IN THE SUPREME COURT OF NEW ZEALAND

SC 100/2010
[2011] NZSC 51

STEPHEN THOMAS HUDSON

v

THE QUEEN

Hearing:	7 April 2011
Court:	Elias CJ, Blanchard, McGrath, William Young and Anderson JJ
Counsel:	G J King and C J Milnes for Appellant M D Downs for Crown
Judgment:	19 May 2011

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

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Introduction

[1] Nicholas Pike was last seen alive in March 2002. He was then 21. His body has never been found. The police did not inquire actively into his disappearance for some months, and their inquiries, once commenced, did not initially produce sufficient evidence to justify the laying of a charge. But significant new evidence came to light in March 2007 and this prompted further investigative activity which culminated in March 2008 when the police charged the appellant with Mr Pike's murder. The appellant was tried in the High Court before Ronald Young J and a jury in October and November 2009, found guilty and later sentenced to life imprisonment with a minimum period of imprisonment of 16 years.[1] His appeal to the Court of Appeal against conviction and sentence was dismissed[2] and he now appeals to this Court against the dismissal of his conviction appeal.

[2] This appeal turns on the admissibility of, and the Judge's directions as to:

(a) admissions allegedly made by the appellant to other prison inmates ("the prison admissions"); and

(b) propensity evidence associated with prior violent behaviour by the appellant.

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1 *R v Hudson* HC Palmerston North CRI-2008-078-372, 4 February 2010.
2 *Hudson v R* [2010] NZCA 417.

An overview of the case

[3] In late 2001, the appellant was involved in two extremely violent assaults. This was the violent behaviour which was relied on by the Crown as providing evidence of propensity, which we will discuss later in the judgment. As well, the two assaults provide a convenient starting point for discussion of the events which led to the disappearance of Mr Pike.

[4] The first of these incidents involved a Mr Cook and occurred in the early hours of 25 November 2001. The appellant had a grudge against Mr Cook because of the latter's involvement with the appellant's girlfriend, Ms S. The appellant arranged for Mr Cook to be lured to a country location. When he arrived, the appellant and another man assaulted him and in the course of the attack the appellant hit Mr Cook on the head with a hammer. Ms S was present at the time of the attack.

[5] The second incident involved a Mr Winter who also had a relationship with Ms S. In the early hours of 9 December 2001 the appellant entered the bedroom where Mr Winter was in bed with Ms S. He threw Ms S against the wall and then attacked Mr Winter, inflicting four stab wounds to the back, a laceration to the bicep, an injury to the wrist and a black eye.

[6] As a result of these two incidents, the appellant was, by late 2001, on the run from the police. This meant that he required assistance from others, much of which was provided by Mr Pike; this in terms of driving cars, running messages and the like. The appellant and Mr Pike also had an involvement in drug dealing and this extended to the manufacture of cannabis oil in Ngongotaha (near Rotorua) for a brief period. This operation came to an end when the police executed a search warrant at the property on 24 January 2002. The appellant evaded the police but Mr Pike was arrested. He was later bailed.

[7] During the period between the end of 2001 and May 2002 (when he was eventually arrested), the appellant usually carried a loaded Smith & Wesson revolver.

[8] In the relationship between the appellant and Mr Pike, the appellant was very much the dominant partner. Mr Pike was at his beck and call. The appellant was rude to, and dismissive of, Mr Pike. He ordered him around and, at times, was threatening. On at least one occasion he held the loaded Smith & Wesson to Mr Pike's head. There was a considerable body of evidence to suggest that Mr Pike was scared of the appellant and believed that the appellant was likely to murder him. The evidence also indicated that the appellant suspected Mr Pike of being a police informant (which in fact he was) and of generally being a risk to his continuing liberty for reasons which included what he saw as Mr Pike's incompetence over the Ngongotaha operation.

[9] In early to mid-March 2002, the appellant and Mr Pike were spending a good deal of time in and around Tauranga. There they met Ms Cindy Vrins. Mr Pike and Ms Vrins got on reasonably well although they did not have a sexual relationship. On the Crown case, the appellant was sexually attracted to Ms Vrins and resented the apparent friendship between Mr Pike and Ms Vrins.

[10] As we have noted, Mr Pike was last seen alive in mid-March 2002. The appellant remained at liberty until May 2002 when he was arrested near Tauranga. At the time of his arrest, the police found the Smith & Wesson revolver to which we have referred. This revolver was loaded. The police also found ammunition and a fast-loading device.

[11] The appellant was prosecuted for the two serious assaults we have discussed and for possession of the revolver. He was found guilty on all the charges and sentenced to a lengthy term of imprisonment. With the exception of a period while he was at liberty following an escape from prison in late 2002, he was in custody from the time of arrest in May 2002 until March 2008 when he was charged with the murder of Mr Pike.

[12] Despite Mr Pike disappearing from view in mid-March 2002 and failing to make a court appearance in March, the police were not initially particularly concerned. Detective Sergeant Clifford who had dealt with Mr Pike as an informant, and who was later the officer in charge of the investigation into his disappearance,

assumed at first that Mr Pike was simply lying low in the company of the appellant. But when there continued to be no sign of Mr Pike after the appellant's arrest in May 2002, the police and Mr Pike's parents became very troubled. As noted, initial police inquiries did not establish what had happened. So the case remained unsolved for a number of years. During this time, there continued to be publicity about the disappearance. This was generated by both the police and Mr Pike's parents. And in March 2007 – that is, five years after Mr Pike disappeared – there was further publicity associated with, inter alia, the police offering a $50,000 reward. This resulted in two former prison inmates (A and B) coming forward. They told the police of admissions made to them in prison by the appellant. The police also approached Ms Vrins around this time. Subsequently, in September 2007, the police canvassed extensively those who had been in prison with the appellant with a view to gathering evidence of other admissions which the appellant might have made. We will discuss the detail of what emerged shortly.

[13] At trial, Ms Vrins was the principal Crown witness. Initially (that is in 2002) she had not been prepared to co-operate with the police. But by 2007, when the police approached her again, her attitude to the police had changed and she gave them a detailed account of the circumstances leading up to Mr Pike's disappearance.

[14] What she told the police, and later the jury, is that on 18 March 2002 she was travelling from Auckland to Palmerston North in the company of the appellant and Mr Pike. She said that while they were driving along the Desert Road, the appellant told her to get out of the car and to wait. He then drove down a side road with Mr Pike. He returned 10 to 15 minutes later by himself and explained Mr Pike's absence by claiming that he was tending a cannabis plantation, a not particularly plausible explanation given the location. Ms Vrins' evidence was that she and the appellant then drove on to Palmerston North where, for the first time, they had sexual intercourse that night.

[15] The Crown contended that the appellant had murdered Mr Pike during the 10 or 15 minutes that he was away from Ms Vrins and that his motives for doing so were:

(a) his suspicion that Mr Pike was a police informant;

(b) his more general but overlapping concern that Mr Pike was a threat to his freedom;

(c) a drug debt owed to him by Mr Pike; and

(d) jealousy about Mr Pike's friendship with Ms Vrins.

[16] A good deal of the evidence of Ms Vrins and that of other Crown witnesses was addressed to the movements and whereabouts of the appellant, Mr Pike and Ms Vrins during March 2002. This provided context, and some support, for the evidence of Ms Vrins and also undermined an alibi proffered by the appellant. There was also much evidence as to the relationship between the appellant and Mr Pike (including the details of how the appellant treated Mr Pike); the tendency of the appellant to carry loaded the Smith & Wesson revolver to which we have referred; his presenting of this weapon, loaded, at Mr Pike's head; and as to the reasons why he may have wished to murder Mr Pike.

The alleged prison admissions

Section 122 of the Evidence Act 2006

[17] The section of the Evidence Act which is primarily relevant to this aspect of the case is s 122 which provides:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:

...

(c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:

(d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a police station, or another place of detention:

...

(3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

...

(6) This section does not affect any other power of the Judge to warn or inform the jury.

The evidence in question

[18] The Crown called seven witnesses who had been in prison with the appellant to give evidence of admissions allegedly made by the appellant. Two of these witnesses (A and B) approached the police independently after the March 2007 publicity. The other five came forward as a result of the canvassing exercise we have mentioned. The evidence of one of these witnesses lacked plausibility in that management arrangements in place in Paremoremo Prison at the time he and the appellant were both there were, at least apparently, inconsistent with his account of how he and the appellant met and were able to speak together. In the end, the Crown prosecutor did not place reliance on his evidence and the Judge effectively directed the jury to put it on one side. For this reason we will not review his evidence.

[19] A gave evidence of a discussion he claimed to have had with the appellant when they were both in the same block in Paremoremo Prison. His evidence was relevantly in these terms:

> Q. What did he say?
>
> A. He asked me if I'd ever killed anyone.
>
> Q. What did you say?
>
> A. And I just, I said no because I haven't. And it seemed kind of a bizarre question to ask but there you go. He told me that he had and like I said to you before, in jail you hear conversations, you have conversations that 95 per cent of what's said you take with a grain of salt and you either cho[o]se to believe it or you don't.
>
> Q. So at this time, what did you think about what he was telling you?
>
> A. Crap.
>
> Q. Did the conversation carry on?
>
> A. It carried on. He explained to me that there was a fellow who had, who owed him drug money or had owed him drug money which he then told me was [$]2000.
>
> …
>
> A. And that he had killed the guy because he wasn't going to pay it or he had refused to pay it or had just not paid it at all. He told me roughly what had happened in his words, where he'd gone, what he'd done, and again I'm still not really believing a lot of it but am listening, and he explained how he had picked the guy up with a story that he needed some drugs picked up in Tauranga and that he picked him up in Palmy, Palmerston North, and driven through to Tauranga, to the outskirts. He then got the guy out of the guy [sic] and they were going to smoke a joint and he'd clubbed him, pretty much bashed him in the face and knocked him down and then caved his head in.

[20] B had also been in the same block in Paremoremo Prison as the appellant. He said that in the course of one conversation he had asked the appellant "what do you think the best way to get rid of a body would be?" He claimed that the appellant had responded by wanting to know why he asked that and that the appellant later made the same inquiry again. His evidence as to this second conversation was in these terms:

> … And Steve in a quiet voice, he pointed at himself and leaned forward and said, "Well I have," you know, pointing at himself, inferring to me that I have had to get rid of a body in the past or I have experienced getting rid of a

> body. He pointed at himself, leaning towards me and pointing at himself and quietly said, "Well I have."

B went on to say that the appellant then described what he thought would be the best way to get rid of a body, a method not consistent with the hypothesis that the appellant had disposed of the body of Mr Pike in the vicinity of the Desert Road.

[21] C gave evidence of two discussions he claimed to have had with the appellant in Paremoremo Prison in 2003. His account of the alleged admissions was in these terms:

> Q. What did he actually say to you?
>
> A. Um, just said that he'd blown somebody away.
>
> Q. Did he tell you why he'd done that?
>
> A. No. Um, yeah I think he did mention something about a girl or a woman or something like that. I can't really recall it because while he was - while we were discussing - we discussed a whole lot of things you know, and sort of that was just something that didn't really register in my mind you know, that it was real or not.
>
> Q. Think back, what did he say about the girl or the woman?
>
> A. To be honest, can't really remember but, I know clearly he said to me that he'd blown somebody away.
>
> Q. When you were in the toilets, did he mention the name of the person again?
>
> A. Yep.
>
> Q. What did he say?
>
> A. He said his name was Nick the Dick.

[22] D had been with the appellant in Mt Crawford Prison. He described a conversation he had with the appellant in this way:

> Q. How did he introduce that topic?
>
> A. Um, first it was sort of about drugs and then he said that, you know, there was this guy his name was Nick and yeah ...
>
> Q. Carry on.
>
> A. And then um

Q. In as much detail as you remember, tell us what precisely Mr Hudson said.

A. He said that, um, he'd ripped him off for drugs and tried to move in on a girl that he was seeing. "And I kill cunts for that mate, and I did." And that's exactly what he said.

Q. That's exactly what he said?

A. Mmm.

Q. "I kill cunts for that and that's what I did."

A. Mmm.

Q. Now, just to get a little bit of clarity from what you've just told us. Who hadn't paid who for drugs?

A. Nick hadn't paid him or someone.

Q. Who was trying to move on whose girlfriend?

A. Nick.

Q. Moving on whose girlfriend?

A. Steve's.

…

Q. When he said that he had, or that he did, did he say how he'd done it?

A. Yeah he said he'd shot him.

Q. Did he say what he'd shot him with?

A. A revolver.

Q. Did he say whereabouts he'd been shot?

A. In the head.

[23] E had also been in Paremoremo with the appellant. He described an incident in which he was returning to his cell when the appellant came down the walkway on the landing. His evidence was:

Q. And what went on between you?

A. Um, basically it was more like, "Gidday". He was yelling out that "Hey yeah", you know, "scuse my language but he says, "Hey fuck I killed that Nick Pike".

Q. Did he say that to you privately or?

> A. He wasn't directly saying it to me, he just said it when he was coming towards me and while I was talking to [a prison officer] at the grille.
>
> …
>
> Q. And what, if anything, did he say about being caught for what he'd done?
>
> A. He says, "I will never be caught for it, because they will never find the body."
>
> Q. Did he say to you where he had placed the body?
>
> A. He was mentioning something about some plantation somewhere around about the Desert Road somewhere. So, yeah, that's all that was mentioned.

E's evidence was that that story was told in bits and pieces over a period of days. He also said that he overheard the appellant talking about Mr Pike's death:

> A. I overheard him talking to, well not talking to a specific inmate but there was a couple of inmates around in the circle by the grille and he was splurting his mouth off about how he had killed Nick over a bad debt and a drug deal that had gone wrong. He owed him money or something, it was, yeah, it was something like that.

[24] F, too, had been in Paremoremo at the same time as the appellant. He described how the topic of Mr Pike's murder came to be discussed:

> A. He was particularly concerned about a conviction relating to a firearm and he basically wanted to ask me if I could – Sorry, he was concerned about an ongoing police investigation and he wanted to ask me if I could sort of be an ear for him to, rather if I could evaluate if the police had sufficient evidence against him at that time to lay a prosecution.
>
> Q. What did the firearm have to do with it?
>
> A. I believe that he had been found in possession of a firearm and that had resulted in a prosecution in the Tauranga District Court and at the same time he was facing some drug charges also in the Tauranga District Court.

[25] F said that the appellant wanted to outline to him the evidence he believed the police had against him, so that F could evaluate whether it would be sufficient for a prosecution. There was then the following question and answer sequence:

> Q. Was there any discussion about a body?
>
> A. Yes, we discussed the body. I asked him if the police were likely to recover the body and he felt certain that the police would not be able to recover the body.
>
> Q. Did he go into any detail about that?

A. No he was very guarded about the body and unrevealing about any specifics about where the body could be located.

The witness said that he had another conversation with the appellant the following day, after the appellant had provided him with a dossier of documents (being newspaper printouts concerning Mr Pike's disappearance which the appellant had obtained from a contact working for a newspaper) with a view to F further assessing the likelihood of prosecution. This led to the following evidence:

A. Yes during the course of the conversation that we had on the next day Steve further disclosed to me that he had in fact killed Nicholas Pike using the revolver that he'd been convicted of being in possession of in the Tauranga District Court and he was particularly concerned that if the body was ever found that the bullet that would be found in Nicholas Pike's body would be able to be forensically linked to that particular revolver.

Q. Was there a discussion as to why he killed Nicholas Pike?

A. Yes there was. Stephen told me that he had killed Nicholas Pike because he believed that Nicholas had either made or intended to make intimate contact with a female friend, either someone he intended to become intimate with himself or somebody that he was currently intimate with. I can't quite remember which of those it was.

Q. Was that the only reason or motive discussed?

A. No he also discussed that Nicholas Pike had owed money for pure methamphetamine which he had been selling on Stephen Hudson's behalf.

Q. In what way did Mr Hudson refer to the woman that was spoken about?

A. I just wonder if you could be a bit more clear on what you're asking in relation to that.

Q. You told us that the first reason he provided was something to do with a woman he may have had an interest in or he may have been seeing?

A. That's correct, yes.

Q. How was that person referred to, by name or description?

A. He didn't actually name the female that he was referring to, he would have referred to her as a chick or woman or however he might have decided to describe her without actually naming her.

Q. Now from what he told you, did either of those two reasons, the woman or the debt, seem more significant?

A. Yes one did appear more significant and that was that he believed Nicholas Pike had had an interest in his female friend.

Some preliminary comments

[26] The six witnesses to whose evidence we have referred all had appalling records and had motives (either in terms of the reward or a possible desire to curry official favour) to implicate the appellant. As well, the admissions they attributed to the appellant were not all consistent with each other and some of them were not consistent with the thrust of the Crown case as to the location of the murder, the likely murder weapon and how and where Mr Pike's body had been disposed of.

[27] That said, at least some of the evidence in question might have carried some weight with the jury. In saying this, we have a number of considerations in mind:

(a) There was some other evidence which provided perhaps some support for the prison inmate admissions. Two prison officers gave evidence of the appellant having spoken of the death of Mr Pike and his apparent involvement in ways which rather suggested that he was prepared to engage in discussions in prison at least broadly along the lines contended for by A, B, C, D, E and F.[3] As well, Ms Vrins gave evidence of having confronted the appellant with the allegation that he had murdered Mr Pike and of receiving a response which, while in form a denial, did make it clear that the appellant considered that he had ample reason (along the lines referred to by some of the prison inmates) to have murdered Mr Pike.

(b) Some at least of the detail of the alleged prison admissions correlated reasonably well with other evidence before the jury; this in terms of the relevant geography, the appellant's ownership of a revolver which he usually carried, his explanation for why he committed the murder and his confidence (yet to be shown to have been misplaced) that Mr Pike's body will not be found.

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[3] The evidence of one of these officers was undermined by a police job sheet which recorded an account given by him which differed from his evidence at trial.

(c) The evidence of Ms Vrins was that the appellant had told her to give differing accounts of what had happened and it is likely that the appellant might have followed his own advice in his dealings with other prisoners. So it is not of controlling significance either that there were inconsistencies in the detail of the alleged prison admissions or that not all of that detail was consistent with the Crown's primary hypotheses as to how and where the murder was committed and Mr Pike's body was disposed of.

(d) F gave a very plausible account of how the relevant discussions started which, it will be recalled, involved the appellant showing him a dossier on Mr Pike's disappearance which he had made up from material obtained from a contact who worked with a major newspaper. F was not challenged on this aspect of his evidence, from which it can fairly be inferred that there was such a dossier and that it was shown to him by the appellant for the purpose of obtaining his advice. F's account of what he was told by the appellant was a very good fit with the Crown case.

The Judge's directions

[28] The Judge gave an extensive direction on the alleged prison admissions. He said:

> [66] The second set of warnings relates to what I have called "cellmate confessions" and that's the next heading. You heard evidence from a number of witnesses who were in prison with the accused, Mr Hudson. They say in one form or another Mr Hudson made admissions or confessions, I don't think it matters much, relating to the killing of Mr Pike. I need to give you a warning about this evidence that you need to treat this evidence with caution. Obviously you will need to take this caution about the evidence and apply it in relation to the evidence of each individual prisoner witnesses [sic] you're considering.
>
> [67] And of course you will consider it when you're assessing the prison witnesses as to whether they're credible and reliable. Consider these factors:
>
> (a) firstly, are there any incentives the prison witnesses may have been offered or that the prison witnesses thought they would get if they gave evidence against Mr Hudson. If the answer is yes then you will need to treat their evidence with

particular caution and the reason will be obvious, they had been offered an incentive;

(b) secondly, was there any animosity between the prisoner you're considering, and Mr Hudson that meant providing evidence against Mr Hudson of an admission or confession is some form of payback by the prisoner to Mr Hudson as a result of what went on in prison? So again, there is a potential motive here and so if there was such animosity this is a further reason to treat the prisoners' evidence with caution and that is the warning I give you.

[68] Further, when you're thinking about the alleged statements by the accused to the prisoners, keep in mind before they can be used, you need to be satisfied they were a genuine admission by the accused and not some form of bravado or showing off.

[69] Next the conversations weren't recorded in writing and you will need to be cautious about the accuracy of the report of what was allegedly said by Mr Hudson, often many years ago.

[70] And finally of course, and importantly with regard to this aspect, you will need to be satisfied that the [sic] Mr Hudson made the statements to the prisoners and you will recall the defence submission that you could not be satisfied that the statements were made at all.

[71] So you'll need to consider each of the prisoner's [sic] evidence separately, consider these factors and especially consider the warnings that I have given you. As I said it's a matter again entirely for you, you can accept all of the prisoners evidence, you can reject it all, you can accept some, reject some, it's a matter for you but you will need to keep in mind the caution and the warning I have given you.

[72] When you are considering whether you think the incentives, and as I understand it the incentive[s] suggested are consideration as to parole, that is the writing of the letters, a shorter sentence given by a Judge or any other advantage by way of a transfer, you need to take into account as I have said whether these incentives may be incentives to say something that is untrue as a way of getting the reward the incentives provide. Approach that evidence where there are incentives with caution.

[73] If, however, you were satisfied having taken into account the warnings that I have given you, being satisfied that the statements were indeed said, being satisfied that they were genuine admissions and not, as I have said, simply bravado or showing off and not admissions relating to a real crime, then that evidence would be strong evidence to support the Crown case, another strand of evidence.

[74] The Crown properly accept and I direct you that these admissions by the prisoners on their own would not be enough to convict Mr Hudson of murder. So by themselves they would not be enough to convict him of murder.

…

> [78] So a brief summary before we deal with each side[']s case. You are entitled to take into account in assessing the evidence of a prisoner whether he has been offered any incentive. The incentives included letters to the Parole Board relating to parole; a note to a Judge sentencing a prisoner in the hope that the Judge will reduce the sentence; shifting a prisoner away from a prison he didn't want to be imprisoned in.
>
> [79] If the prisoner you were considering was offered these incentives then you will need to treat their evidence with particular caution for the obvious reasons that incentives had been offered.
>
> [80] Secondly, you will also need to apply this caution to prisoners where there may have been bad blood between the prison witnesses and Mr Hudson. Their evidence must be treated with particular caution as to whether or not this is a situation of pay back in some way for Mr Hudson. So keep these cautions in mind for the reasons I've said.

The Judge also summarised the submissions of Crown and defence about the inmates' evidence.

[29] There was no challenge in the High Court to the admissibility of the prison inmate evidence. As well, the appellant's very experienced trial counsel (not Mr King) did not suggest to the Judge that the directions given were inadequate to the occasion. As to this second point, we note that the Judge gave counsel a general indication as to how he intended to sum up on all aspects of the case and also afforded counsel an opportunity to be heard, both before and after the summing-up, on the detail of the directions.

What happened in the Court of Appeal

[30] In the Court of Appeal the argument advanced by Mr King addressed the directions given by the Judge. Mr King relied particularly on the judgment of the Privy Council in *Benedetto and Labrador v R*.[4] In that case the Board commented:

> [32] … In the case of a cell confession it is that the evidence of a prison informer is inherently unreliable, in view of the personal advantage which such witnesses think they may obtain by providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice. They are men who, as Simon Brown LJ put in *R v Bailey* [1993] 3 All ER 513, 523J, tend not to have shrunk from trickery and a good deal worse. And they will almost always have strong reasons of self-interest for seeking to ingratiate themselves with

[4] *Benedetto and Labrador v R* [2003] UKPC 27, [2003] 1 WLR 1545.

> those who may be in a position to reward them for volunteering confession evidence. The prisoner against whom that evidence is given is always at a disadvantage. He is afforded none of the usual protections against the inaccurate recording or invention of words used by him when interviewed by the police. …
>
> ...
>
> [35] It should be noted that there are two steps which the judge must follow when undertaking this exercise, and that they are both equally important. The first is to draw the jury's attention to the indications that may justify the inference that the prisoner's evidence is tainted. The second is to advise the jury to be cautious before accepting his evidence. Some of the indications that the evidence may be tainted may have been referred to by counsel, but it is the responsibility of the judge to examine the evidence for himself so that he can instruct the jury fully as to where these indications are to be found and as to their significance. Counsel may well have suggested to the jury that the evidence is unreliable, but it is the responsibility of the judge to add his own authority to these submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence.

[31] The Court of Appeal, in rejecting the complaint that the directions were inadequate, commented:

> [69] We consider that the passage cited by counsel for the respondent [being the second of the above two quotations from *Benedetto*] correctly describes the task of the ... Judge. In *R v Ngarino*[5] this Court expressed the view that a warning under s 122 is unlikely to be effective if it does not explain to the jury the reasons why the evidence may be unreliable. We consider that the directions given by the Judge clearly met the objectives which a s 122 warning is intended to achieve. The Judge clearly warned the jury of the need for caution, and identified the reasons why caution is required. He drew attention to the indications that might justify the inference that the prisoners' evidence is tainted, and advised the jury to be cautious before accepting the evidence, the two steps described in *Benedetto*.

The appellant's argument in this Court

[32] In this Court the argument for the appellant was primarily addressed to the admissibility of the evidence. Mr King was able to point to the extremely unsatisfactory records of the witnesses and the inconsistencies in terms of detail between the admissions which the appellant was said to have made. The reality, he claimed, was that the prisoners (and particularly some of them) stood to benefit from being seen to have co-operated with the police. He noted as well that it would be unwise to assume that the witnesses could not have learnt – and independently of the

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5 *R v Ngarino* [2009] NZCA 200.

admissions attributed to the appellant – enough of the detail around the disappearance of Mr Pike and the police suspicions as to what had happened to lend some apparent circumstantial plausibility to their accounts. He also complained about an argument advanced by the prosecutor as to the likely consequences for prison inmates of "narking", to the effect that such consequences would generally dissuade inmates from doing so untruthfully. He accepted under questions from the bench that this was a legitimate argument for the prosecutor to advance but maintained that it was a seriously incomplete analysis of the motivational factors affecting the witnesses.

Our evaluation: overview

[33] We accept that the evidence of admissions allegedly made by the defendant while in prison to other prison inmates requires careful scrutiny. This is for the reasons advanced by Mr King. Prison inmates are likely to have motives to co-operate with the authorities, in terms of sentence, parole, money (including rewards) or perhaps just a slightly better relationship with the police. Such witnesses are likely to be unscrupulous and dishonest. By one means or another they may well be able to learn enough about suspected offending and a defendant's possible role in that offending to provide apparently plausible detail. Further, although there no doubt are often adverse consequences of "narking" for prison inmates (and more generally those who associate with criminals), such consequences might be thought to be at least as likely where the information provided to the police is true as where it is false. So the prosecutor's argument adverted to in [32] above, while legitimate, was not particularly compelling as to the truth of the prison admission evidence.

[34] There are two possible ways in which the courts might deal with the dangers of the kind which we have just discussed:

(a) exclude the evidence; or

(b) direct juries as to the dangers associated with such evidence.

Exclusion?

[35] It has sometimes been suggested that the evidence of admissions made by a defendant in prison to prison inmates should be treated as presumptively inadmissible.[6]

[36] Such an approach would not be consistent with the scheme of the Evidence Act. Section 27 provides that the statement of a defendant is admissible when tendered by the prosecution and excludes certain admissibility rules, including the hearsay rule, in subs (3). Section 28, which addresses reliability by reference to the circumstances when such statements are made, is not engaged by the present situation where the primary controversy is instead as to whether the statements were in fact ever made.[7] Unlike the situation with hearsay evidence,[8] there is no reliability threshold for the admission of prison inmate confessional evidence. Nor did the legislature adopt the technique of declaring such evidence presumptively inadmissible unless particular criteria were adopted, as is the case with voice identification evidence.[9] Specific provision for such evidence is, however, made in s 122(2)(d) and this is not couched in terms of exclusion but rather addresses the directions which the trial Judge should give to the jury. We recognise that there may be scope for excluding prison admission evidence under ss 7 and 8 of the Act, but, that said, the legislative scheme as a whole is indicative of a legislative intention that reliability decisions ought to be made by a properly cautioned jury.

[37] There is nothing unorthodox in this scheme. In other common law jurisdictions, the courts have shrunk from treating confessional evidence as inadmissible simply because it is given by prison inmates. There is no hint in the jurisprudence of the Privy Council that such exclusion is ordinarily appropriate.[10] In

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6 For example see Peter de C Cory *The Inquiry Regarding Thomas Sophonow* (Inquiry established by the Government of the Province of Manitoba 7 June 2000, report released 5 November 2001) <www.gov.mb.ca/justice/sophonow>. As discussed below at [37], this report's recommendations do not reflect the general Canadian approach.

7 See Evidence Act 2006, ss 28(1)(a) and (2). Although the Judge reminded the jury of the need to be sure that any admissions made were not "some form of bravado" (see [68] of the summing-up, set out at [28] above), the defence position at trial was primarily that the evidence as to prison admissions was untrue and unworthy of belief and there was no admissibility challenge.

8 See Evidence Act 2006, s 18.

9 See Evidence Act 2006, s 46.

10 See for instance *Benedetto and Labrador* and *Pringle v R* [2003] UKPC 9.

the case of accomplices (in respect of whom similar reliability issues can arise), the English Court of Appeal has firmly held that concerns as to reliability should be addressed not by exclusion but rather by appropriate warnings and directions to the jury.[11] The same approach to this general type of evidence is taken in Australia[12] and in Canada as well.[13]

[38] All in all, we are satisfied that the evidence was admissible.

Stronger directions?

[39] It is common ground that the case required a s 122 warning.

[40] In his written submissions Mr King noted:

> Apart from telling the jury to completely disregard this evidence, it is not suggested in this forum that the learned Judge could have gone much further than he did in his directions to the jury on the cellmate confessions on the basis of the present law.

But having said that, he then went on to argue that there should be a standard form direction on prison admission evidence broadly along the lines of that adopted in *R v Turnbull*[14] for identification evidence and now codified in s 126 of the Evidence Act. He postulated a form of warning which would record that such evidence might be both apparently convincing and fabricated and explain why this is so.

[41] Sections 122(2) and 122(4) militate against this Court either requiring judges *always* to warn juries in relation to admissions allegedly made to other prison inmates or prescribing a particular form of standard direction. Whether a direction is required at all will depend on the circumstances (although we consider that a direction will normally be required). More importantly, the terms of the direction need to be tailored to the facts of the case.

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11 *R v Daniels (John)* [2010] EWCA Crim 2740, [2011] 1 Cr App R 18 at [56].

12 See *Pollitt v R* (1992) 174 CLR 558 and *Rozenes v Beljajev* [1995] 1 VR 533 (VSCA).

13 See *Vetrovec v R* [1982] 1 SCR 811; *R v Brooks* [2000] 1 SCR 237 and *R v Khela* [2009] 1 SCR 104. Reference can also usefully be made to *R v Duguay* 2007 NBCA 65; (2007) 50 CR (6th) 378; *R v MacDonald* 2000 NSCA 60, (2000) 573 APR 1 and *R v Assoun* 2006 NSCA 47, 207 CCC (3d) 372.

14 *R v Turnbull* [1977] QB 224 (CA).

[42] As Mr King acknowledged, Ronald Young J's warning was given in firm terms and we can see only one possible criticism. This relates to the congruence between the detail of some of the admissions attributed to the appellant and the Crown case. In deciding what weight to place on those admissions, the jury necessarily had to consider whether the prisoners (or ex-prisoners) concerned might have obtained those details otherwise than via the admissions they attributed to the appellant. But the Judge did not explicitly warn (or advise) the jury to approach the evidence in that way.

[43] Although there was no warning along the lines just postulated, the Judge's summary of the competing contentions as to the prison admission evidence made it clear to the jury that when they were addressing the weight to be placed on particular details in any of the alleged prison admissions, logic required them to consider whether the witness could have learnt of those details in some other way. The opposing arguments on this point were carefully summarised. There had also been extensive cross-examination by defence counsel as to the publicity which the case had attracted and the various other ways in which the prison inmate witnesses might have been able to learn about the circumstances of Mr Pike's disappearance to flesh out, in an apparently convincing way, the admissions they attributed to the appellant.

[44] Accordingly, we are not persuaded that the absence of an explicit warning along the lines mentioned in [42] resulted in a miscarriage of justice.

The propensity evidence

Section 43 of the Evidence Act

[45] It is convenient, at this point, to set out the relevant provision of the Evidence Act:

> **43 Propensity evidence offered by prosecution about defendants**
>
> (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

(2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.

(3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:

(a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:

(b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:

(c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:

(d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:

(e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:

(f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.

(4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—

(a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and

(b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

The approach taken by Ronald Young J

[46] The admissibility of the evidence of Messrs Cook and Winter was the subject of a pre-trial application heard by Ronald Young J in July 2009. In his subsequently delivered ruling, he concluded that the evidence was admissible, albeit for limited purposes.

[47] The Judge described the Crown submission as to admissibility in this way:

> [67] The Crown case is that the accused's motives for killing Mr Pike included his suspicion that Mr Pike was a police informant and his jealousy about Mr Pike's relationship with Cindy Vrins, the accused's girlfriend. Support for the later motive comes from three of the cellmate confession witnesses, [C, F and D]. They say the accused told them that he had killed Mr Pike because of Mr Pike's interest in his girlfriend, Ms Vrins. In addition Ms Vrins' evidence is that the accused was jealous of her relationship with Mr Pike.

The Judge then tied the relevance of the challenged evidence back to that alleged motive:

> [70] I am satisfied the evidence of both Mr Cook and Mr Winter comes within the definition of propensity evidence (s 40(1)(a)). It is evidence which, if accepted, tends to show Mr Hudson's propensity to react with extreme violence when he believes another person is involved in, or interested in, his girlfriend.
>
> [71] If the evidence of Mr Cook and Mr Winter is accepted then they describe extremely violent jealous rages. The probative value of such evidence is therefore to support the Crown's case that when the accused is jealous he reacts with extreme violence. The evidence of the cellmates is that the accused said jealousy was his motive for the killing. The Crown case is that the accused was jealous of Mr Pike's relationship with Ms Vrins. They say, therefore, it would be consistent with his past conduct for the accused to react violently toward Mr Pike. This propensity evidence could also be seen as supporting the credibility and reliability of the confessions. I am satisfied that this evidence does go to the heart of the Crown case.

We interpolate that the reference to "rages" was wrong as the incidents involving Messrs Cook and Winter both involved premeditation. But given that the same could be said of the murder of Mr Pike as hypothesised by the Crown, nothing turns on this.

[48] The Judge then went on to consider the factors in ss 43(3) and (4) of the Evidence Act:

> [75] *Extent of similarity*. The accused argues here there is little actual evidence of, and little actual similarity between, the two propensity events and the alleged murder other than extreme violence. The accused points to the previous attacks using a knife and a hammer where, here, a gun is alleged to have been used. On one previous occasion there was more than one assailant involved whereas in this case only the accused is alleged to have been involved.
>
> [76] While the three incidents are clearly not identical there is, in my view, significant similarity. All involve a jealous reaction to another man who is, or who the accused believes is, involved with the accused's

> girlfriend or someone in whom he has a romantic interest. All involve extreme violence. On the earlier occasions the complainants could have been killed by the accused's actions. On all occasions weapons are alleged to have been used by the accused.
>
> ...
>
> [80] *Unfair pre-disposition (ss (4)(a) and (b)).* There is no doubt that the evidence of the extreme violence on two other occasions does have the capacity to unfairly pre-dispose the jury against the accused. In addition, given the extreme violence described in the earlier incidents it is probable that this evidence will weigh on the jury when they deliberate.
>
> [81] This is, as I have stressed, evidence of two very brutal attacks by the accused. The prejudice is in the jury hearing of this extreme violence. On the other hand the extreme violent reaction illustrates the strength of the claim as propensity evidence. The probative value is therefore very high given the circumstances involving a very violent reaction to jealousy with the use of a weapon are common in all three events.
>
> [82] The prejudice can, in my view, be reduced by having the evidence of Mr Cook and Mr Winter given by an agreed statement of facts. This will reduce the immediacy and colour of the previous events and therefore the impact of this evidence on the jury. It will enable the jury to focus on the allegations of a jealous reaction to a suspected girlfriend rather than the extent of injuries and the violence of the attack.

[49] The upshot was that the Judge ruled the evidence admissible. There was no pre-trial appeal against that ruling.

[50] At trial, the Judge's suggestion that the evidence be given by an agreed statement of fact was adopted by having agreed briefs of the evidence of Messrs Cook and Winter read to the jury at a very early stage in the trial.

[51] In summing up, the Judge dealt at some length with the propensity evidence:

> [25] Mr Cook's and Mr Winter's evidence is available to you because the Crown say on those previous occasions the accused attacked men when he was jealous of their relationship with a girlfriend or an immediate past girlfriend. And the Crown say that in March 2002 the accused was jealous of Nicholas Pike and his relationship with Cindy Vrins and that provides one motive, amongst other motives, for Mr Hudson to do Mr Pike harm.

He told the jury that they needed to consider whether they were satisfied that the attacks on Messrs Cook and Winter were motivated by the appellant's jealousy. He advised them that if they were not so satisfied then the evidence would be irrelevant. He then said:

> [28] So if you are satisfied that one or both of the attacks on one or both of these men was motivated in part because of Mr Hudson' jealousy of their relationship with his ex or current girlfriend then go to the circumstances with respect to Cindy Vrins and Nicholas Pike. Again, before you can make a connection between the assaults on Mr Cook and Mr Winter and the current circumstances you must be satisfied that Mr Hudson was indeed jealous of Mr Pike and his relationship with Cindy Vrins. If you are not satisfied that the Crown has established that Mr Hudson was jealous in this way then again the evidence would be irrelevant for the reasons I have given. But if you were satisfied that Mr Hudson was jealous of the relationship of Nicholas Pike and Cindy Vrins then the evidence of the jealous assault by Mr Hudson, assuming you have found them to be on these other two men, is relevant in this way.
>
> [29] The Crown says that when Mr Hudson is jealous he is likely to violently attack the man who he thinks is involved with the woman who is the focus of his attention. So in this case if you are satisfied that the accused was jealous of Mr Pike and Cindy Vrins then the Crown say this is exactly the type of situation where the accused would attack Mr Pike. Thus, the accused has a motive to attack Mr Pike, supporting the Crown case. His violent reaction to jealousy is, the Crown say, shown by his attack on these other two men.
>
> [30] Be careful though about the way in which you use this evidence. It can only be used in this limited way. Simply because Mr Hudson may have behaved badly on previous occasions doesn't mean he murdered Mr Pike. Keep in mind that this evidence would only be relevant if you are satisfied that Mr Hudson attacked these two men because he was jealous of their relationship with his girlfriend, and it will only be relevant if you are satisfied Mr Hudson was jealous of Mr Pike's relationship with Cindy Vrins. If all of these factors are established then Mr Hudson's jealousy of Mr Pike could provide a motive for him to attack Mr Pike and thereby support the Crown case.

The Judge then said that the defence case was that there was no evidence that the appellant was jealous of Mr Pike's relationship with Ms Vrins and he summarised the reasons advanced by the defence in support of that argument.

[52] The Judge also gave an extensive direction on the topics of prejudice and sympathy. He said:

> [10] I want now to talk about that especially in this case. There's plenty of opportunity for prejudice and sympathy in this case. But the fundamental point is that you must avoid deciding this case based on prejudice or sympathy. If you let any prejudice or sympathy influence your decision then you will be deciding the case not based on the evidence but on that prejudice or sympathy.
>
> [11] Now you have heard extensive evidence about Mr Hudson's life. His itinerant lifestyle, his use of drugs, his supplying drugs, his violence, the fact that he was on the run from the Police and the fact that he has been in prison

> and escaped from prison. And of course none of that behaviour is attractive at all. But ordinarily in a criminal trial you would not get to hear of this evidence. *Ordinarily it would be wrong to hear the evidence because of the danger that it might influence your verdict without it being relevant.* However, in this case obviously the background and the circumstances that brought Mr Hudson and Mr Pike together and about what was happening to them was essential information. And obviously the evidence that Mr Hudson was in prison had to be known because of the prisoners' evidence.
>
> [12] And later in my summing up I am going to talk to you about how you can and cannot use the evidence of the two witnesses who say they were attacked by Mr Hudson, Mr Cook and Mr Winter. But the important thing and indeed the vital thing in this case is to keep in mind is that what [sic] you must not let Mr Hudson's lifestyle and his illegal activity influence your decision at all. *The mere fact* that he is violent, *the mere fact* that he deals in drugs, *the mere fact* that he was on the run from the Police and was in prison *does not entitle you to say well that's exactly the sort of person that would kill another. Thinking in that way is completely the wrong approach.* And if you decided Mr Hudson was guilty of murder because, for example, he'd been involved in drugs and was violent to others *by itself*, then as I have said you would be wrongly basing your verdict on prejudice and not on the facts of the case or the evidence. *So just because Mr Hudson may have behaved badly indeed behaved illegally doesn't, because of that, make him a murderer.* And it's very important that you keep this in mind.
>
> [13] Equally sympathy must not influence your verdict. Obviously Mr and Mrs Pike want to know what happened to their son. But their pain and upset cannot influence your verdict with regard to Mr Hudson. You must set aside any feelings of sympathy you have in reaching a decision in this case. What you must do is calmly and objectively assess the facts and decide on the facts whether Crown has proved the charge beyond reasonable doubt without prejudice and without sympathy. Base your verdict on those facts.
>
> (emphasis added)

The admissibility of the evidence

[53] Mr King's challenge to the admissibility of the evidence was largely based on the contention that the Judge's reasoning placed more weight on the sexual jealousy motive than the evidence as a whole justified. Sexual jealousy was only one of four motives asserted by the Crown and, on the argument of Mr King, the associated evidence at trial was comparatively weak. Ms Vrins told the jury that she had never had a sexual relationship with Mr Pike and that the first time she had sexual intercourse with the appellant was on the night of 18 March 2002, the day on which, according to the Crown, the appellant had murdered Mr Pike. Mr King maintained that, at best, her evidence provided only limited support for sexual jealousy as a motive.

[54] What seems to have been a similar argument was advanced by Mr King to the Court of Appeal,[15] where the appellant claimed that the admission of the propensity evidence had occasioned a miscarriage of justice. In its judgment the Court reconsidered the applications of the s 43 test in the light of the evidence as it emerged at trial.[16] The Court carefully reviewed the evidence given by Ms Vrins and concluded that it did provide support for sexual jealousy as a motive. Ms Vrins said that she had been conscious, before 18 March 2002, of the appellant being sexually interested in her. She referred to an incident in Auckland on 16 March 2002 when the appellant had displayed indications of jealousy after she had been speaking to a man at a night club and, on the same night, had apparently been jealous when she and Mr Pike were talking together.[17] Further, as the Court noted, sexual jealousy had been referred to as a motive in three of the prison admissions attributed to the appellant.[18] The Court was of the view that the propensity evidence was arguably relevant on a basis broader than that recognised by the Judge, essentially as indicative of a propensity to act with extreme violence when crossed but concluded that it was also relevant and admissible in the way in which the Judge treated it.[19]

[55] We think it best to address the admissibility issue in terms of the Judge's actual approach, rather than on the wider basis that the propensity evidence revealed a relevant tendency towards extreme violence when crossed. Subject to that possible qualification, we agree with the assessment of the Court of Appeal. There was ample evidence to support a sexual jealousy motive. In this context, it would be quite unreal to ignore the evidence of Ms Vrins that she and the appellant had sex on the night of 18 March 2002. The incidents relied on by the Court of Appeal as indicative of sexual jealousy on the part of the appellant had occurred within two days of the alleged murder and thus within two days of the appellant first having sex with Ms Vrins. Looked at in this way, the sexual jealousy motive can be seen to have arisen closer in time to the murder than the other alleged motives. And in this context the prison admissions are also material, as the Court of Appeal pointed out.

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15 See [18]–[19].
16 See [23].
17 See [24]–[25].
18 See [26].
19 See [39]–[40].

[56] There are close similarities between the assaults on Messrs Cook and Winter and the murder of Mr Pike as hypothesised by the Crown. All incidents were characterised by a high level of violence and the use of weapons. In all cases, the woman concerned was sufficiently closely involved (actually present in the case of Ms S and practically present in the case of Ms Vrins) to be in a position to give evidence later against the appellant. This indicates a very distinctive pattern of thinking in terms of the likely future behaviour of the women involved.

[57] On this basis, and contrary to Mr King's position set out above at [53], we conclude that the evidence was highly relevant and that its probative value outweighed the risk of an unfairly prejudicial effect; this for the following overlapping reasons:

(a) The jury was entitled to conclude that the appellant was affected by sexual jealousy which provided him with a motive to kill Mr Pike.

(b) The propensity evidence showed that when affected by sexual jealousy, the appellant had a tendency to resort to extreme violence and in this way added to the significance which the jury might place on the sexual jealousy motive.

(c) The propensity evidence provided some support for the prison admission evidence.

(d) The propensity evidence reinforced the evidence of Ms Vrins, which, without the context thus provided, might have seemed implausible to the jury. On the evidence she gave, the appellant, for nothing approaching what a jury would see as a good reason, murdered Mr Pike and did so in circumstances in which she was a potential witness. His very similar conduct a few months before provided considerable support for the plausibility of her evidence.

[58] As is usual in propensity cases, there was also scope for coincidence reasoning; in this instance in two respects:

(a) On the account given by Ms Vrins and the propensity evidence, the jury could fairly conclude that the appellant was affected by sexual jealousy and was inclined to resort to extreme violence when so affected. On the assumption that Mr Pike was murdered, the defence case involved the coincidence that there were at least two people who had sufficient motive to resort to extreme violence against Mr Pike, the appellant and the murderer. The fact that the appellant and Mr Pike were constantly in each other's company up until Mr Pike's disappearance is material to the plausibility (or otherwise) of this postulated coincidence.

(b) The defence case involved the contention that Ms Vrins made up her account. This theory involved the perhaps improbable coincidence that of all the people in the world to accuse falsely of murder, Ms Vrins just happened to choose someone with a track record of acting with extreme violence in the situation in which he found himself on the day on which, according to the Crown, he murdered Mr Pike.

[59] The Judge did not address the case on the basis of coincidence reasoning and we think that he was right to do so as it is likely to have been confusing for the jury. The coincidence reasoning just discussed is, in a sense, just an elaboration of the points discussed in [57] (particularly (b) and (d)). As well, an assessment of the plausibility (or otherwise) of the postulated coincidences depended on the evidence of Ms Vrins and, at least by the time she began to co-operate with the police she must have been well aware of the way in which the appellant had attacked Messrs Cook and Winter.[20]

The Judge's directions

[60] On this aspect of the case, Mr King had two primary complaints about the Judge's summing-up:

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[20] Ms Vrins continued to see and support the appellant while he was awaiting trial in relation to charges involving Messrs Cook and Winter.

(a) he did not explain to the jury how the propensity evidence might assist the jury to assess the evidence of the prison admissions; and

(b) the warnings against prejudicial reasoning were inadequate.

[61] On the first point, it is true that the Judge did not direct the jury as to how the propensity evidence might be of assistance in evaluating the weight to be placed on the prison admissions evidence. But it will be recalled that on his tight approach to admissibility, reflected in his directions to the jury,[21] the propensity evidence was relevant only if the jury were satisfied that the appellant was affected by sexual jealousy. On this threshold issue the prison admissions were relevant, but in assessing them for this purpose the jury could not resort to the propensity evidence. So in effect the Judge told the jury that in addressing the threshold question (which necessarily required consideration of the prison admissions), the propensity evidence had to be put to one side.

[62] Assuming that the jury resolved the threshold issue in favour of the Crown, the propensity evidence then became part of the whole body of evidential material which was available to the jury, all of which required holistic assessment. At this stage of the inquiry, the propensity evidence provided support to all of the evidence which implicated the appellant in the murder and did so in respects which were perfectly obvious. While the Judge could have pointed this out to the jury specifically, doing so would hardly have been to the advantage of the appellant and his failure to do so does not give rise to a miscarriage of justice.

[63] The second complaint made by Mr King primarily focussed on the tendency of the Judge, when speaking of the appellant's bad character, to use expressions such as "the mere fact" (three times), "by itself" or "just because" (all of which are emphasised in the passage cited from the summing-up in [52] above). Mr King contended that this language may have left the jury with the impression that they could make general use of the appellant's bad character in their overall assessment of the case against the appellant providing they did not base their verdict solely on that bad character. He argued that the Judge was required to identify specifically to the

[21] See the portions of the summing-up reproduced above at [51].

jury what he called the "forbidden chain of reasoning" (namely that the appellant's bad character made it more likely that he was a murderer) and make it clear to the jury that such reasoning was indeed forbidden.

[64] We agree with Mr King that a close reading of what the Judge said to the jury shows that at times he was warning the jury against basing their decision on the appellant's bad character as opposed to being more generally influenced by his bad character. This, however, is something of a semantic point. The Judge explained to the jury that in the ordinary course of events they would not have heard evidence of the appellant's bad character "because of the danger that it might influence your verdict without it being relevant." He then explained carefully why the evidence was relevant and had been led. And although he generally expressed his warnings in terms of the jury not basing their decision on the bad character evidence, he also noted that this evidence:

> … does not entitle you to say well that's exactly the sort of person that would kill another. Thinking in that way is completely the wrong approach.

In putting the matter that way, the Judge appropriately warned the jury away from the forbidden line of reasoning identified by Mr King.

Disposition

[65] For these reasons, the appeal should be dismissed.

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