particularly serious.

WILLIAM YOUNG J:

Don't we say "really serious injury"? Isn't that the normal way it's explained to a jury?

MR LAURENSON:

It's really serious injury, but the definition which I was looking at yesterday actually, it's something which impairs the person for a period of time, it doesn't have to be anywhere near life-threatening.

TIPPING J:

But the real point, I suggest to you, Mr Laurenson, once we've got to the position we're now in, that they, the common intention for section 66(2) purposes was to exert serious violence on the opposition. Then the issue is, did they know that death was a probable consequence of doing that, probable in the sense of could well happen?

MR LAURENSON:

Well, I –

TIPPING J:

And that's a pretty easy inference to draw, or it's an inference which the jury could well draw on this evidence.

MR LAURENSON:

Well, Sir, no, I don't agree with that, if we look at the particular factors of the case. And again, what – my reasoning is that if they went down with a baseball bat, three upon three or perhaps even, however many more were down there, those who were being followed would have had recourse to weapons, whether it be knives or whatever was down there, that effectively what you have is a standoff, you've more likelihood of a standoff, there might be a swing of a bat and they run away.

TIPPING J:

But just – you're being very helpful in referring to the facts of the case, but do you accept that that is the right legal framework? The question is whether the jury was entitled to infer that your client knew that death could well happen as a consequence of prosecuting the common purpose of wreaking serious violence?

MR LAURENSON:

Well, no, I –

TIPPING J:

Is that the correct legal approach, before we get to the facts?

MR LAURENSON:

Well, yes, I think it is, but my submission is that a jury could not infer that from the facts of the case.

TIPPING J:

In the Judge's direction then, in what way did that prejudice your client? If anything, it seems to me that it was favourable to your client, that he had to know that there was a weapon being carried by the perpetrator of the killing. That, frankly, I think is beneficial to your client in the context of the law.

MR LAURENSON:

Well, it is certainly more beneficial than what the Crown were submitting, but less beneficial obviously than what counsel was submitting to the Court at the time.

TIPPING J:

Where do you get this need for specificity of weapon from in the New Zealand statutory framework?

MR LAURENSON:

Well, I suppose the way I've looked at that is that if you look at the common law from the United Kingdom where there is that requirement for foresight, et cetera, and I accept that that is different, but – and I think Lord Hutton said it in the case of *R v Powell* [1997] UKHL 57, [1999] 1 AC 1 that – and there needs to be some care here, because on logic what you're asking for is for an accused person to be found guilty of manslaughter who has a lesser mens rea than the actual perpetrator, but from a

pragmatic point of view you don't want people running round the place in gangs and that, causing these type of injuries. So there needs to be, in my submission, some caution. And another quote that I would refer the Court to is from *R v Clayton* HC Wellington CRI-2006-054-557, 22 June 2007, at page 94 – sorry, paragraph 94, and it says, "In my view, there is a –

ELIAS CJ:

Sorry, you're taking – is this…

MR LAURENSON:

This is *R v Clayton*. That is number 6 on the appellant's…

ELIAS CJ:

And paragraph?

MR LAURENSON:

Paragraph 94, Ma'am. And I'll read the entire paragraph that may be of assistance. "The test adopted by the common law to constitute what is, in effect, the subjective element in the crimes established by extended common purpose liability falls short of obliging proof of actual intent. All that is required is that the relevant outcome must be foreseen by the accessory as a possibility. The applicants argued that this step forward did not go far enough, it exposes a secondary offender to liability of conviction of murder upon proof by the prosecution of nothing more than foresight of possible homicide. In my view, there is force in the applicants' submission that many juries are likely to conclude that the fact that a murder has occurred shows that it was possible that it would. And if it was possible, in fact, it is but a small step to conclude that the secondary offender foresaw, as a possibility as least, that in effecting the common purpose the victim might suffer really serious harm with intent from the act of the principal offender. It follows that this form of secondary liability is disproportionately broad and it tilts the scales too heavily in favour of the prosecution." So, in my submission –

TIPPING J:

This is in Justice Kirby's dissenting judgment, is it?

MR LAURENSON:

Yes, but I, my submission is that in cases such as this, and I refer to the case of *R v Rameka* as well, is that where you have a situation where a secondary offender, such as the appellant in this case, has been charged with murder or manslaughter, then it is important to ensure that the probable consequence is reined quite tightly in to the specific facts of the case, because otherwise, in my submission, as with Justice Kirby in that particular case, it's far too broad.

TIPPING J:

Well, the test for probable consequences is "could well happen", which is more than mere possibility, which was the *Clayton* concern.

MR LAURENSON:

The principle, I submit, is the same. But it could well happen. So, in my submission, in this particular case, that the facts of what happened and the knowledge of the appellant of those facts is important to determine what in fact the probable consequence, what could well have happened.

Now, if you have a situation of the facts – and I won't go in too deeply as –

ELIAS CJ:

But all of that is, I think, nobody would disagree with. But that's simply, surely, to say that circumstances such as knowledge of what weapons were being carried have evidential significance. Why does it go further than that?

MR LAURENSON:

Well, it certainly has evidential significance but, in my submission, a jury should be directed, that that would be a necessary element before the appellant could be convicted in this case.

TIPPING J:

Well, that's making it into a mandatory requirement rather than simply a matter of assessment for the jury. I'm saying no more than what the Chief Justice has said.

MR LAURENSON:

Well, it would depend on the facts of the case. But in cases of murder and manslaughter I would submit that there is more of perhaps a mandatory necessity for this type of thing. Because, if we look for example at the various cases that we've

had in New Zealand where it's been short of murder, then I wouldn't disagree that the type of weapon doesn't make too much of a difference, because they can all cause grievous bodily harm. It's when you go to that next step up, where a death is, death results, that the knowledge of these types of weapons are, what the person actually had is important, because we're asking for a secondary party to be found guilty of murder or manslaughter, with a degree of mens rea and a knowledge which is less than the actual perpetrator.

ELIAS CJ:

Well, in some circumstances, knowledge of the type of weapon may be the only evidence that you can point to, to show that serious harm was, could well happen, in an enterprise. But here you've got pleas of guilty to the fact that this enterprise was about the infliction of serious violence.

MR LAURENSON:

Yes.

ELIAS CJ:

So doesn't that overwhelm other bits of evidence that might be floating around?

MR LAURENSON:

Well, no, I submit it doesn't, Ma'am, because serious violence is – there's a wide range of serious violence and the consequences that can result from that. But what we have is a situation where three go down, one with a bat and, just for argument's sake, no one knew anything else. It is very unlikely that death would have resulted in those circumstances, in my submission.

ELIAS CJ:

Well, I just don't see how you can say that, Mr Laurenson, and it really is important that you engage with the legal elements with which we're concerned in this case. You're saying that as a matter of law the Judge should have directed that knowledge of the particular weapon.

MR LAURENSON:

Mmm.

ELIAS CJ:

You just have to substantiate that.

TIPPING J:

I suppose as a fall-back you could say that the Judge should have directed knowledge of a lethal weapon.

ELIAS CJ:

Yes, yes.

TIPPING J:

But I'm not proposing that as a test or anything like that, but at least that would be more convincing –

ELIAS CJ:

Yes.

TIPPING J:

– than the actual precise weapon.

MR LAURENSON:

Well, I –

WILLIAM YOUNG J:

Could I just put – the aspect about the case that sort of puzzles me a bit is that, on one view of it, there was a lethal weapon there anyway and that was the one your client had.

MR LAURENSON:

Indeed.

WILLIAM YOUNG J:

Do I take it it's not known what the gun was?

MR LAURENSON:

It's not known what the gun was; it is not known whether it was loaded …

WILLIAM YOUNG J:

Well, yes, but – well, that would be a matter of inference, that there's probably not much point in a gang confrontation waving around an unloaded gun. But in the images that I've looked at there's a picture of a rather sinister-looking cut-down shotgun that's been turned into a pistol because the stock's been cut off, and a rather more anaemic-looking air rifle which doesn't look to be, as it were, the lethal kind. Was there any – what was the evidence about them?

MR LAURENSON:

Quite frankly, Sir, I cannot remember which one the Crown submitted, if indeed it was either of those, because those weapons were found sometime later at another co-accused's house.

WILLIAM YOUNG J:

All right. Fenton's house?

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

But he was the supplier of the weapon, I think, wasn't he?

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

If it was the case that the weapon was a lethal one, then it's hard for your client to say that lethal consequences were not foreseeable. If he's standing there as a look-out chap, an orchestrator of the attack, and arms himself presumably in case someone runs back or events take an unforeseen turn down the drive, the prospect that he would kill someone with it, with the gun, must have been a real one.

MR LAURENSON:

Well, I certainly didn't –

WILLIAM YOUNG J:

Which casts something of a shadow over his suggestion that, the defence that, you know, that death was out of the question.

MR LAURENSON:

Well, the way that I looked at that, Sir, is that the attack, as we can call it, was going down to have a fight or do whatever they were going to do down at 1A Squire Place, and that the gun was out, for a brief period of time, and it was described that he went to the boot, picked it up, went round to the front and, I think, stood there for a minute – well, not even that – and then went back and put it into the boot, more as a warning that everyone should stay away. My focus is on the submission that, to an extent, that had they wanted to use lethal weapons then he would have given that weapon to one of the others to go down to use, but it was deliberately held back, away from the attack. So again, it is my submission that the only weapons that they knew was that a baseball bat had been taken down that driveway.

ELIAS CJ:

Mr Laurenson, I really don't think we are going to get anywhere by bandying the facts about. You really need to close on the submissions as to why the trial Judge's direction was wrong.

MR LAURENSON:

Yes, Ma'am.

ELIAS CJ:

The grounds on which leave to appeal to this Court were granted.

MR LAURENSON:

The grounds obviously being whether the trial Judge should have directed the jury that they could not convict the appellant unless satisfied that he knew that the principal offender was carrying a knife. Well, it is my submission that the necessity for that, because without the act of the principal offender, Mr Pahau, took the actions outside what was the common purpose, and –

WILLIAM YOUNG J:

Well, there are two very closely related ways of looking at this, aren't there? One is, what was the common purpose, in terms of whether what actually happened was, involved, its implementation. So if it's an assault where, between one group of boys and another and they're all just going to use fists, it might, the common purpose might, not encompass a more lethal assault. And then the second way of looking at

it, which is probably pretty much the same, is were the consequences that occurred, the offence that occurred, of a kind which was reasonably foreseeable?

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

And the knowledge of the weapons cases tend to involve disputes where the only evidence that the defendants formed a sufficiently serious common purpose or were aware of the possibility of lethal consequences is their knowledge of the weapons that were deployed in the fracas. Now, whether those are right or not, it may be in question, but it's a little different, isn't it, when there's independent evidence of the level of the nature of the common purpose and the seriousness of the harm that was envisaged. For instance, if the common purpose is, "Let's do serious violence and we will use whatever weapons are to hand," would it really matter if someone has a knife when everyone else thinks they've just got swords or clubs or baseball bats or tomahawks or axes?

MR LAURENSON:

Well, Sir, you mentioned, "To use whatever weapons we've got at hand". I'm not sure where that comes from?

WILLIAM YOUNG J:

Well, we know that in this, in this case there's an admission of an intention to cause serious violence, serious violence.

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

Normally there won't be that. The evidence that serious violence was intended is to be taken from them looking around and seeing that someone's got a fence paling, someone else has picked up a bit of wood, someone else had the foresight to bring a tyre lever or something of the sort. Here, you've got a sort of broader background of them loading the car up with weapons: a gun and the club, or baseball bat, already a knife there, another knife taken by Pahau. And then you've got the context and what might be regarded as implicit in the planned, premeditated attack by one group of

men on another group of men who are associated with a gang. So, the case wasn't really dependent on Edmonds looking around saying, "Oh, gee, Pahau's got something bulky in his pocket and Fenton's got a, I think that's a baseball bat," do you agree with that?

MR LAURENSON:

Well, I mean, I'm sorry, but I really find it difficult not to speak to the facts to a certain extent in this, because the earlier assaults that, and confrontations that that parties had had, had been fist fights and there'd been no particular weapons used. This is the first time that a lethal weapon had been introduced into any of these assaults.

BLANCHARD J:

But they went and got weapons, didn't they?

MR LAURENSON:

In which one, Sir?

WILLIAM YOUNG J:

Fenton produces a gun.

MR LAURENSON:

Yes, in this case, yes. It's accepted there was a common purpose to go and cause serious violence.

WILLIAM YOUNG J:

And where did the baseball bat-like instrument come from?

MR LAURENSON:

I don't know.

BLANCHARD J:

Well, it was either there throughout –

MR LAURENSON:

Or it was introduced into the car.

BLANCHARD J:

– and hadn't been used before, or they went and got it.

MR LAURENSON:

Mr Edmonds went to – no, Mr Pahau went to pick up Mr Edmonds and the others followed, and whether the bat was in the car at the time or whether it was introduced, I can't recall.

WILLIAM YOUNG J:

Whatever Mr Edmonds said to Fenton, it was enough for him to bring a gun along when he was, as it were, summoning the clan together.

MR LAURENSON:

Well, I think we're speculating there, Sir. We don't know what was said or whether Mr Fenton grabbed that gun, whether it was in the car or, you know – well, I suppose he must have assumed that Mr Fenton brought it and put it in the boot.

TIPPING J:

I wonder –

MR LAURENSON:

But the gun wasn't taken down the drive.

TIPPING J:

I wonder if I could invite you to come back to the summing up, Mr Laurenson?

MR LAURENSON:

Certainly, Sir.

TIPPING J:

And the Crown in paragraph 25 of its submissions sets out, it seems to me, an accurate and succinct statement of the key directions of the trial Judge. Are you able to find that?

MR LAURENSON:

Yes, I have it, Sir.

TIPPING J:

25.1, there can't be any question that that's right.

MR LAURENSON:

Yes.

TIPPING J:

25.2, that is, that a killing was a probable consequence, is arguably favourable to your client. But, again, you couldn't possibly complain about that, could you?

MR LAURENSON:

No, Sir.

TIPPING J:

So, it's 25.3. And the Judge says that they can only find 25.2 established if he knew Pahau was carrying a weapon. Now, arguably, that restricts the jury's ability to infer knowledge of the probability of a killing –

MR LAURENSON:

It does.

TIPPING J:

– unjustifiably, but that's why I said to you before that it seems to me that, more than arguably, that is favourable to your client, and adding reference to a specific weapon becomes even more favourable to your client, which I don't think is justified, and so far you've said nothing that leads me to think that, in terms of the New Zealand statute, knowledge of a precise weapon is an essential. It may be evidentially significant, but you're saying it's an essential ingredient. Now, can you capture in some succinct way what it is out of the statutory framework that we're concerned with, that makes it essential?

MR LAURENSON:

I'll do my best, Sir.

TIPPING J:

Yes, because isn't that the crunch?

MR LAURENSON:

It is.

TIPPING J:

As a matter of law, not on these facts or anything like that.

MR LAURENSON:

As a matter of law, in cases where there is a homicide, whether it be charged with murder or manslaughter, then it would be necessary for the secondary parties to be aware of the type of weapon used by the principal offender before the secondary parties can be convicted of either murder or manslaughter.

TIPPING J:

Why is the inference, which the jury must draw about knowledge that death was a probable consequence of the carrying out, in the sense it could well happen, why is it as a matter of law necessary to have specificity of weapon before that inference can legally be drawn.

MR LAURENSON:

Because the lack of the knowledge would, in my submission, take, or could may well take, the actual acts of the principal offender outside the common purpose.

TIPPING J:

Without knowledge of specific weapon, act of perpetrator, outside common purpose – common intention, sorry. Is that the submission?

MR LAURENSON:

Yes, I think so, and that without that knowledge – that knowledge is required before the appellant can be found that, to know that killing was a probable consequence. He would need that knowledge.

TIPPING J:

In other words, without that knowledge, a verdict that he knew would be unreasonable?

MR LAURENSON:

Yes.

ELIAS CJ:

I thought that in your earlier submissions you acknowledged that it wasn't the particular weapon, as long as it was known that there was a weapon of the same sort of lethal quality?

MR LAURENSON:

Well, yes, I did, and that was the case of *Rameka*, and I don't have any particular problems with that because it was a knife as opposed to an axe.

ELIAS CJ:

Yes. So I'm just –

MR LAURENSON:

Yes.

ELIAS CJ:

– getting your confirmation that you would modify what you've just said to Justice Tipping by allowing that it isn't the particular weapon, it's a weapon of similarly lethal potential?

MR LAURENSON:

Yes. I don't think I can argue that a particular weapon, but it's –

TIPPING J:

Without knowledge of lethal weapon, then.

MR LAURENSON:

Well, of, a weapon of similar or same lethality.

BLANCHARD J:

Well, what in this context is a lethal weapon? Surely, it's any weapon, the use of which could well cause death? In other words, if they went down there with a walking stick, that's not a weapon that is at all likely to cause death, if used. But if you go down there and start wielding a baseball bat then, yes, that could well cause death.

MR LAURENSON:

They're the degrees of what is lethal, Sir. I mean, for example, you have a stone, which is not particularly lethal, then you go to maybe a stick, a baseball bat, and then you step up again to a knife, you step up again to a gun, all of those become more lethal. They are weapons which inherently, I suppose, can cause death more easily with less risk to the attacker, I suppose.

TIPPING J:

Doesn't the fact that there are degrees of lethality undermine your proposition and support the view that it's an evidentiary issue?

MR LAURENSON:

Well, no, in my submission, in cases where someone is to be charged with murder or manslaughter, then the knowledge of that type of weapon is, is essential.

TIPPING J:

What if I know that you've got a gun, Mr Laurenson, and forgive me, I'm the accused, I know that you, the perpetrator, have a gun, but you actually use a knife to kill and I didn't know you had a knife. Is that going to matter, on your thesis?

WILLIAM YOUNG J:

Or I know you've got a .22 but in fact you use a shotgun.

TIPPING J:

Or any –

ELIAS CJ:

It's all settled by authority, isn't it?

MR LAURENSON:

Well, the authorities in the common law, Ma'am, require the knowledge of the weapon. I'm sorry, I'm not following you.

ELIAS CJ:

Yes, I'm sorry.

McGRATH J:

Well, we'll come to that no doubt, but you've got to deal with the argument that the common law is different, joint enterprise liability is different to section 66(2) liabilities.

MR LAURENSON:

Well, it is, but I must admit to being quite confused as to actually how different that is, and I refer to respondent's submissions –

McGRATH J:

Well, have you finished what you've done earlier? I don't want to sort of take you off if there's anything further you want to say.

TIPPING J:

Well, I would like an answer as to whether it makes a difference, if I know there's a gun but the knife is actually used, in your submission.

MR LAURENSON:

I would – no, I would have to argue that, well, I'd have to say that, no, it probably doesn't matter, because you have the lethal value up there and anything less – and that's been, that's been settled anyway, I don't disagree with that, it's similar to the tomahawk or the hatchet and knife. It's where you take a step beyond the known lethalness of the weapon, where we go up. If you're going down, I don't see that it is something I could forcefully argue.

WILLIAM YOUNG J:

But you say you've got to draw a circle around the driveway at 1A Squire Place and we thus ignore the fact that your client had a gun.

MR LAURENSON:

Well, the gun wasn't taken down there. I mean, that's for –

WILLIAM YOUNG J:

I know it wasn't taken down there, but –

MR LAURENSON:

The offence, I submit, was down on the, down in 1A Squire Place, that's where the weapons were. This weapon, to my submission, was kept out of it, was not part of the offending down there.

WILLIAM YOUNG J:

It wouldn't have been much point brining it unless there was a likelihood of it being used. So, it does point to a willingness to encompass the risk that would be associated with the potential, with the use of a lethal weapon.

MR LAURENSON:

Well, in my argument it is but that, Sir, it wasn't taken down there. Had they – my argument obviously is that had Mr Edmonds intended this lethal, intended a possible killing, then he would have grabbed the gun, given it to one of the others, said, "Way you go, take the gun down there," but they didn't.

WILLIAM YOUNG J:

What if someone had doubled back?

MR LAURENSON:

If someone had have doubled back, taken the gun and walked down, then that's a different –

WILLIAM YOUNG J:

No, no, if one of those who were being pursued had doubled back and come at Edmonds.

MR LAURENSON:

Well, it can only be speculation, Sir, I can't say what would have happened.

BLANCHARD J:

Are you arguing that it was his belief that they went down that driveway without any weapons?

MR LAURENSON:

No, I'm accepting that there was a blunt weapon, whether it be a baseball bat was taken.

BLANCHARD J:

So he knew there was a baseball bat?

MR LAURENSON:

Yes, on the evidence that has to be accepted.

BLANCHARD J:

Well, it also has to be accepted on the plea of guilty that they were intending to use the baseball bat to inflict serious, at least serious injury.

MR LAURENSON:

Well, possibly use the baseball bat, yes, on that basis, yes, I accept it, I accept he must have known.

BLANCHARD J:

Well, it had to be a probable consequence, that the baseball bat at least would get used –

MR LAURENSON:

I would have to accept that.

BLANCHARD J:

– to inflict serious injury.

MR LAURENSON:

Yes, I would have to accept that.

TIPPING J:

And the infliction of serious injury, it might be thought, in these circumstances, could well give rise to a death.

MR LAURENSON:

If –

TIPPING J:

That's the problem I have with this case, Mr Laurenson, never mind all about specific weapons and so on.

MR LAURENSON:

If we're looking at – are we looking at these circumstances, Sir, of these facts?

TIPPING J:

Yes, yes.

MR LAURENSON:

Then, in my submission –

TIPPING J:

I mean, it was a reasonable inference for a jury to draw, without – with a baseball bat. Now, I don't see how, as a matter of law, they had to know, your client had to know any more than that before it was reasonable for the jury to draw that inference.

MR LAURENSON:

Well, if we look at these circumstances, Sir, I submit that if a simple one baseball bat taken down there in those circumstances, then a killing was a remote possibility, at best, I would have, I would submit.

TIPPING J:

All right, I hear your submission, a remote possibility.

MR LAURENSON:

I would – inherently unlikely, I would put it.

TIPPING J:

Yes, thank you.

MR LAURENSON:

Your Honours, in what direction would you like me to focus my submissions on this point?

ELIAS CJ:

Well, do you want to address us on the statutory provisions at all?

MR LAURENSON:

Statutory provision of section 66(2), Ma'am?

ELIAS CJ:

Yes.

MR LAURENSON:

Well, those provisions have been considered in a number of decisions in the Court of Appeal, through *R v Hartley* [2007] 3 NZLR 299, (2007) 23 CRNZ 420, which is a section 66(1) case, *R v Vaihu* [2009] NZCA 111, which is a section 66(2), but one where death did not ensue, death did not result. The Court of Appeal decision of *R v Rameka*, I submit is a useful one which was decided last year on the 18th of March, and I think the decision came out something like a week after the decision in this particular case.

TIPPING J:

Are you referring to paragraph 120 and following?

MR LAURENSON:

Yes, Sir, I think it's 120. That's a section 66(2) discussion. Now, the Court of Appeal in that case seems to accept – well, firstly, it accepts that *Vaihu*, at paragraph 142, expressly left open the situations where the victim was killed, and at 143, William Young P wrote separately and noted, "In some cases it will not be possible for a rational jury to infer that a particular defendant had the required knowledge unless they were sure that the defendant was aware members of the group were armed. Whether knowledge of the weapon is required will depend on what level of common purpose is being alleged to the Crown." Paragraph 144: "All three Judges in *Vaihu* acknowledge that the knowledge needed depends on the nature of the charge. We agree we think common assault can be distinguished from murder, given the specific intent required, knowledge of which will usually be needed before a jury can infer that the parties acknowledged that death was a probable consequence of the assault." The Court then went on –

TIPPING J:

What is the support in this case for the specific weapon or lethal weapon thesis?

MR LAURENSON:

Well, that went as far on that paragraph to say that the knowledge of a weapon –

WILLIAM YOUNG J:

I think that the indefinite article is quite significant there.

TIPPING J:

Mmm, “a” one, “a” one, yes, that's why I’m asking you.

MR LAURENSON:

Yes, yes –

TIPPING J:

I would have thought, if anything, it goes the other way.

MR LAURENSON:

Well, if I move on a little bit, Sir. The case at paragraph 146 goes on to discuss the English authorities of *R v English*. At paragraph 147, “The case is explicable because the knife is a more dangerous weapon than the post. The issue is more difficult where a party has knowledge of a dangerous weapon different from the actual weapon used. It will be a question for a jury whether the weapon used took the act outside the scope of the common purpose. In some cases knowledge of a more dangerous weapon may not be enough.” So, they seem to be saying in that case that the English authorities are at least guidance, a persuasive guidance in New Zealand, and that the reason why in *English* that the appeals were allowed was because that was a more a dangerous weapon used than the post, and that was a, I think it was a knife.

TIPPING J:

Well, the – but 147 –

MR LAURENSON:

Yes.

TIPPING J:

– the last part of it, last two sentences, with respect, I don’t think support your proposition, the absoluteness of your proposition. It suggests that it’s evidentiary for the jury.

MR LAURENSON:

It does, Sir. If I move on just a little bit further in relation to the knowledge of the weapons. The other one, that’s *R v Smith (Wesley)* [1963] 1 WLR 1200 (CA), at

paragraph 150, "The greater the difference between the act actually committed and the behaviour that was under contemplation, the more likely the jury will infer the appellant did not foresee the murder." And I move on to – you see, at paragraph 157, what I am looking at is, "We are satisfied that an attack with a large butcher's knife of at least 27 metres in length is capable of doing as much damage as an axe and is not fundamentally different to an attack with the butt of an axe. We think this is the case can be distinguished from *R v English* and the obiter comments in *R v Smith,* where the actual act involved a more dangerous weapon than that within the knowledge of the party. In contrast, a knife is at least a weapon as a butt of an axe. There was enough evidence for the jury to infer that she must have foreseen the possibility an attack might lead to death." It seemed to be saying, in that case, that the knowledge of the weapon was important, because also in that case one of the accused had a knife but others didn't know, but that because they knew there was a butcher's knife, that's as serious as an axe, and therefore that is sufficient knowledge of a weapon…

BLANCHARD J:

This was a murder case, however ...

MR LAURENSON:

Yes.

BLANCHARD J:

... Where there was need for the probable consequence to be that one of the group would form some form of murderous intent. Here we're dealing only with manslaughter, where the probable consequence only has be that someone gets killed.

MR LAURENSON:

Yes, well, I mean, that's true, but still, the knowledge, in my submission, where a death results, is that it's necessary for what that common purpose is and what the probable consequence of that purpose is. And the knowledge of the particular type of weapon, and we're talking about more lethal weapons, is necessary –

TIPPING J:

It's much easier to infer knowledge of murderous intent on the part of the principal, if they've got a lethal weapon –

MR LAURENSON:

Of course.

TIPPING J:

– than if they haven't. But, as my brother says, that not the point with manslaughter.

MR LAURENSON:

No, but you're still in a situation where you have, in this example, Mr Edmonds, who was up the drive, a long way away, to be convicted of the charge of manslaughter, when the probable consequence of – my submission is that the probable consequence of walking down that drive with a baseball bat was not that a killing would result. Had Mr Edmonds known –

BLANCHARD J:

Well, they weren't just walking down the drive with the baseball bat –

MR LAURENSON:

Well, they were running down the driveway.

BLANCHARD J:

– and having an intent to inflict serious violence on someone.

TIPPING J:

And your client shouting, "Go, go, go," and brandishing a firearm.

MR LAURENSON:

We –

TIPPING J:

I mean, we're giving you a little bit of a hard time, Mr Laurenson, because –

MR LAURENSON:

Well, that's –

TIPPING J:

– you must focus on the law.

MR LAURENSON:

Yes, I'm attempting to, Sir, yes.

TIPPING J:

At the moment I am quite unable to see how you get this legal requirement out of it. It may be a good point to make with a jury factually – do you understand what I mean? But to elevate it to a legal requirement, I just do not understand how you do that, under our statute, never mind what they do in England.

MR LAURENSON:

Well, whether it's a legal or a factual, it's my submission that that was something…

TIPPING J:

You've been given leave to appeal that the summing up was wrong because the Judge didn't make, what I understood you to be arguing, a legally appropriate direction. Now, where do you get the need for that direction out of the statute?

MR LAURENSON:

Well, I can only take it from the legal requirement and the necessity from the common law and that, in my submission, that section 66(2) doesn't sufficiently change the common law to negate that requirement.

McGRATH J:

What do you say to the Crown's argument that the common law requirement for joint enterprise liability was that the other party acted intentionally, whereas that is not in section 66(2)? That seems to be the essence of the Crown, the way Crown distinguishes *English*.

MR LAURENSON:

Are you talking about the secondary party acting intentionally?

McGRATH J:

No, I'm talking about the requirement for joint enterprise liability that the principal acted intentionally, that the person who actually did the killing in this case, acted intentionally. That seems to – well, it –

MR LAURENSON:

Sorry, can you –

McGRATH J:

And that was what was foreseen, the intentional, the intent was foreseen, the intentional act was foreseen.

MR LAURENSON:

Well, there'd seem to be some debate on that, whether it's the actual intentional act or whether they foresaw that the weapon was there and that it could possibly have been used. Could you refer me, Sir, to the particular paragraph your Honour's referring to?

McGRATH J:

I think so, just a minute. Paragraph 27 of the Crown's submissions, second sentence is the essence, and then it moves on to 32.

MR LAURENSON:

My understanding from the –

TIPPING J:

I think, if I may intervene, that the question here is directed to murder, not to manslaughter, and for murder you have to see a killing with murderous intent on the part of the principle, but not for manslaughter.

McGRATH J:

Okay.

TIPPING J:

I think that's the point the Crown is making.

WILLIAM YOUNG J:

I think it's fair to say that the New Zealand section 66(2) jurisprudence is very similar, leaving aside possibly the knowledge of the weapon cases, to the common law joint enterprise. And, if that's the case, it's hardly surprising because Stephen was setting out largely to capture the common law, in section 66(2) and the English Aiders and Abettors Act in section 66(1), or their precursors in the 1879 code. And, if you read

the Privy Council judgment on appeal from Hong Kong where Sir Robin Cooke wrote the judgment, the two legal sets of principles are pretty much in alignment.

McGRATH J:

I think that's clarified that matter from my point of view.

TIPPING J:

Pace the English cases on specific weapons.

WILLIAM YOUNG J:

On the knowledge of the weapons, yes.

TIPPING J:

Yes.

MR LAURENSON:

Well, my submission is that the common law cases require the knowledge of weapon in cases such as this, and that section 66(2) doesn't significantly modify that to the point where that would not be necessary, in cases of murder and manslaughter. Because it is necessary for the accused to know a particular type of weapon so that that forms, is part of, the common intention which flows through to what the probable consequence is.

TIPPING J:

Can your argument really be summarised by saying that what you're arguing is that the learned trial Judge should have directed, that you be fixed with the requisite knowledge only if you knew that Mr Pahau was carrying a lethal weapon at the time, and the absence of any reference to that makes the summing up fatally flawed. Is that the simplest and shortest way of putting your point?

MR LAURENSON:

Well, that's not the lethal weapon, Sir, it needs to know a weapon of the –

WILLIAM YOUNG J:

A cutting or stabbing weapon.

MR LAURENSON:

Cutting or stabbing weapon.

TIPPING J:

Oh, it's got to be as specific as that?

MR LAURENSON:

Well, it needs to be a weapon of the same lethality. A baseball bat is one level of lethal, a knife or a cutting weapon is further, further up the grade, and then a firearm, a bomb or whatever, is further up.

TIPPING J:

So he should have directed the knowledge that Pahau was carrying a cutting or stabbing weapon at the time? That would have cured the problem, in your submission, and it was mandatory?

MR LAURENSON:

Well, I would submit, Sir, that he should have knowledge that there was a knife, but I would accept that if he was directed that he had a weapon of that type, cutting or stabbing or something like that, that would be sufficient.

WILLIAM YOUNG J:

It was a very favourable direction that he had to know that it was Pahau who had the weapon.

TIPPING J:

Mmm.

WILLIAM YOUNG J:

Why wouldn't it have been sufficient if he had known –

BLANCHARD J:

Of any of it.

TIPPING J:

Yes.

WILLIAM YOUNG J:

– that Brown or Fenton had a weapon?

MR LAURENSON:

Because, one, those weapons were never used, they were nowhere near –

WILLIAM YOUNG J:

But their potential use would have been within the range of probable consequences. What the Judge effectively has done is said, "We're only going to look at what happens down the drive, so therefore the fact that Edmonds has got a gun is irrelevant, and we're really only going to look at what actually happened, so the possibilities that Fenton or Brown might have killed someone and thus also excluded." It was a pretty narrow approach.

MR LAURENSON:

Well, I guess, in the particular facts, that Pahau was the only one there.

WILLIAM YOUNG J:

Sorry?

MR LAURENSON:

Pahau was the only one there.

WILLIAM YOUNG J:

Well, he was at the end.

BLANCHARD J:

Not at the point when they're urged by your man to go down the drive.

MR LAURENSON:

No, but at the time of the actual killing, he was the only one there.

BLANCHARD J:

But he's not there then.

MR LAURENSON:

Edmonds is not there, none of the others are there as well.

BLANCHARD J:

The question must be, what was foreseeable when he urged them to go down the drive?

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

Had the charge been laid under section 60 or been pursued under section 66(1), there couldn't be a defence to manslaughter on what the jury must have found, could there? He's lookout man, section 66(1) liability, and knowledge of, no foresight would have been required to have him guilty of manslaughter. All he would have to know is that there was going to be an assault.

TIPPING J:

Well, he'd incited or counselled.

WILLIAM YOUNG J:

Because when he was saying, "Go, go, go," it's possible to construe that as counselling an assault.

TIPPING J:

Yes, he was counselling or inciting serious violence.

WILLIAM YOUNG J:

The Crown may have been a bit perturbed by the *Hartley* possibility, that *Hartley* may have intervened, I suppose, on that.

TIPPING J:

But anyway –

WILLIAM YOUNG J:

Yes.

TIPPING J:

– you're facing 66(2), so…

MR LAURENSON:

Well, I'd prefer not to deal with that one.

TIPPING J:

And your problem's bad enough in there.

MR LAURENSON:

Well, yes, you're quite right, Sir. The Crown, from memory, did open the case on whether they were going to choose section 66(1) or 66(2) and they made their election to go into section 66(2). And there was a reason for that and I can't recall precisely –

WILLIAM YOUNG J:

I suspect it may have been *Hartley.*

MR LAURENSON:

– what that reason was. It may well have been. Because then we had the arguments and the Crown obviously relied on *Vaihu.* Now, I suppose, in all of the cases –

ELIAS CJ:

What other weapon could it have been? Are you saying that – I'm just trying to think about how realistic the submission that you're making to us is. What could the jury have thought, that Mr Pahau might have had a stone with him or something?

MR LAURENSON:

Well, I – with respect, Ma'am, in my submission there was no evidence Mr Pahau had a weapon at all anyway. But even on the Judge's direction they were found guilty.

BLANCHARD J:

I'm sorry?

MR LAURENSON:

I'm sorry, I may have misunderstood the question.

ELIAS CJ:

No, well, sorry, I'm now thinking about the answer and I've forgotten the question. Perhaps it doesn't matter.

BLANCHARD J:

I – I certainly didn't understand the answer.

ELIAS CJ:

I thought Mr Pahau was the stabber.

MR LAURENSON:

He is the stabber.

ELIAS CJ:

Well, I'm just trying to think, in context, if the Judge directs that the appellant must have – that the jury couldn't convict unless they were satisfied that the appellant knew that Mr Pahau was carrying a weapon, in context, what other weapon could it have been?

MR LAURENSON:

Well, I suppose – well, given the fact of the stabbing, obviously it had to be a knife, but before that, I mean, who knows, it could have been a stick, it could have been anything, a fence post …

ELIAS CJ:

Well, in that context, surely the jury must have taken that direction to mean that they had to be satisfied that the appellant knew that Mr Pahau was carrying a knife.

MR LAURENSON:

If you work back from it that way, that certainly makes some – well, not necessarily, I mean, the jury could –

BLANCHARD J:

At one point in the summing up the Judge actually uses the expression "the weapon".

WILLIAM YOUNG J:

Well, he was only carrying, presumably, one weapon. The, "Go, go, go," must have been, included a contemplation that he was going to use whatever weapon he had to

inflict serious violence. It's – and the evidence about the blunt instrument was that that was carried by either Brown or Fenton, was that right?

MR LAURENSON:

One of the two.

WILLIAM YOUNG J:

Yes, and there were no other weapons present. There was only a gun, a blunt instrument and two knives.

MR LAURENSON:

One knife, I think.

WILLIAM YOUNG J:

Well, there was one – I thought there's one in the glove box and one in the pocket.

MR LAURENSON:

Well, we don't know if there's one in the glove box. Mr Murray assumed that the knife had come from the glove box because he had seen Mr Pahau's knives, work knives, in the glove box. Earlier Mr Pahau, on this occasion, says he got the knife from a jacket or something and put it in his pocket before he left his bedroom. So we don't know whether there was a knife in the glove box or not.

WILLIAM YOUNG J:

All right. So there's a gun, a blunt instrument and one or two knives?

MR LAURENSON:

Possibly, Sir.

WILLIAM YOUNG J:

And the gun and the blunt instrument are accounted for?

MR LAURENSON:

They are, the knife is not. ... I'm sorry, I've certainly lost my train of thought …

ELIAS CJ:

Where do you want to take us to next?

MR LAURENSON:

May I just have a moment?

ELIAS CJ:

Yes.

MR LAURENSON:

Well, I suppose, I mean, if I take it back to what my argument really is, and that is that under the common law it is a requirement that the knowledge of the weapons is needed, and the reasons for that is, set by Lord Hutton, that it's not necessarily logical that a secondary party is convicted or murder or manslaughter when they have a lesser degree of knowledge, but it is a necessity from a pragmatic point of view, for the safety of society and ensuring that gangs and the like do not run round the place causing these type of offences and they're held liable for that. But, from a policy point of view, the United Kingdom particularly has determined that there needs to be some limits on that, and the legal necessity there is that there needs to be a knowledge of the knife or weapon in cases of murder or manslaughter, and it's my submission that section 66(2) doesn't change that significantly.

The case law that we've had in New Zealand to date has struggled with that and hasn't provided the answer. *R v Vaihu* specifically left that open. In my submission, *R v Rameka* in fact supported the contention that that was necessary, because they, in that case the Court held that because one of the accused knew that one of them had a butcher's knife, then the fact that a blunt axe was used didn't matter. But they've still, in that case, were deciding that the knowledge of the particular weapon was necessary. And, in this case, granted the common intention was to inflict serious violence, but it is my submission that if you then lead to what is the probable consequence of that, a killing then, to find a person guilty of murder or manslaughter, it is necessary for the secondary party to be aware of the nature of that weapon before a jury should be entitled to find that there was, a killing was a consequence.

And I referred the Court earlier to the quote of *R v Clayton,* where the jury may well work backwards saying, "Well, the killing has occurred, and therefore it is most likely a probable consequence that in fact that was going to occur." But, in my submission, you need to work forward there and that, on the facts of the case, for a killing to be a probable consequence and for Mr Edmonds to be held liable for that, then he would

need to know of that weapon. And a failure to do so would render that – the killing would not have been a probable consequence. If there hadn't been a knife there wouldn't have been a killing, in my submission.

Now, Your Honours, as you're aware, I've gone through an number of other issues which you probably will not be troubled by in relation to the facts of what the common intention was, and also the evidence of the knowledge of the knife.

ELIAS CJ:

Yes, thank you, Mr Laurenson.

TIPPING J:

Mr Laurenson, I would just like to raise with you something that my brother Blanchard raised with you, but I just would like you to have the opportunity of addressing this more fully if you feel able. I've just been re-reading the summing up, and on page 322 of the case on appeal there is a passage which is certainly, a passage which directs on this question of knowledge of weapons, and it may be that there's another passage that you're able to point to. But, as my brother said, there the Judge referred to, "the weapon" 322, about line 14 …

BLANCHARD J:

Yes, that is the passage I was referring to.

TIPPING J:

Yes, now –

BLANCHARD J:

He says "a weapon" on at least one other occasion.

TIPPING J:

Well –

ELIAS CJ:

Well, he does in the –

TIPPING J:

In the issue…

ELIAS CJ:

– sheet, the issues sheet.

TIPPING J:

Does he?

WILLIAM YOUNG J:

And this is murder, he's talking about murder there too.

BLANCHARD J:

Yes.

TIPPING J:

Murder…

WILLIAM YOUNG J:

Well, I, I don't think there's much difference, or should be much difference.

BLANCHARD J:

Yes, on – the top of 323 he's talking about "a" weapon.

TIPPING J:

Is that where it is – oh, "carrying a weapon."

MR LAURENSON:

Well, only the –

TIPPING J:

Right.

MR LAURENSON:

He directs that he needs the knowledge –

TIPPING J:

Okay, that solves my problem. I just wanted to be sure that there was another passage where the complaint might resonate.

BLANCHARD J:

I mean, it may be that it is a distinction that he's making between murder and manslaughter. Because when he goes on to manslaughter –

TIPPING J:

It could logically be a valid distinction.

ELIAS CJ:

Is the issues paper similarly – does that –

TIPPING J:

No, I don't think …

ELIAS CJ:

– draw the same distinction? No.

TIPPING J:

I don't think –

ELIAS CJ:

It's just that in the context, what other weapon was he talking about, "Was carrying a weapon"? There wasn't a – the jury weren't being invited to speculate at all, it was effectively the weapon that was used.

MR LAURENSON:

Well, I mean, that's difficult to answer, that one. If the jury – it is less onerous. It means if the jury thought – I mean, I can only speculate, I can really only speculate on that, because my submission on that point is that there was no evidence that Mr Edmonds knew that Mr Pahau had a weapon in any event.

TIPPING J:

There is a reference to "a weapon" in the murder issues sheet, but there's no reference to anything in the nature of weapons on the manslaughter issue sheet.

WILLIAM YOUNG J:

I think there is, it's in the notes, it's in the notes.

BLANCHARD J:

There is, there is.

TIPPING J:

Oh, it's in the notes, is it? Oh, there we are, yes. Mr Fenton – oh, the same would apply to Edmonds if he was carrying "a" weapon, yes. So he's actually making – it's the indefinite article in both there, both murder and manslaughter. Sorry to be so pedantic about this, Mr Laurenson –

MR LAURENSON:

No, you're welcome, welcome, Sir.

TIPPING J:

– but I just thought it was important we got the whole picture very clear.

ELIAS CJ:

So, does that complete your submissions?

MR LAURENSON:

It does, unless I can assist the Court any further then that completes my submission.

ELIAS CJ:

No. We'll take the morning adjournment now, counsel, and consider where we want to go from here. Thank you.

COURT ADJOURNS 11.13 AM

COURT RESUMES: 11.31 AM

ELIAS CJ:

... is lurking beneath this an issue, which you flag in your submissions, as to knowledge of likelihood of death ensuing. But we don't think that that arises on the case so having heard the exchanges, if there's anything that you wish to add or help us with, we would be happy to hear you on that.

SOLICITOR-GENERAL:

Thank you very much, your Honours. Perhaps it would be helpful if I explained what the Crown would say is the general law relating as to when a weapons direction is in fact required in a section 66(2) manslaughter case and the decision as to whether or not a weapons directions is, in fact, required is going to involve a judgment for the trial Judge based upon the two key components of section 66(2), namely the nature of the common unlawful purpose, which the Crown alleges, and then secondly the need for the jury to be satisfied the accused knew that the offence with which they have been charged was a probable consequence of the prosecution of the common unlawful purpose and it's actually a matter that in each case is going to hinge on its facts.

If one takes a very broad spectrum, at one end of the spectrum you might have A and B forming a common intention, common unlawful purpose, to murder C. C is killed by A. B is charged with murder under section 66(2). The Crown would say that in those circumstances no weapons direction is required at all because it doesn't matter how C is killed by A. It's B's contact with A to murder C that overwhelms the case.

WILLIAM YOUNG J:

Well this is what Lord Hoffmann called plain vanilla murder.

SOLICITOR-GENERAL:

Yes, yes. But then at the other end of the spectrum we might have A and B forming a common unlawful purpose to fight C in a public place and during the course of the fight A produces a knife and fatally stabs C. A weapons direction would be highly desirable because B couldn't be convicted, or shouldn't be convicted of murder or manslaughter unless he knew that that offence was a probable consequence of the fight.

WILLIAM YOUNG J:

And that's *Davies v DPP* [1954] AC 378, the example given in that case isn't it?

SOLICITOR-GENERAL:

Yes. And so to infer that B had that knowledge, the jury would be likely, need to be satisfied, that A knew that B had a knife. And there are a whole range of scenarios in between. And I think the point that your Honour Justice Young made in *Vaihu* was that the closer the correlation between the common unlawful purpose and the

accused's knowledge that the offence which occurred was a probably consequence of that common unlawful purpose, then there is a decreasing necessity for a weapons direction. I think that that's the very point that Your Honour was making in *Vaihu*, admittedly a case involving –

TIPPING J:

Isn't this phrase, Mr Solicitor, a weapons direction, I've been out of the front line for some time, has this become a sort of term of art in the summing up world nowadays?

SOLICITOR-GENERAL:

Yes it has.

TIPPING J:

Has it?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Interesting. I've never heard it, as such.

SOLICITOR-GENERAL:

Right.

TIPPING J:

I understand exactly what it means, of course. In my time you just gave whatever direction you thought was appropriate to the facts of the case. If weapons were involved and there might be lack of knowledge, you direct accordingly.

SOLICITOR-GENERAL:

Yes. Well –

TIPPING J:

Has it achieved something of a sort of cult status, this weapons direction?

SOLICITOR-GENERAL:

I wouldn't elevate it to that status, your Honour.

TIPPING J:

No.

SOLICITOR-GENERAL:

It is frequently referred to in cases of this kind.

TIPPING J:

For shorthand.

WILLIAM YOUNG J:

Well the English cases are quite frequently relied on. They have been adopted in a slightly different context in *Hartley* and section 66(1) and then there's this sort of debate that's floating around in relation to section 66(2). That's right, I think, isn't it?

TIPPING J:

It's really, without wishing to diminish it, just ordinary common sense. If you don't know someone's got a weapon in a fight situation then, you know, chances are you won't be aware that death could well ensue out of the fight.

SOLICITOR-GENERAL:

Yes and the point of the weapons direction is to provide the jury with the evidential foundation that they need to be able to infer whether or not there was knowledge of the – that the accused had the foreseeable knowledge of the offence with which they have been charged.

TIPPING J:

I was a little, just while I've interrupted you, I was a little curious that the Judge gave it on a mandatory basis that they could not infer without that knowledge.

SOLICITOR-GENERAL:

I was going to make some comments about the summing up because I think in a number of respects it was incredibly generous to the accused in this particular case.

TIPPING J:

All right.

SOLICITOR-GENERAL:

But just in terms of general assistance, which this Court might be able to give trial Judges, the converse point that Your Honour made in *Vaihu* was made by the Court of Appeal in *Rameka* saying exactly the same point, making exactly the same point but conversely at paragraph 151 of the judgment, that the greater the difference between the act actually committed, and the behaviour that was within contemplation, the more likely that the jury would infer that the appellant did not foresee murder. So it's exactly the same point but just expressed in a converse way.

I did, with Mr Marshall's assistance, try and put all of this into a diagram but I'm not certain if the Court will be greatly assisted by such a thing because the point is actually very, very straightforward and has been well articulated by the Court of Appeal in both *Vaihu* and *Rameka*. I'm happy to make it available but I won't hold the Court up.

ELIAS CJ:

Well for myself I have an aversion to charts but that's probably antediluvian. Justice Young may be very anxious to see that.

BLANCHARD J:

It depends on whether your purpose was to simplify or confuse.

ELIAS CJ:

Yes, pass it over Mr Solicitor. But don't be hurt if it doesn't appear in the judgment.

SOLICITOR-GENERAL:

And that charge really, I think, just illustrates what your Honour Justice Young was saying in *Vaihu*. Just very, very briefly along the lateral axis varying degrees of common unlawful purpose and in the vertical axis whether or not there is a need for a weapons direction to establish that the offence – in this case manslaughter – was known to be a probable consequence of one of the unlawful common purposes. The greater is the need the further the distance is between the common unlawful purpose and offence which has actually been committed.

TIPPING J:

Does this sort of thing go to a jury in today's world?

ELIAS CJ:

No, no.

WILLIAM YOUNG J:

No, it's for the Judge. I mean, it's obviously at the left-hand end of the curve, it's getting a bit debateable, because manslaughter's never an intended purpose.

SOLICITOR-GENERAL:

Yes, yes.

WILLIAM YOUNG J:

If it is, it's murder.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

But I understand what you're talking about.

TIPPING J:

Unless you've got a very subtle mind.

ELIAS CJ:

Well, that's probably the area of dispute –

TIPPING J:

Yes.

ELIAS CJ:

– for another day, isn't it?

BLANCHARD J:

The purpose is a spot of unintentional killing.

SOLICITOR-GENERAL:

Well, with that particular point in mind, can I just reaffirm what the Chief Justice was saying in exchanges with counsel for the appellant? There is actually a point, which I

regret was not made in our written submissions, and that is that in effect, in this particular circumstance of this case, the direction which was given was, in fact, could only be construed as a direction that Mr Edmonds had to know that Mr Pahau was carrying a knife. And that is because Mr Pahau gave evidence and he explained to the jury that he carried a knife, it was a knife with a 14 or 15 centimetre blade, and that when he got to the house the deceased confronted him, he held the knife out as some form of warning to the deceased, and that the deceased came into contact with the knife in circumstances which were entirely accidental, that was his explanation. There was no suggestion from any point in the trial that Mr Pahau was carrying a weapon such as the weapon that's been described as being like a baseball bat. The only weapon, if he was carrying one, was a knife –

TIPPING J:

Well, he admitted he was carrying it.

SOLICITOR-GENERAL:

– and he admitted he was carrying it.

TIPPING J:

He admitted he was carrying the weapon.

SOLICITOR-GENERAL:

He admitted that he was carrying it. So therefore the direction in the circumstance of this case, that the accused, that the appellant had to know that Mr Pahau was carrying a knife – a weapon, could only be construed by the jury as them being satisfied to the requisite standard that Mr Edmonds knew that Mr Pahau was carrying a knife, no other –

WILLIAM YOUNG J:

Well –

SOLICITOR-GENERAL:

– interpretation is possible.

WILLIAM YOUNG J:

Well, I think you're right in the result, but there's another step, isn't there? Because, stopping there, it's theoretically possible that the appellant thought that Pahau was

carrying the club, but in fact we know that the club, the baseball bat, is otherwise spoken for, don't we?

SOLICITOR-GENERAL:

We do.

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

So with that extra step …

TIPPING J:

It's an inference that he knew what weapons were available.

BLANCHARD J:

He could have been confused as to who had which weapon.

ELIAS CJ:

Mmm.

TIPPING J:

Mmm.

SOLICITOR-GENERAL:

Yes, but I think that by the time the jury were receiving the summing up from the trial Judge, there just was no doubt in anyone's mind that Mr Pahau was carrying a knife. The only issue was whether or not Mr Edmonds knew that Mr Pahau was carrying it. And, in the circumstances of this case, there was a quintessential jury question: was there enough evidence for them to infer that of course he knew that? And their answer, when they gave their verdict, was that if – they accepted that he did know it. And I think that that's a completely unassailable finding. Certainly not a finding that could be seriously attacked in this Court. I –

ELIAS CJ:

Did – I'm sorry, I don't know the answer to this. Did Edmonds give evidence?

SOLICITOR-GENERAL:

No, he did not.

ELIAS CJ:

No, that's what I'd assumed but …

WILLIAM YOUNG J:

And there's no statement, no police statement, I take it?

SOLICITOR-GENERAL:

None that's before this Court. No, my friend tells me that there was none.

Now, I have analysed the common law cases but, in light of the indication which your Honour the Chief Justice gave me a few moments ago, I will not go into that quite subtle but, in my view, quite important distinction between where the common law has gotten to on this very delicate point and where the code jurisdictions have gotten.

WILLIAM YOUNG J:

Is that just for my benefit? That relates to the knowledge of the weapons cases in England, is that right?

SOLICITOR-GENERAL:

It does, it does.

WILLIAM YOUNG J:

Because the principles themselves would appear to be the same at common law or under section 66(2).

SOLICITOR-GENERAL:

Yes, indeed. The principles are the same, it's the way in which the common law has just evolved –

WILLIAM YOUNG J:

It's the application.

SOLICITOR-GENERAL:

One step further than the code jurisdictions have evolved. I don't think that Your Honours will have any difficulty at all in accepting that submission, but I'm quite happy to elaborate on it further if you needed to, but –

TIPPING J:

It's highly debateable, and this is what we've really got before us, as to whether the English have got themselves slightly up a gum tree on account of elevating something into a matter of law which is really a matter of fact.

SOLICITOR-GENERAL:

Yes, exactly, and the point is, of course, that the code does not envisage this being a matter of law at all. And I think that that point was probably most succinctly made by her Honour Justice Kiefel in the *R v Keenan* [2009] HCA 1, (2009) 236 CLR 397 judgment, which is in the respondent's bundle of authorities under tab 15, a case dealing with Queensland equivalent of section 66, and in that judgment, case, Her Honour gave the principal judgment for the majority, and I would direct Your Honours to page 431 and the paragraph commencing line 15 of the judgment.

TIPPING J:

Sorry, which page number?

SOLICITOR-GENERAL:

It's 431, and I think that – oh, the line commencing 115, not 15, and it's the, "It is necessary to bear in mind how section 8," that's the equivalent of our section 66, "operates." And I think that that very, very succinctly and very accurately encapsulates the difference between where the code jurisdictions have gotten to and where the common law cases are. And it's exactly the same point which I think was recognised by the Court of Appeal in both *Vaihu* and *Rameka.*

I have also made available to you what I consider to be quite a helpful article by Professor Simester, and he very, very skilfully explains the fundamental differences between aiding and abetting offenders and joint enterprise criminality, and very forcefully explains the policy reasons why we have criminality for joint enterprise liability, and that's an article which I would commend to your Honours.

But, apart from that, unless I can assist the Court further, those would be my submissions.

ELIAS CJ:

Thank you, Mr Solicitor. Mr Laurenson, is there any matter arising out of that?

MR LAURENSON:

Nothing, Ma'am, unless I can be of any further assistance to the Court.

ELIAS CJ:

Yes, thank you. Well, thank you counsel, we will reserve our decision in this matter.

COURT ADJOURNS 11.48 AM