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IN THE SUPREME COURT OF NEW ZEALAND SC 59/2023

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 9

MOETU KAITAI

Appellant

v

THE KING

Respondent

Hearing:	11 July 2024
Court:	Winkelmann CJ Glazebrook J Ellen France J Williams J Miller J
Counsel:	T Epati and M D N Harris for the Appellant Z R Johnston and B J Thompson for the Respondent

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CRIMINAL APPEAL

MS EPATI:

Tēnā koutou e te Kōti, ko Epati, tōku ingoa. Kei kōnei māua ko Mr Harris he rōia me te kaipīra Ms Kaitai.

WINKELMANN CJ:

Tēnā korua Ms Epati, Mr Harris.

MS JOHNSTON:

May it please the Court, tēnā koutou, e ngā Kaiwhakawā. Ms Johnston together with Mr Thompson for the respondent.

WINKELMANN CJ:

Tēnā korua Ms Johnston and Mr Thompson. Ms Epati. So just to be clear with counsel, I think you have received the timetable for today, that we are going to shorten lunch so we can be finished by 3.30. No? Breaking news to you? I thought we had advised counsel.

MS EPATI:

I did speak with the registrar about how the timetable would run, and he indicated it was a possibility, but I haven't received a timetable as such.

WINKELMANN CJ:

Okay. Well we are going to shorten lunch to the extent required to ensure that we are able to finish by 3.30.

MS EPATI:

Very well. Thank you, your Honour.

WINKELMANN CJ:

So it shouldn’t inconvenience counsel. I suppose it will, in terms of having a short lunch break, so that is that. Ms Epati, we would be assisted if you could be clear as to the different defences, lines of defence that are run, because it seems quite confusing.

MS EPATI:

Yes, yes, perhaps we can start there, that this was a case that perhaps started out relatively simply, but because the evidence changed at trial, in fact I think almost every civilian witness was *Hannigan*-ed [*Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612] in the sense that they had to reconsider what they told police. But more particularly two witnesses who were in the garage at the time of the shot changed their evidence in quite a profound way, and so what I'll do is I'll open essentially on the way that accident related, and the nub of the appellant's case, and it's this, and it's outlined in the road map, the one page road map that you have in front of you.

So accident was critically relevant to the case in two ways. The first is that it potentially reduced murder to manslaughter by either negating intent, so unintentional discharge, or negating actus reus of the reckless discharge of the firearm, and I think this is where the real confusion began, because for the Crown's primary theory of reckless shooting, it was the shooting that they nominated as the act which was voluntary and, in fact, intentional, they had to prove beyond reasonable doubt that she discharged the firearm voluntarily. So accident negated either an element of the unlawful act in the first place, for the Crown's primary theory, or just negated intent. On the facts of this case they were essentially one and the same.

WINKELMANN CJ:

So that's the second ground?

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MS EPATI:

Well, it's actually the first way accident impacted but it did it in two ways.

WINKELMANN CJ:

So on your account, if you negate the actus reus by showing she discharged the firearm involuntarily that just reduces it to manslaughter?

MS EPATI:

Yes.

WINKELMANN CJ:

And why is that?

MS EPATI:

Because it's not an unlawful act. Sorry. Because the unlawful act then reverts to the alternative "careless use" which is the alternative theory the Crown ran.

WILLIAMS J:

So were you intending to be referring to the mens rea component then or are you intending to refer to the actus reus?

MS EPATI:

Which point are we at?

WILLIAMS J:

Well, I thought the Chief Justice asked you about the negating of the actus reus. I may have misheard it.

WINKELMANN CJ:

I could just read back what you've said. It reduced murder to manslaughter by either negating intent or by negating the actus reus which was the first line of the Crown's actus reus by showing she discharged the firearm involuntarily which meant that the Crown then had to revert to its alternative scenario which is that the unlawful act was the careless use of a firearm.

MS EPATI:

Careless use of a firearm. Okay.

GLAZEBROOK J:

Which then is manslaughter.

MS EPATI:

Which then is manslaughter, correct. But I'll just go back to the question Justice Williams asked about mens rea. So on the facts of this case there were three scenarios. There were three scenarios essentially. There was the Crown primary theory which was reckless shooting. That was a takeaway, takeaway the gun from Mr Kana. He never manages to grab it while it's up in the air. It's re-presented and the trigger is pulled. So that's the Crown's primary theory, right, of reckless discharge?

Their alternative theory of careless use was also pull away, he doesn't get hold of it while it's in the air, bring it back, but he grabs it while it's pointing at him. There's a tussle. The tug of war cannot exclude the reasonable possibility of involuntary discharge and the Crown conceded that if that was the case it was not reckless discharge. It was careless use of a firearm causing death and it was manslaughter.

MILLER J:

You said there were three scenarios?

MS EPATI:

The third scenario was what the –

WINKELMANN CJ:

Could we just pause for a moment while I just get that because it's quite important? So their alternative theory was careless use, pull away, bring it back, he grabs it while it's pointing at him, the Crown can't exclude that the trigger's involuntarily pulled, so the actus reus, so it's careless use of a…

MS EPATI:

Firearm, causing death, because at the point the firearm is discharged, if we zero in just on that act, it's excluding the reasonable possibility that that happens involuntarily. Everything prior to it is willed and voluntary though. So that's the Crown's alternative theory.

The defence case, which is the third scenario, which is obviously what Mr Lewis and Mr Mihaere said at trial and stuck to, which was that when she pulls the gun away Mr Lewis, sorry, Mr Kana grabs it while it's in the air with both hands, there's a wrestling with it while it's up in the air, and it's Mr Kana who pulls it down and effectively directs it at his own torso and then a tug of war.

MILLER J:

Can I just be clear? Do you say that is an involuntary act by her or is it his act that causes the gun to go off? In other words she has not committed the actus reus at all.

MS EPATI:

Are we talking about careless use or discharge of a firearm?

MILLER J:

No, I'm talking about your theory of the case.

WINKELMANN CJ:

So you're going back up to the theory of the case.

MS EPATI:

Yes, okay, so on the defence theory of the case it's not discharge of a firearm or careless use and it's not careless use because the motion of both pulling down and wrestling, those two actions, amount to an intervening act.

MILLER J:

Right, so it's a causation?

MS EPATI:

Yes, but –

MILLER J:

"Involuntary" conveys that it is her act but she didn't have the mental state needed to make it a willed act.

MS EPATI:

Yes.

MILLER J:

You're really saying it's his act?

MS EPATI:

Yes.

MILLER J:

That's why defence counsel talked about causation at trial.

MS EPATI:

Yes.

WINKELMANN CJ:

So that notion that it's, that notion of that it's his act is only relevant to the careless use framing of the Crown case?

MS EPATI:

No, it's, the pulling by him, which causes the involuntary discharge when it's down, that's his act too. But it's the addition of the pull down that the defence uses the defence then to the alternative theory of careless use. So can I just, I'll just, if I can just summarise the position. Accident was critically relevant, if we separate out the two unlawful acts, that's probably a better way to look at it. The Crown's primary theory, discharge of a firearm, intentionally pulling the trigger.

WILLIAMS J:

Don't aim that thing at me.

MS EPATI:

Sorry, sorry, I'll put it up in the air, just don't come at me, okay.

WINKELMANN CJ:

Accident was critically relevant?

MS EPATI:

Yes, accident was critically relevant in two ways, because it answered the Crown's primary theory of discharge of the firearm, either by the fact that the involuntary act of discharge meant that the unlawful act wasn't proven in the first place, or it negated intent. In this particular instance, on the facts of this case, if the Crown, if the jury excluded scenarios 3 and 2, all they were left with was Mr Lewis' police statement, which was effectively an intentional shooting. I take it away, you don't get it, I bring it back, boom. That's what he described in his police video, all right. So if they excluded the possibility of a tug of war being responsible for the involuntary discharge, and they excluded the possibility of a pull down and the tug of war being an intervening act, one, two are gone, all I'm left with is an intentional shooting. So in many ways all roads lead to Rome. If it was tidier to deal with at the actus reus point, which is why the redraft of the question trail does that, but if it had come in at mens rea point i.e. now this point you're going to really have to zero in at the point that the gun was fired and ask yourself what was the intent there, and, hey, if you cannot exclude the possession of involuntary and therefore unintentional discharge, it's manslaughter and the Crown have conceded that fact.

WINKELMANN CJ:

So if we look at the facts, your first scenario which is that it's negating the careless use, so it's, the pulling down, that's the first scenario, pulling down.

MS EPATI:

And then tug of war?

WINKELMANN CJ:

Then tug of war.

MS EPATI:

Yes.

WINKELMANN CJ:

So that, yes, I've lost my thought, that's the actus reus gone.

MS EPATI:

There's no mens rea because obviously we're in the manslaughter part.

WINKELMANN CJ:

Yes, manslaughter part.

MS EPATI:

That's why in the redrafted question trail, and I need to couch that with a whole lot of humility because this wasn't an easy case for anybody, including the trial Judge.

WINKELMANN CJ:

Actually, I've just regained my thread. So the first point, so the fact is that that, you only needed – if the jury was convinced that it had been pulled down by the victim, and the tug of war ensued, so it was placed by the victim in this danger spot, that's your first scenario, oh, lost it again. Struggling a little bit with a virus. That's your first scenario, and they have to determine that factual scenario first, and that goes to, in terms of how the Judge directed it, that's the first ground, but then when you get to a scenario, so if they reject that scenario and they think it wasn't pulled down, it was, the tug of war had occurred as it was placed by the appellant, that is your intent scenario. So does it line up that neatly with the facts, or not?

MS EPATI:

It does, but also it could also eliminate an essential element of the unlawful act in the first place, because remembering that the Crown pinned their colours to reckless shooting. The act of shooting was their act, right, so if it was a case that that, the shooting, was actually involuntary discharge, we don't even get out of the starting blocks in terms of whether an unlawful act has occurred in the first place, and I appreciate that is confusing, but on the facts of this case, the involuntary discharge and the lack of intent were actually one and the same

because once you excluded these two theories here, all you were left with was an intentional shooting situation.

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WILLIAMS J:

So your actus reus scenario draws a division between the pull down and tussle?

MS EPATI:

Yes.

WILLIAMS J:

And the mere tussle?

MS EPATI:

It's the Crown that came up the hybrid tussle.

WILLIAMS J:

But for some reason you argue that bringing, presenting a loaded weapon, however it ends up pointed at Mr Kana's chest, is not careless use. Why do you say that?

MS EPATI:

Because the pull down and tussle is a completely independent and unexpected event that breaks the chain of causation because at that point the gun is pointed away and up. It's brought down to the presentation point in his torso by him.

WINKELMANN CJ:

So we're trying to –

MILLER J:

Some of the authorities you have cited us, cited to us from other jurisdictions, make clear I think that just bringing and loading the weapon is sufficient as an unlawful act for manslaughter, so it wouldn't, the distinction you're drawing in which he pulls the weapon down doesn't save your client because that's an

entirely foreseeable risk of doing what she did do, that is, loading the gun and presenting it.

MS EPATI:

Well my response to that is that was a jury issue to be determined. What I'm saying is there was sufficient evidence and evidential foundation for the jury to consider whether what he did was an intervening act that was completely unexpected and the defence dealt with the submission of reasonable foreseeability in their closing addresses and said: "Well, we're dealing with a…". They talked about the circumstances of the case and someone who was not in their right mind, everyone had drugs on board and the rest of it. So I'm not saying it was the strongest defence available, but it was there and it should have been put to the jury. But I think the more important issue here though is whether the jury were able to further grapple with the involuntary discharge because when we look at the jury directions –

WILLIAMS J:

It's not really, involuntary discharge is probably the wrong term because on your scenarios 2 and 3, she's not pulling the trigger.

MS EPATI:

That's right.

WILLIAMS J:

It's not involuntary, it's not her.

MILLER J:

She has not done anything that caused death bearing in mind we're only talking here about the shooting. We're not looking at the second scenario.

MS EPATI:

Yes.

MILLER J:

It seems to me that the trial was confused about this because counsel spoke both of involuntary act and of intervening cause.

MS EPATI:

Yes.

MILLER J:

But in the absence of some condition that affected her mental state, so that it was truly involuntary, it seems to me this is a causation case. It's his act. She's done nothing except that she was already holding onto the gun. It's his act that causes it to go off.

WILLIAMS J:

And that takes you back to the careless question. Is the bringing the gun to the scene sufficiently careless to make everything that happens after that –

WINKELMANN CJ:

Well, more than that.

WILLIAMS J:

To stop everything that happens after that from negating the carelessness which the Canadian cases tend to suggest. I'm not saying that they are cases we should follow, but those scenarios.

MS EPATI:

Yes, yes, well it's –

WINKELMANN CJ:

Yes, and the trial Judge actually put it further than that. It was not just bringing the gun to the scene, it was presenting it.

GLAZEBROOK J:

And loading it.

MILLER J:

And loading it.

WINKELMANN CJ:

In a loaded state.

MS EPATI:

But also the Crown couched their alternative theory of careless use on the re-presentation, and I can take you to the passages of the Crown closing where they describe what they rely on. I think that's important. They rely on that act as completing the chain that they rely on.

WILLIAMS J:

Would that of, fair point, but would it have mattered if as a matter of law they didn't need to?

MS EPATI:

I still think there was sufficient evidence for a jury to consider whether it was, in fact, an intervening act, the pulling down and grapple.

GLAZEBROOK J:

What in law is an intervening act?

MS EPATI:

Completely independent, unforeseeable, such that the original chain is now broken.

GLAZEBROOK J:

It just seems slightly difficult to come to the view in the particular facts, but I think you concede it wasn't necessarily the best…

MS EPATI:

It wasn't the strongest defence, and I think we're getting…

GLAZEBROOK J:

It's just whether it should have been left to the jury is the…

MS EPATI:

Yes, I think we're also getting waylaid because what was unfortunate was that the two unlawful acts, which I say required different things, right, ended up being covered under the same, the one and the same question, and –

WINKELMANN CJ:

Well they didn't, in a way, but they might appear to be, because the first direction by the Judge is about causation, isn't it?

MS EPATI:

Yes.

WINKELMANN CJ:

And that's your point, when he comes to deal with intent, he doesn't deal as clearly as you say he should have done. But I'm just looking at your draft question trail, and you put this issue of – it does seem to turn on the different scenarios. A tussle which is just between them, or a grabbing up here and bringing down. So you put the grabbing up here and bringing down into your issue 4.

MS EPATI:

Yes.

WINKELMANN CJ:

So as to make, so as to ensure that the jury remains focused on intent when they're dealing with issue…

MS EPATI:

One.

WINKELMANN CJ:

Three.

MS EPATI:

Yes, issue 3. So the reason why I've done that is because the Crown's primary theory was obviously reckless intentional shooting. That falls neatly within the terms of section 198(2) [of the Crimes Act 1961], which is discharging a firearm with reckless disregard for the safety of others. So the question there was whether the discharge was a voluntary act. If we can put aside the semantics of what we label it, whether you could truly say it was Ms Kaitai discharging, or there was a sense in which accident, using as a shorthand term, related to this very part, and in fact the way the Crown closed was they said, pick an unlawful act at the beginning. Pick it right at the beginning, because that will help you with the rest of the question trail, right. If you pick the right one, if you consider accident at the front end, everything else flows, because they said if you cannot exclude the possibility of involuntary discharge, then obviously that's unintentional, we conceded murder, it's manslaughter, and then you fall back as careless use, and that being an intervening act is ridiculous. Right? That's how they ran it.

So that's why in the first notes this requires the Crown to prove beyond reasonable doubt that Ms Kaitai voluntarily discharged the firearm at Mr Kana, and in this case, there is no issue that Mr Kana was shot and killed by a gun. So cause of death actually wasn't at issue. There's no question how he died, and that was a substantial and operative cause. The question is, who was responsible for the discharge of the firearm. So that was the causative question.

WINKELMANN CJ:

And you've put that issue at the tail end so as to keep, so as to avoid it being conflated.

MS EPATI:

Well I think because in actual fact when you think about it, if the Crown have to prove unlawful act in a first place, before cause of death comes into it, then they have to exclude the – they have to prove beyond a reasonable doubt that she discharged the firearm, and that focuses the jury's mind on where they need to

be. You don't worry about the preparatory acts, you just zero in on the point the shot was fired. A close analysis.

WINKELMANN CJ:

Okay, so it's not actually in the, it's not at the tail end.

ELLEN FRANCE J:

Why then are you – is the use of the word "voluntary" or "involuntarily" correct in that scenario?

MS EPATI:

Why would it be incorrect?

ELLEN FRANCE J:

Well are you saying she pulled the trigger but that was as a result of what he did?

MS EPATI:

Yes, so the armourer accepted there's a reasonable possibility that if he's pulling on it, and her hand doesn't go with the full force of it, it's that, it's the pulling that depresses the trigger.

MILLER J:

That's his act.

MS EPATI:

That's his act, yes.

ELLEN FRANCE J:

That's his act though, that's my query.

MS EPATI:

Yes, yes, and you may be right, it may be a framing issue, but I come back to the point that it was an element that the Crown had to prove beyond, exclude it, right, and the –

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MILLER J:

She wouldn't have, if we just focus on the trigger, she would not have committed the actus reus if it was an involuntary act and she wouldn't have done so if it was his act.

MS EPATI:

Yes.

MILLER J:

I just want to be clear what is your real case about this because that informs the way we look at the Judge's directions.

MS EPATI:

I suppose I'm struggling with what the real distinction is in this case.

MILLER J:

The real question is whether the jury understood that was the defence.

MS EPATI:

Yes.

MILLER J:

And on one view of it, defence counsel did put it quite clearly actually but –

MS EPATI:

That it was an involuntary…

MILLER J:

– the Judge didn't pick up on that.

MS EPATI:

Yes.

MILLER J:

No, he spoke about intervening cause. He talked about a break in the chain.

MS EPATI:

It all got a bit muddled.

MILLER J:

Yes.

MS EPATI:

But the intervening cause was an answer to the careless use scenario. I appreciate that in the closings they went back and forth and indeed, that was because the Judge had placed them together too in the question trail.

MILLER J:

It seems to me quite a difficult case for you to run for the reason given by Justice Williams. There's no dispute that she brought the weapon there.

MS EPATI:

Yes.

MILLER J:

Anticipating that it might be needed for some purpose.

MS EPATI:

Yes.

MILLER J:

There's no dispute that when there was some conflict, she brought it out and loaded it and what's wrong with the proposition that that is enough –

WINKELMANN CJ:

And presented it.

MILLER J:

– because she has done the dangerous thing that is quite likely to result in someone being shot.

MS EPATI:

Because that's careless use of a firearm.

MILLER J:

Yes, so you are with manslaughter at this point.

MS EPATI:

Yes, but I don't concede that accident has no relevance then because there was still the argument the defence ran specifically in relation to the preparatory steps argument that the Crown said, that the chain of her preparation was broken by her basically pulling it up, so withdrawing and then Mr Kana going to grab it with full hands pulling it back down to the, and then wrestling with it.

WINKELMANN CJ:

Isn't the gravamen of your appeal that it was a difficult case to run and the way the Judge directed, he was quite negative about that aspect of the defence's directions because he makes the point.

MS EPATI:

Yes.

WINKELMANN CJ:

He makes the point that the appellant brought the gun, loaded it, presented it. But he put that up front and then didn't clearly deal separately with the alternative defence which was that it negated intent or negated –

MS EPATI:

Discharge.

WINKELMANN CJ:

Discharge and so it ended up a muddle.

MS EPATI:

Yes.

WINKELMANN CJ:

So it's not clear what the jury's decision tree was.

MS EPATI:

Well, can I put it this way. When he talks to them about unlawful act and causation, the focus is very much on the careless use scenario and that being absolutely sufficient to satisfy both unlawful act and causation. That seems to be the focus and I think technically you could say well, because it is enough as a minimum to get through that part. The problem is that when we come to intent, which does require a laser focus then at the point of discharge, he says one sentence which is: "This unintentional discharge is relevant to murderous intent." The appellant says well, hang on, having pretty much avoided any engagement with section 198(2), the Crown's primary theory, you then really had to bring the jury back because those directions were very much focused on preparatory acts being sufficient and causative of death, whereas what we needed was to come back to this point and ask yourselves that pulling motion, that the Crown conceded if they couldn't exclude that, it was manslaughter.

MILLER J:

Can I suggest to you that perhaps we can reason from the jury's verdict and the Crown's concession that the second scenario was manslaughter, that the jury must have found that it was her voluntary act that pulled the trigger and she did so knowing that it was likely to cause death? In other words, even if the Judge's directions were confused, has there been a miscarriage here?

MS EPATI:

Sorry, just run me through that again? I just want to be sure about what you're asking me.

MILLER J:

I'm suggesting that the jury verdict and the Crown concession in combination tell us that the jury decided the case on scenario 1. They must have found that she pulled the trigger and it cannot have been an involuntary act because they found that she had the necessary foresight but went ahead anyway.

MS EPATI:

Yes, my –

MILLER J:

Another way of looking at this would be to say so long as the Judge's directions on the requirement of "reckless intent", that subjective knowledge, were clear, we can be comfortable that the verdict is safe.

MS EPATI:

No, my response is that those points, the involuntary discharge point, and indeed the lack of intent point, were not clearly put to the jury and the confusion and the error starts much earlier when the focus is on preparatory steps and careless use being sufficient, right? So we have got one note in there about the issue is whether the Crown has disproved the reasonable possibility the gun was fired involuntarily by reason only of it being grabbed by Mr Kana, and that's right. The problem is that everything else around it has to do with preparatory steps and substantial and operative cause of death which then muddles the whole framework that they should have worked through.

WINKELMANN CJ:

You're saying the Judge's directions and question trail muddled it, are you, or –

MS EPATI:

Yes.

WINKELMANN CJ:

Because Justice Miller is saying to you that the Crown was actually very clear in their closing address.

MS EPATI:

Yes. No, I agree. I agree, but the difficulty is obviously the Crown says, well, the Judge is the final arbiter of law so please take whatever he says as what goes, and then you had a question trail which straight out of the starting blocks just said: "Are you sure that Ms Kaitai did something which was a substantial and operative cause of death?" Well, of course the answer is "yes", and then the second question just reverted you to self-defence.

WILLIAMS J:

The problem is if you're arguing, essentially, it seems to me, your scenario 3, going back to the three you're talking about, is intervening cause, it was Kana, not Kaitai.

MS EPATI:

Yes.

WILLIAMS J:

The problem is that causation is defined as a substantial and operative cause. It needn't be the only cause or even the main cause.

MS EPATI:

That's right.

WILLIAMS J:

And then the way you deal with that is to divide between preparatory steps and immediate cause, but it does seem to me you've got a problem with the whole causation test which does not necessarily require it to be the immediate cause.

MS EPATI:

In a careless use scenario?

WILLIAMS J:

No, in any scenario, just the idea of causation.

MS EPATI

Well, sorry, hang on, the Crown's primary theory required proof beyond reasonable doubt that she discharged the firearm.

WILLIAMS J:

Yes, correct, which is why your question 1, issue 1, really should be did Ms Kaitai discharge the –

MS EPATI:

Discharge the firearm.

WILLIAMS J:

You don't need the "voluntarily". That's confusing. Did she?

MS EPATI:

Okay, yes. It's not – yes, the redraft is not perfect.

WILLIAMS J:

No, of course, I accept that. This was an extraordinarily difficult case.

MS EPATI:

Yes.

WILLIAMS J:

The question is then whether that excludes any possibility of a causation test being met by another route, given substantial and operative cause, and it needn't be the only or main cause. So then the question in my mind is, is that actually the right question because it's premised on the idea that she had to be the discharger.

MS EPATI:

So are we importing the substantial and operative cause into whether she discharged the firearm is the question that I then pose back?

WILLIAMS J:
Well, just on issues of causation, I suppose, just the idea of causation generally.

MS EPATI:
Can we just step it back a bit to first principles?

WILLIAMS J:
That was me stepping it back to first principles.

MS EPATI:
Okay. Culpable homicide is obviously unlawful act causing death. The unlawful act has to be proven in the first place, so –

WINKELMANN CJ:
Your point is that there are two – that if she – the factual scenario is very important.
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MS EPATI:
Yes.

WINKELMANN CJ:
And perhaps it needed to be more a fact-based summing up to deal with the issues you're raising because on your scenario, if it was pulled, the gun was pulled down and the tussle then ensued, then there wasn't an unlawful act because it wasn't a careless use of a firearm.

MS EPATI:
It wasn't a reckless use.

WINKELMANN CJ:
Yes.

MS EPATI:
And it wasn't a careless use.

WILLIAMS J:

Sorry, I should have clarified, I'm talking about whether manslaughter is nonetheless available.

MS EPATI:

Oh, oh, yes.

WILLIAMS J:

Because you say intervening cause negates manslaughter as well.

MS EPATI:

Yes.

WILLIAMS J:

But on general tests of causation –

MS EPATI:

It's not the strongest defence.

WILLIAMS J:

No.

MS EPATI:

No, but I'm saying that's a jury issue which should have been put.

MILLER J:

Right, so the thesis here is that her unlawful act may be something quite early in this scenario such as, say, bringing the gun to the party at all and the rest of it is Mr Kana's responsibility and in that scenario the jury says okay, there was an unlawful act but it's got a substantial and operative cause question to answer.

MS EPATI:

Yes, yes.

MILLER J:

And should have been clearly directed to that.

MS EPATI:

Yes.

MILLER J:

It is a jury question, you are correct.

MS EPATI:

Yes. But again, what we are talking about, we're now in the manslaughter avenue.

MILLER J:

Yes, correct.

MS EPATI:

Sorry. My real concern is murder/manslaughter.

WILLIAMS J:

You're talking about, yes, I understand your point there.

MS EPATI:

Because that just seems to have been missed.

WILLIAMS J:

Right and the correct question should have been did she discharge the firearm?

MS EPATI:

Did she discharge the firearm?

WINKELMANN CJ:

Yes, and your point is that the way the defence ran the case and how it was dealt with by the Judge tended to ally the two different grounds, really two different thrusts of the defence case. Not the defence, it was the way it was

summed up by the Judge and that could have obscured the requirement for intent.

GLAZEBROOK J:

What do you say about question 1 of the question trail?

MS EPATI:

Of the Judge's question trail?

GLAZEBROOK J:

Mhm.

MS EPATI:

I say that it basically knocked them off the path they should have been considering because it basically says did she do something which was a substantial and operative cause of death and if you focus on preparatory steps, of course she did. Of course she did. The only question then becomes were his acts a break in the chain of causation? But what we've missed is the Crown's primary theory on murder as to whether she discharged the firearm in the first place.

GLAZEBROOK J:

But that's what's asked on that, isn't it, on that first question?

MS EPATI:

Are you talking about the –

GLAZEBROOK J:

And there's an absolute acquittal, isn't there?

MS EPATI:

The note?

GLAZEBROOK J:

On the Judge's first question.

MS EPATI:

On the Judge's first question: "If it is a no, you find her not guilty." Yes, the difficulty becomes that he's also included the note about substantial and operative cause doesn't have to, and that's actually the test for the manslaughter part.

WILLIAMS J:

Yes, you have to be satisfied she discharged the firearm first of all.

MS EPATI:

Correct.

WILLIAMS J:

With intent to injure.

GLAZEBROOK J:

All I'm trying to do, all I'm trying to say is that on your third scenario where you say there's no actus reus, doesn't question 1 deal with that?

MS EPATI:

No. No, it doesn't.

GLAZEBROOK J:

Why not?

MS EPATI:

Because it muddles the two unlawful acts which have two different enquiries and in fact when we go into self-defence, self-defence related to two different parts of the event. It's better to read that question with obviously the directions that were given and that might be a good time to go to the summing up to read it all together. So this is volume 2 of the Supreme Court's case on appeal and Mr Harris will helpfully bring up the requisite passage, 248 volume 2. So we have at 88: "Was the death the result of an unlawful act," and there is two notes. "A substantial and operative cause does not have to be the main or only cause,

but it must have played a part which was not insubstantial or insignificant." So that's your careless use scenario test, and then there is no issue in this case that Mr Kana was shot and killed by a gun by Ms Kaitai. So cause of death isn't an issue. "The issue is whether the Crown has disproved the reasonable possibility that the gun was fired involuntarily by reason only of it being grabbed by Mr Kana." That is absolutely the right issue in terms of the "reckless" theory.

The Judge then goes on to summarise the armourer's evidence which was important in the sense that it provided an avenue for this defence to effectively be run, and we have what the Crown says in relation to their primary theory, so it sort of summarises it there, and then he talks about the deliberate acts at 94 of getting the shotgun, so this is all the preparatory acts, and re-presenting it, because that's an important part of the careless use theory.

95: "By contrast," notwithstanding, closing the breach. We have an intervening act. He says it is "voluntary and unanticipated". It "breaks the chain of causation", and he challenges the thesis around, you know, who in their right mind would do this.

So far not so bad, bit muddled, but anyway. It's 96 through to 98 that the appellant really has issues with, because at 96 the Judge says: "If the Crown has not excluded as a reasonable possibility that Mr Kana grabbed the end of the gun, pulled it, that Ms Kaitai's whole hand did not follow the pulling motion and this put pressure on the trigger and caused it to fire, does this necessarily mean that the Crown has failed beyond reasonable doubt to prove Ms Kaitai did something which was a substantial and operative cause of death? That's the question."

With the greatest of respect, that probably wasn't the right question to ask, and in fact if it was a case where the Judge was saying: "Well, if they haven't excluded the possibility of this involuntary, it's manslaughter," and the Crown concede that. So he says that's the question. He then identifies what intervening acts are, which are admittedly extreme, and then in 98 he says: "In this case my advice is to be careful about too refined an analysis of the 'act'

causing death. It is a matter entirely for you but even if the Crown has not excluded the reasonable possibility that activation of the trigger was caused by Mr Kana grabbing the barrel and pulling, you might also wish to consider, to the extent you think it is relevant, the fact that the gun had already been uplifted by Ms Kaitai from the table, loaded, the safety switch at some stage disengaged, the gun pointed at Mr Kana before being lifted over [her] shoulder and then returned to face Mr Kana," so this is the Crown's version of careless use, and then he puts in brackets: "(that is, of course, if it ended up in that position…rather than being pulled there…)". So he does add that note about what the defence position is.

"Whether those actions were a substantial and operative cause of Mr Kana's death…for you and for you alone."

But the argument here is that we lose completely whether or not the Crown can exclude the reasonable possibility that she actually discharged the firearm. That's just – they're dissuaded from it.

GLAZEBROOK J:
I'm just having trouble seeing that actually from both the directions and the question.

MS EPATI:
Having trouble seeing it being lost?

GLAZEBROOK J:
Yes.

MS EPATI:
Because effectively the Judge is saying to the jury unlawful act and causation are fine here, that it's –

GLAZEBROOK J:

Or what I'm saying is were her actions a substantial cause of death and there's a recognition that him pulling it down, if you look at the end of 98 – I'm really dealing with your third scenario where you say that it wasn't, the intervening act wasn't put to the jury.

MS EPATI:

Yes, yes.

GLAZEBROOK J:

Because it seems to me that it probably was in perhaps a slightly muddled way but actually in a way that was probably, I think, helpful to your client because it was an absolute acquittal as against manslaughter.

MS EPATI:

Yes.

WINKELMANN CJ:

Isn't this his intervening event direction and if it is what is wrong with it? I'm struggling to see that myself. I mean I can see your point that when you come to intent and you refer back to this the issue arises, but –

MS EPATI:

Yes.

WILLIAMS J:

The problem is it doesn't direct itself at 198(2) –

MS EPATI:

Correct.

WILLIAMS J:

– which requires proof that the firearm was discharged –

MS EPATI:

Correct.

WILLIAMS J:

– for reckless murder by Moetu Kaitai –

MS EPATI:

Yes.

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WILLIAMS J:

And so substantial and operative cause of death is not the correct question.

MS EPATI:

Correct. Sorry, I don't think I've said correct and yes to you so many times in my life. It's a rare moment.

WILLIAMS J:

I don't think anyone has said correct to me so many times.

GLAZEBROOK J:

But it surely has to be the correct question for causation issues.

MS EPATI:

Yes, so coming back to your point, coming to your point Justice Glazebrook, as to whether or not the defence of careless use was properly put, you probably, that's probably right in the sense that there was certainly a lot about it. I suppose the issue that I have is the way, is the way he's, the way that –

WINKELMANN CJ:

I'm still not with you Ms Epati.

MS EPATI:

Okay.

WINKELMANN CJ:

I just don't understand it. He's asking there, have they, what's wrong with what he's saying apart from stuff at the beginning of 98. What's wrong with what he's saying in the rest of 98 and 99: "Whether these actions were a substantial and operative cause of Mr Kana's death." I suppose you say it's muddying it up with the act?

MS EPATI:

It's muddying it up with the task, which is effectively to start deciding whether it's murder or manslaughter, because this –

GLAZEBROOK J:

This is whether she's guilty of anything.

MS EPATI:

Yes.

GLAZEBROOK J:

And it's very favourable to your client, I think.

MS EPATI:

Yes, but this test belongs in a place, once you've determined that it's not murder.

GLAZEBROOK J:

Well no, not necessarily, because this is saying it's not manslaughter either, because death wasn't caused by an unlawful act. Isn't it?

MS EPATI:

It is, it is, but the –

GLAZEBROOK J:

Which I think to be honest is quite favourable to your client.

WINKELMANN CJ:

It's a different kind of question I suppose. It's just that you're saying the question should have been about the actus reus, and causation is another question.

MS EPATI:

Causation is very much a question when you get rid of murder, and you're focused on the manslaughter part.

WINKELMANN CJ:

Well, isn't the first question, as Justice Williams said, whether or not she actually…

MS EPATI:

Discharged the firearm.

WINKELMANN CJ:

Discharged the firearm.

MS EPATI:

Yes.

WILLIAMS J:

The causation tests are different.

WINKELMANN CJ:

Is a sort of simple factual one.

MS EPATI:

Yes.

WINKELMANN CJ:

And then you might say there are different causation scenarios where that might not have been the substantial operative cause of death, but the first question is, did she do it.

MS EPATI:

Yes, and my concern is that if you elevate the substantial and operative cause test right up at the front, there's a risk the jury thought that was sufficient for scenario 1.

WILLIAMS J:

Yes, because the correct question, causation question, question 1, is did she cause the discharge of the weapon.

MS EPATI:

Correct.

WILLIAMS J:

Not did she cause death. Causing death is later.

MS EPATI:

Causing death wasn't even actually at issue. The shot killed him. It's who discharged the firearm that was the issue.

WILLIAMS J:

For the purpose section 198(2).

MS EPATI:

Yes.

WILLIAMS J:

Which is the substratum of murder?

MS EPATI:

Correct, and it was only when we really removed murder off the table, and then moved to preparatory steps and whether they caused death, that it came into it. So we elevated the causation test for manslaughter into the primary question. Which was determining whether it was even murder in the first place. That's the risk of the model.

WINKELMANN CJ:

Yes, well I'm still feeling quite muddled I have to say Ms Epati. Because if she, yes. Now we're back to if she'd, if it was an accident and she didn't voluntarily pull the trigger, she's not guilty of anything, but I thought that was not what we were saying.

MS EPATI:

Let's have a look at how I've framed how I think it should have been. Let's say we get rid of the involuntary, like the discharge issue falls away. We can't be sure. We don't know actually what happened at the point of discharge. So now we're left with preparatory steps, which is issue 4, and that places us in a separate realm because now we're only considering is it manslaughter or is it a full acquittal. Are you sure that on the afternoon of 10 May 2020 Ms Kaitai caused Mr Kana's death by carelessly using a firearm, and I've underlined "caused" because that now we have to grapple with causation, and I've noted, for the Crown to prove causation they do not need to prove Ms Kaitai's use of the firearm was *the* cause of death. It is enough to prove the use of the firearm by Ms Kaitai in the lead up to the firearm discharging was *a* cause of death.

So there's your, there's a different way of substantial and operative causation test being put there. In this case there's no issue that Mr Kana was shot and killed by a gun held by Ms Kaitai. There's also no issue Ms Kaitai voluntarily retrieved, loaded, placed her finger on the trigger, initially presented it before pulling it up and away from Mr Kana. The issue is whether the Crown can exclude the reasonable possibility that Ms Kaitai's voluntary acts were broken by an independent act such as Mr Kana grabbing and pulling the firearm down and redirecting the barrel towards himself if that was something that could not have reasonably been expected to occur.

WINKELMANN CJ:

So you're saying that 96 is a problem for your first ground of a defence which is reducing murder to manslaughter?

MS EPATI:

Yes, yes.

MILLER J:

I am finding it a bit hard to see how this is helpful to you in the end because in scenario 1, if the jury have found that she pulled the trigger, there's no doubt about causation.

MS EPATI:

No.

MILLER J:

There isn't a question for the jury at all. So as Justice Glazebrook says, to introduce it here is a bit confusing but possibly to your client's advantage.

MS EPATI:

To introduce it?

MILLER J:

To introduce the idea of causation by reference to these other acts.

MS EPATI:

Is to an advantage to the appellant?

MILLER J:

Yes.

GLAZEBROOK J:

Well in terms of a total acquittal.

MILLER J:

Because in fact on scenario 1 causation was not an issue at all. It couldn't be. If she's pointed the shotgun at him and pulled the trigger, there can be no doubt that was the cause.

MS EPATI:

Yes, yes, but the complaint that I have is that that important critical question gets lost in amongst it and if, when we came to an intent the Judge then worked quite hard to bring the jury back on track, then it would have been okay, which is why I say look, either we entered it the first point the way the Crown closed and recommended choose your unlawful act at the beginning because that will help you with the rest of the question trail, right. If your unlawful act at the beginning is actually careless use, murder is gone, we concede it.

MILLER J:

Okay, so you're really telling us that on scenario 1 the Judge should have said did she pull the trigger?

MS EPATI:

Did she discharge the firearm?

MILLER J:

Did she discharge the firearm, yes? The answer to that is yes, there is no doubt about causation, we are now focusing on murderous intent.

MS EPATI:

Yes.

MILLER J:

And a lot of this other –

GLAZEBROOK J:

And self-defence.

MILLER J:

Self-defence, sorry.

MS EPATI:

Yes, yes.

MILLER J:

It's her act, then self-defence and then murderous intent.

MS EPATI:

Yes. Here is the reason why it was cleaner to deal with the defensive involuntary discharge or accident whatever right at the beginning because in actual fact self-defence applied differently again depending on which avenue you took. So if you made it past question 1 and said yes, I can exclude the possibility that it was his act that discharged the firearm, she intentionally pulled the trigger, then your self-defence analysis is right at the point of the shot. Whereas the defence ran self-defence in relation to, additionally, in relation to the careless use scenario because they said the preparatory steps were done in self-defence. So the focus of the self-defence defence was wider on the full event. So you actually looked at what were the circumstances when she retrieved the gun, when she loaded it, all of those things and she was telling him to back off, were they done in self-defence because in which case it was full acquittal because there was no unlawful act, there was no carelessness, or it wasn't unlawful the steps that she took.

Once you start looking at the fact that the defence is applied very differently, it becomes quite important to be upfront at the beginning what is the unlawful act that you rely on. In this case, unfortunately the Crown didn't have in their charging notice the unlawful act they relied on. They opened in a relatively vague way and only nominated careless use as an alternative theory at the end. So I think all of counsel, including the Judge, were then having to grapple with some really complicated issues that were thrown up on the fly.

WILLIAMS J:

Really? I thought the Crown was reasonably clear upfront that this was reckless all day. This is reckless murder all day everyday or something like that.

MS EPATI:

Yes, well intentional shooting. Well, that it was intentional shooting.

GLAZEBROOK J:

Reckless.

MS EPATI:

Yes, reckless shooting. But the careless use, the sense that she's done enough before the struggle begins, that only came in at the end.

WILLIAMS J:

No, well the Crown didn't agree with it of course.

MS EPATI:

Yes.

WILLIAMS J:

But then said: "If on the other hand you think I haven't convinced you of that, then…"

MS EPATI:

Yes, yes, but that –

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WILLIAMS J:

They did that in opening too, didn't they?

MS EPATI:

No.

WINKELMANN CJ:

Didn't the Crown, didn't someone really need to say to the jury: "You need to decide on what factual scenario you're dealing with right up front. So are you assuming that the struggle included" – "This is the facts. Can you exclude the possibility that the gun was up here, it was brought down by the victim and then a tussle ensued? Can you exclude that possibility that the placement of the gun was actually the result of the victim's wrestle to get it away?"

MS EPATI:

Yes.

WINKELMANN CJ:

And if you can't exclude that possibility then there's one scenario, one fact trail that you go through, but if you can exclude that possibility then it's a completely different fact trail and that's kind of like the thing up the top which needs to be resolved before you – and you need two probably, to ease the jury perhaps, two different question trail routes.

MS EPATI:

Which is why I've separated – at the point at which you're deciding about involuntary discharge, at that fine point, if you exclude it, you still have to go on to the careless use route which is a separate trail. If you are sure that she re-presented and pulled the trigger, well, then the rest follows.

MILLER J:

There are quite a few cases in which the Court of Appeal has directed the jury or said that a jury ought to have been directed that they must agree on the pathway to guilt and typically that happens whether as a defence it applies differently according to each pathway, and I've been wondering whether you might say here that in one there's a question whether she's acting in self-defence at all and the other it's a question whether the force used is disproportionate. But I'm not sure that's correct. Can you just explain to me how it is that self-defence applies differently in the two scenarios?

MS EPATI:

On the two scenarios?

MILLER J:

Yes.

MS EPATI:

Well, so if we follow scenario 1 which is a re-presentation in intentional shooting, the point at which you analyse self-defence is at the point that she shot, right? Because the focus in careless use is on the preparatory steps, because then it becomes actually – well, let's say we discount the intervening act part, we go: "No, no, no, that's silly," so clearly she caused, that she did – it was a cause that she retrieved, loaded, all that kind of thing. Then we have to look at those steps in the lead-up, not the shot, the lead-up, were they done in self-defence? It's a little awkward, I have to say, because self-defence is the use of force but it's threatened force, right? So it does technically fit, but yes, the self-defence then would come in under consideration as to whether her preparatory steps, not the shot, but the preparatory steps, were done in self-defence.

GLAZEBROOK J:

You'd have to look at the earlier steps even in the moment of shot, wouldn't you, in your first scenario? I mean the jury isn't just looking at the time of the shot. They're looking at why she's feeling threatened, what steps she took in accordance with that, and then whether what she did was proportionate to the threat.

MS EPATI:

Yes, I suppose it's artificial to divorce it completely but –

GLAZEBROOK J:

Well, yes, because the whole scenario was, or the whole theory of self-defence, was that she was threatened which is why she brought the shotgun, loaded it, et cetera.

MS EPATI:

Yes, but the shot then becomes part of a, yes, scenario – yes.

GLAZEBROOK J:

Yes, it's obviously the last part of it because that's a voluntary act of hers, or an act that she did, pulling the trigger.

MS EPATI:

Yes. But then if we're looking at purely a careless use scenario then you remove the actual shot part because that's not really relevant to your analysis. It's whether the preparatory steps were sufficient, sorry, whether they were done in self-defence. So it is a slightly different way of looking at it and that's why when in the re-draft the way in which self-defence is – issue 5: what were the circumstances as Ms Kaitai honestly believed them to be at the time she was retrieving, loading and in issue presenting the gun at Mr Kana. Whereas self-defence, or an intentional shooting, focuses very much on what were the circumstances as Ms Kaitai honestly believed them to be at the time she shot Mr Kana.

GLAZEBROOK J:

So the concern is there were different unlawful acts, or at least in relation to deliberate shooting or her pulling the trigger, that was an additional unlawful act effectively, and therefore the analysis of self-defence may have been slightly different?

MS EPATI:

Yes, I'm not saying that there was a standalone error in relation to the way self-defence is put, it's just an illustration that – put it this way. When I sat down and asked myself, what should the question trail have been, I found myself starting to really get myself muddled when I had to then apply self-defence, because it looked at different parts of the transaction, and it was really at that point that I, the penny dropped, that you needed to separate them out completely because in the end they actually require very different questions.

GLAZEBROOK J:

Well I must admit that I agree that I think the factual issue here was important to set out right at the start. So what the jury thought the Crown had proved or not.

MS EPATI:

Yes.

GLAZEBROOK J:

So I would, in fact, agree with you on that, because this was so muddled that that's what they needed to decide.

MS EPATI:

Yes.

GLAZEBROOK J:

And when I say "muddled" there was evidence that they could've come to the conclusion that actually she pointed that at him and shot him deliberately, depending upon who you believed, and which police statement, whether you believed the police statements or the evidence in – and obviously it's a proof beyond reasonable doubt.

MS EPATI:

Yes, that would be my only amendment to your…

GLAZEBROOK J:

No, no, but I'm just putting it in a colloquial term for that.

MS EPATI:

Yes.

GLAZEBROOK J:

So you have to have excluded the reasonable possibility that…

MS EPATI:

She didn't discharge the firearm.

GLAZEBROOK J:

She didn't pull the trigger.

MS EPATI:

And I keep coming back to this, because it's so important, and the Crown conceded that if that was the case it was manslaughter, and then they would consider, well, she still caused death though via all the things that she did, and this idea that his acts are then an intervening act which broke the chain of causation, is not reasonable, that's not a reasonable defence.

GLAZEBROOK J:

Yes, possibly, although of course that question 1 still needed to be asked and answered from the defence theory that was put of the course.

MS EPATI:

Yes, because it removed the risk that you were muddling a causation test for a lesser matter with the causation test sufficient for murder, right, and we focused on intent because there was an avenue for the Judge to have saved it, in my submission, we're not happy with the directions on actus reus and causation, for all the reasons that I've said, but there was the potential that if we got to intent, sorry, I've managed to talk so far with no notes, so I'm really getting discombobulated by that, but can I just, and I would like to give Mr Harris just a brief opportunity at some stage just to canvas with you the overseas authorities.

So I wrote down for myself what could have been said at mens rea to have saved the situation, and I'm happy to cut and paste this to provide this to Mr Registrar so that your Honours don't need to write it down completely, but I'll just read it out.

So, you need to focus now on the point of discharge of the firearm and the question of whether the gun was discharged as a result of what Mr Jenkins calls

an unintentional act. You will recall the defence contention that it was the acts of Mr Kana in pulling down, and/or grabbing, which caused the gun to discharge. If that happened, then there could be no intent to injure or other knowledge. The Crown says, purely based on Mr Lewis' police interview, that Mr Kana never go this hands on it until it was already pointing at him being fired. The Crown says this was an intentional pulling of the trigger, therefore you need to consider whether the Crown has excluded the reasonable possibility that the gun discharged as a result of Mr Kana's pulling the barrel towards him while Ms Kaitai had her finger on the trigger.

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The relevance of an unintended discharge of a firearm, if the Crown cannot exclude this, is that it negates intent for murder. At this point the state of mind of Ms Kaitai is relevant at the point she shot the gun. The Crown have to prove beyond a reasonable doubt that she intended bodily injury to Mr Kana, that she knew there was a real risk that injury would cause him death and that Ms Kaitai ran the risk he would die as a result of the shooting. If there was an unintentional discharge at the point of Mr Kana being shot, it would not be possible for Ms Kaitai to have formed any of these states of mind. Remember, it is for the Crown to prove beyond reasonable doubt that Ms Kaitai had these states of mind at the precise point Mr Kana was shot. Keep in mind the Crown have already accepted that if the discharge of the firearm was involuntary it was therefore unintentional and it's manslaughter.

WINKELMANN CJ:

So when we look at the question trail as it was presented, the question, issue 1 does seem to be very generous to the appellant but nevertheless problematic because it suggests that if the answer to the question is whether the Crown has disproved the reasonable possibility that the gun was fired involuntary by reason only of it being grabbed by Mr Kana, then, if "no", find Ms Kaitai not guilty, which is not actually what you say is the case. You say you only find Ms Kaitai not guilty if, on the scenario that occurred, the gun was pulled into place by the victim.

It just seems like this – I haven't – this question trail doesn't really engage with the way you're now framing it for us which is that how critical it was whether the gun was pulled into place by the victim before it was discharged.

MS EPATI:

But the Crown couched their alternative careless use theory on the basis that he doesn't pull it down, that the tussle happens once it's presented, that there's a tug of war there and that that causes the discharge. They conceded murder there. So it –

WINKELMANN CJ:

They conceded manslaughter?

MS EPATI:

Sorry, well, they conceded to manslaughter. They said it wasn't murder, it was manslaughter.

MILLER J:

It seems to me that had the jury returned a verdict of not guilty of murder but guilty of manslaughter, you would have something to complain about with these directions because the jury were told that if Mr Kana pulled the trigger it only went to intent, went to murderous intent, and that would've – whereas if they'd been told that it went to the actus reus of the offence she'd walk through, she wouldn't be guilty of manslaughter. But the jury's verdict tells us that problem didn't arise.

MS EPATI:

The jury's verdict tells us that what didn't arise? The consideration of actus reus or –

MILLER J:

Yes, the possibility that because they weren't told the sequence of events could be involuntary they returned a verdict of manslaughter when they should have acquitted her. That didn't happen. Just listening to the passage that you read

out from the summing up, it would be problematic if that were the outcome, but the verdict tells us the jury didn't make that mistake. They were satisfied that she pulled the trigger.

MS EPATI:

No, I don't agree. I don't agree that the way that they were directed can satisfy us that they properly considered the question of whether the Crown could exclude the reasonable possibility of accidental discharge, and I'll just use it as the – no. And in fact –

MILLER J:

Well, it's a question of what we mean by "accident".

MS EPATI:

Yes.

MILLER J:

It might be accidental in the sense that she didn't have murderous intent or it might be accidental in the sense that it was not her act at all.

MS EPATI:

Correct, correct, and what I'm saying is that that question was never properly engaged with because when "unlawful act" and "causation" were dealt with the focus was on the careless use causation test and where it could have been saved is by then bringing the jury back to the point of discharge and asking them again, or asking them for the first time: "You really need to think about this. Forget about preparatory steps. What happened then, and that'll help you determine murderous intent."

WINKELMANN CJ:

So I mean is there much more to your appeal that when it came to the issue 3, intent, the Judge didn't square the issues up clearly enough and by reaching back to his direction under issue 1, which was dealing with something else, he might have confused, he would have confused the jury?

MS EPATI:

Well I think using the word “it’s relevant” was a misdirection.

WINKELMANN CJ:

He didn’t square the issue up.

GLAZEBROOK J:

Well it may or may not be because you could still have that intent and even at the stage that it was involuntary but that wasn’t the way that the Crown have put the case, so we can probably leave that aside because you could still have that intent. So you intend to shoot someone, you trip and you do shoot them. Whether the tripping breaks the chain of causation is the relevant point, not whether actually you had that intent.

WINKELMANN CJ:

But we don’t have to worry about that.

MS EPATI:

Well, they become one and the same – yes.

GLAZEBROOK J:

But we don’t need to worry about that in this case. It wasn’t how it was put.

MS EPATI:

No, no, I just wanted – I'm just bothered a little bit about, Chief Justice, your comment that question 1 was generous to the appellant.

WINKELMANN CJ:

Well, in a sense, I mean it says: “Well you can see that if the gun was fired involuntarily it is still manslaughter.” Oh no, it does say by –

MS EPATI:

By reason only.

WINKELMANN CJ:

It's still manslaughter if the tug of war occurred between them because of the careless use scenario. He doesn't differentiate there. There he says: "By reason only of it being Mr Kana, so grabbed by Mr Kana." So it's actually favourable because, you know, careless use is actually still at issue even if it's grabbed by Mr Kana and goes off.

MS EPATI:

Yes, although inserting the word "only" really elevates it to that independent –

WINKELMANN CJ:

Yes.

MS EPATI:

– type of intervening act scenario. That's why the Crown insisted on inserting that word. That was not the trial counsel's preference.

WINKELMANN CJ:

But my point is that there is a disconnect between what you're saying here now and what's in the question trail because your analysis is very focused on, it seems very critical to the outcome as to whether the Crown, the jury could exclude as a reasonable possibility that the victim grabbed the gun and brought it down between themselves because if on that scenario that occurred and there was a tussle, it went off, your case is that the appellant, the verdict should have been not guilty of either murder or manslaughter. But you agree that if the gun was presented, lifted and then she brought the gun back down and there was a tussle –

MS EPATI:

And pulled the trigger.

WINKELMANN CJ:

And there was a tussle.

MS EPATI:

Oh, there was a tussle, yes.

WINKELMANN CJ:

Then that's manslaughter.

MS EPATI:

Yes.

WINKELMANN CJ:

Yes, and so what I'm saying is this question trail doesn't really engage with those two factual scenarios, it just engages with a tussle.

MS EPATI:

Yes.

WINKELMANN CJ:

And that is favourable because on this it says: "By reason only of it being grabbed by Mr Kana." It doesn't matter where the tussle takes place. So I think that, and contrary to what you may be thinking I'm about to say, I think that it is part of the problem with making sense of the question trail because it's difficult to see how you get to the accident being relevant to intent if the Judge has already dealt with everything at issue 1 because if there has been an accident by virtue of the tussle, then the jury has found the person not guilty.

MS EPATI:

Yes.

WINKELMANN CJ:

On that question trail.

GLAZEBROOK J:

Well I think the problem is that it's looking at causation I think as you say which is different from working out exactly what happened.

WINKELMANN CJ:

Yes, but I'm not saying this is perfect. I'm just trying to analyse what exactly is, what the dynamic in the question trail is and it seems to me that perhaps in the Judge's mind the person is not guilty if it is an accident, so he comes back round to, he only comes round to it vaguely with intent because he is saying: "If it was fired involuntarily by reason only of it being grabbed by Mr Kana, then if no, find Ms Kaitai not guilty. If yes, go to question 2."

MS EPATI

And my concern with it is that it elevates a lower causation test, or a lower standard of proof for the Crown and then you get to intent and then he simply says: "Oh just go back."

WINKELMANN CJ:

Yes.

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MS EPATI:

So on one hand that might be right, but the problem is that we've got a very low causation test, and the jury being told don't worry too much about, if you can't exclude the reasonable possibility of involuntary discharge of a firearm, it's okay. You've got all these preparatory –

GLAZEBROOK J:

But isn't that right on causation? That has to be right.

MS EPATI:

Yes, generally, yes.

GLAZEBROOK J:

Well on any scenario. So you're third scenario – I think possibly the issue is that the jury may well have thought that – well we don't know what the jury thought, but they may well have thought it was involuntary and still decided that

her actions that her actions were causation, and of course they were perfectly entitled to do that in terms of the causation test.

MS EPATI:

Yes, yes.

GLAZEBROOK J:

But what you're saying is that they needed guidance, I think probably only on intent at that stage, in terms of – because it was conceded that it became manslaughter if it was involuntary.

MS EPATI:

Yes.

WINKELMANN CJ:

I mean so I'm not saying –

GLAZEBROOK J:

Which just doesn't come out in the question trail is the other unfortunate thing.

MS EPATI:

Just on that point about we don't know what the jury were thinking. We sort of have some idea because an hour after they retired they asked a question about getting directions for murderous intent again. So going back to Justice Miller's point about, oh well, they would have decided the unlawful act, it's safe. Not if they're asking about intent, and then a further question about delivering a manslaughter verdict. If your Honour is right, that they tracked it through properly, they wouldn't be asking those questions, is just a point that I'm making.

WINKELMANN CJ:

So your point is the only real direction on accident is at issue 1 and it conflates quite a lot, and the Judge only deals with the negating intent, a very critical part of the accident defence.

MS EPATI:

They're saying go back.

WINKELMANN CJ:

By saying its relevant and go back, but going back is just something else. It's a, issue 1 is something else.

MS EPATI:

Yes, yes, that's the nuts of it, yes. But it could have been saved if he'd told them about, if he'd brought them back to that point in the way –

WINKELMANN CJ:

To what the jury – what the Crown had said, really.

MS EPATI:

Yes. Yes, there were two roads to manslaughter. One was to upfront, get them to engage with accident right from the get-go, in all the scenarios. So you've got the reckless discharge of a firearm, careless use of a firearm, and the defence theory, which was the combination of Mr Mihaera and Mr Lewis at trial, which was that there was a pull down and then a struggle, and it was an intervening act.

WINKELMANN CJ:

Well it's, the defence was non-careless accident, or accident.

MS EPATI:

Yes.

WINKELMANN CJ:

That's a simple way of putting it, isn't it?

MS EPATI:

Yes.

GLAZEBROOK J:

And issue 1 I think does deal, perhaps not wonderfully, with an acquittal because it's just a pure accident from whoa to go, isn't it?

MS EPATI:

It muddles the two enquiries.

GLAZEBROOK J:

Well I'm not sure it does in terms of pure accident, because the pure accident is that there's no causation, isn't there?

MS EPATI:

Yes.

GLAZEBROOK J:

Because there's an intervening act.

MS EPATI:

Yes.

GLAZEBROOK J:

And that is dealt with by issue 1.

MS EPATI:

Yes, that's probably fair.

GLAZEBROOK J:

So really we're looking at intent at this stage, in this case?

MS EPATI:

In this case, yes.

GLAZEBROOK J:

Right.

MS EPATI:

But then I still have a complaint about the way that's put to the jury, because it does seem very favourable to the Crown case that causation –

GLAZEBROOK J:

Which, what is, to the causation part of it?

MS EPATI:

The causation part –

GLAZEBROOK J:

Yes, I know, I understand that part of the submission.

MS EPATI:

Yes.

GLAZEBROOK J:

I'm just saying that that does deal with it. Whether it deals with it properly is another matter, but not related to… that if it dealt with it properly, and, no, I do understand that you have some concerns about the way it was dealt with.

MS EPATI:

Sorry, so are we saying that if it had been dealt with properly, in other words properly demarcated at the beginning, there is no issue with intent, or are you saying the way it's dealt with, we then turn to intent?

GLAZEBROOK J:

Having been told that if causation is broken it's an acquittal, that seemed to me to deal with your third scenario and that part of the defence case, and then the issue would be there wasn't a proper concentration on intent because issue 1 didn't have them saying she pulled the trigger. That wasn't the question.

MS EPATI:

No, that was the question.

GLAZEBROOK J:

And I know you say it should have been.

MS EPATI:

Yes.

GLAZEBROOK J:

And I have a lot of sympathy with that, but I'm just trying to really work out whether you're still arguing that the directions on causation caused a miscarriage in themselves.

MS EPATI:

Generally speaking in relation to the third scenario?

GLAZEBROOK J:

Third scenario.

MS EPATI:

I suppose in and of themselves if we just compartmentalise them and we're happy that they are where they need to be, right?

GLAZEBROOK J:

Yes.

MS EPATI:

We've discounted murder. Murder's off the table. Then my only complaint is the way that the Judge has put, has –

GLAZEBROOK J:

The way they were put.

MS EPATI:

Has couched it, taking a favourable view of the Crown's version of the careless use which is obviously – the pulldown was disputed. The Crown said the carelessness is in the re-presentation with your finger on the trigger and a

loaded firearm which unquestionably – if you discount the pulldown then yes, it's careless use of a firearm causing death.

WINKELMANN CJ:

Well, I have found it most helpful to think about non-careless accident and careless accident. I think that's the – and perhaps that was the factual matrix that needed to be sorted out up front.

MS EPATI:

Yes. Yes, that would have been helpful. There are three scenarios that you have to, you know, work through, given that the Crown have to exclude the reasonable possibility of scenarios 2 and 3 to get to murder. To get to murder, scenarios 2 and 3 have to be excluded beyond a reasonable possibility. If those were clearly articulated to the jury at the outset and then the question trail followed, you know, question 1 deals with scenario 1, so knock that out –

WINKELMANN CJ:

It might have been a fact-based question trail and the scenario was what was required.

MS EPATI:

Yes. The trick with question trails, not that I would know, but this is the learning that I've taken from it taking me almost a week to draft, re-draft it, is obviously you have to ask the right questions. That's really hard.

WINKELMANN CJ:

It's a logic tree.

MS EPATI:

But it's hard in a case like this where things obviously change dramatically and you've got multiple defences being run, and that's not a criticism of defence and it's certainly not a criticism of the Crown to then elect an alternative to try and protect their case, but it does throw up some very hard issues, and I hope that

a re-draft of the question trail has been accepted by this Court in a very humble way because as I –

GLAZEBROOK J:

It was very helpful.

MS EPATI:

But it took me the better part of a week to do it and that luxury isn't afforded in cases where things change so dramatically at trial for counsel and for the trial Judge, so I'm just very keen to make sure that that message is communicated.

WINKELMANN CJ:

Now, Ms Epati, I think we've got kind of the basic shape of the appeal. Was there anything else you – because it's 11.28.

MS EPATI:

Yes.

WINKELMANN CJ:

Would you want to take us to any of the Canadian cases or any of the cases of –

MS EPATI:

I would like Mr Harris to do that if that's acceptable. He's done all the work on those in accordance with the practice direction for this Court, junior counsel obviously…

WINKELMANN CJ:

That would be very much appreciated.

MS EPATI:

Yes, so he's got a very condensed presentation of taking you round the world and that should take no more than 30 minutes.

WINKELMANN CJ:

Maybe less.

MS EPATI:

Maybe less? All right, message received, and then if there's anything more that I can – I would like to reserve the position to come back if I need to, but I think I've communicated the argument as succinctly as I possibly can.

WINKELMANN CJ:

We'll take the adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.50 AM

WINKELMANN CJ:

Mr Harris?

MR HARRIS:

Thank you your Honours. E ngā Kaiwhakawā tēnā koutou. In light of the invitation from your Honour the Chief Justice I will endeavour to be as succinct as possible.

WINKELMANN CJ:

And we will endeavour not to harass you too much.

MR HARRIS:

Thank you. I do want to make two submissions. The first is a submission in response to what the Crown has said on general principles on jury directions. I will be quite brief on that, but the short submission is that the authorities relied upon by the Crown in their discussion of jury principles needs to be put in their proper context to arrive at an accurate understanding of New Zealand law on jury directions. Then I will move secondly to the submission that has been foreshadowed by Ms Epati which is that there is a wealth of overseas case law, in particular from Canada, that reinforces the need for judges to instruct juries

on the legal effect of accident on actus reus and mens rea which provides great clarity for the trial judges in Aotearoa New Zealand.

So to begin just briefly with this responsive submission, your Honours, at paragraphs 47 to 55 the Crown provides a perspective on jury directions in New Zealand, and there are some quite extensively footnoted passages, and it is our submission that some of these points generalise out too much from cases that are explicitly confined to particular contexts, that these comments urge excessive caution on jury directions and so do not always represent an accurate statement of New Zealand law.

I will just go to three examples of why, in our view, the Crown's submissions on this point need to be treated with special care. The first is the treatment of the Supreme Court decision in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 which your Honours will be familiar with. So we're here at 47 to 55 of the respondent's submissions. But in particular the Crown relies on the decision of this Court in *Wi* at paragraph 54.1 where the Crown says: "The extent and content of directions should generally be left to the trial Judge who has the 'feel' of the case," and that's footnoted at footnote 117 to *Wi v R* at paragraph 40. Also the Crown says at paragraph 54.2 that: "Directions are only *required* where they are essential to ensure the defendant has a fair trial," referring to *Wi* at that same paragraph. And the reason this is relevant, your Honours, is some of these points are returned to by the Crown in their submissions to defend the jury directions in this case.

If I just take your Honours to the decision of the Supreme Court in *Wi* and the Crown, that's at tab 2 of the Crown's bundle. Sorry, that's at tab 3 of the Crown's bundle starting at page 24. The points relied upon are from paragraph 40 and there you will see that the Supreme Court is saying: "We are of the view that in principle mandatory directions should be reserved for cases in which they are essential to ensure the defendant has a fair trial." The short point I will make is if you read back, if your Honours read back several paragraphs, it's very clear that that's a point made with reference to directions in relation to the absence of prior convictions and the key point we would wish

to underscore is the comments made at paragraph 35 where it said at the end of this paragraph: "This is not, however, an appropriate occasion to conduct a general review of this area of the law if for no other reason than the absence of submissions on the wider aspects of the topic." That is the area of law of jury directions. "The following discussion is confined to evidence of a lack of relevant previous convictions." It is very important that those passages are not taken out of context in our submission.

The second example, just to draw your Honours' attention –

WINKELMANN CJ:
Well, can I just ask you.

MR HARRIS:
Yes.

WINKELMANN CJ:
I mean cutting to the chase, wouldn't you say fundamentally whatever is said in various cases about jury directions there's an ultimate question for the Court, which is whether the particular directions in the context of the case overall create a risk of a miscarriage of justice?

MR HARRIS:
Yes, yes, your Honour, that is the ultimate question.

WINKELMANN CJ:
Right, well against that background.
1155

GLAZEBROOK J:
I'm not sure we need these examples, therefore it would be better if we go directly to why in this case there should have been a direction.

MR HARRIS:

Sure, sure, but just say in summary that the points made on *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 and also on *R v Wanhalla* [2007] 2 NZLR 573 (CA) come out of a very particular context, that in our view the risk of miscarriages of justice and the right to a fair trial should be paramount. That there's a need for caution and sweeping statements on jury directions and that in providing proper jury directions it's important that necessary assistance is given to the jury. But I'll leave that point there in light of that indication, and I'll move then to the Canadian case law, which I think points to why there is a need for a direction in this case.

So in relation to the Canadian case law, I just won't take your Honours through all of the cases that we've touched on in our written submissions, and we'll just underscore some points from four of the cases, and then I'll make a point about one of the Australian cases raised by my learned friends for the Crown.

So the first case just to touch on is *Regina v Tennant* (1975) 23 CCC (2d) 80 (ONCA), that's in tab 2 of volume 3 of the appellant's bundle. Beginning at page 291, and the key –

GLAZEBROOK J:

Volume 3 sorry? What was the name of the case again?

MR HARRIS:

[Regina] v Tennant. That's in volume 2, in tab 3, I beg your pardon. Beginning at 291, the key passage just to draw your Honours' attention to, is paragraph 25, where it said: "The learned trial Judge ought not only to have instructed the jury with respect to the meaning of 'accident' as a defence but, after relating the evidence to the specific issues of such defence, should have instructed the jury as to the legal consequences which flowed form their findings."

A series of other Canadian decisions have elaborated helpfully, in our submission, on what it means to instruct the jury on the legal consequences which flow from such findings.

The second case I want to draw your Honours' attention to just briefly is the recent decision of the Supreme Court of Canada in *R v Barton* 2019 SCC 33, [2019] 2 SCR 579, that's at volume 1 of the appellant's authorities, tab 1. It's a very lengthy decision and we do acknowledge that the comments made on accident are not essential to the outcome in that case. But there are some very helpful comments that bring conceptual clarity to how accident has a legal effect on mens rea in particular, beginning at paragraph 186. Justice Moldaver for the majority says there: "The way in which the term 'accident' is used in everyday parlance passes over some of the nuances that characterize the use of that term in the legal context." We say that's a helpful reminder that common sense may not provide a complete guide to determining how accident might affect actus reus and/or mens rea, and Justice Moldaver goes on to say: "But the term has a more specialised meaning in the criminal law context."

Then at paragraph 187 says: "… in assessing whether a claim of 'accident' may negate mens rea in any particular case, it is obviously essential to consider what the relevant mens rea requirement is in the first place."

Then in our submission Justice Moldaver helpfully sets out some different categories of mens rea, and at paragraph 189 relevantly for our purposes says: "Where the offence charged requires proof of subjective intent to bring about a particular consequence, the claim that the accused did not intend to bring about that consequence, making it a mere 'accident', is legally relevant, as it could negate the mens rea required for a conviction."

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The next case just to bring your Honours to briefly is *R v Roe* 2009 BCCA 193, a case of the British Columbia Court of Appeal. That's also in that same volume 1 but tab 3, beginning at page 235, and I want to take your Honours to paragraph 20. If your Honours have that, that's page 246 of the appellant's volume 1.

Madam Justice Newbury there says: “If an act is done accidentally, it is unintentional and the intent for murder – either the intent to kill or the intent to cause serious bodily harm – may be negated. The case law,” in Canada, of course, “makes it clear that the concept of accident should be ‘linked’ to mens rea for the jury where accident is advanced by an accused.”

Her Honour goes on to say at paragraph 21, this is over the page on page 248, that more has to be done and so the case of *R v Pawliuk* 2001 BCCA 13 is cited approvingly and her Honour says: “This Court,” in *R v Pawliuk*, “adopted the reasoning in *Sutherland*,” *R v Sutherland* (1993) 84 CCC (3d) 484 (SKCA), “and stated that it is insufficient to deal in a jury charge with the issue of intent ‘without instructing specifically on the issue of how accident operates to negate intent.’”

So accident has to be linked to intent but there must also be instructions specifically on how accident could operate to negate intent, and in that case Madam Justice Newbury holds that the trial Judge, this is the next paragraph, 22, “failed to ‘crystalise’ the question of whether accident negated intention or mens rea, and failed to summarise for the jury the evidence relating to that question”, and at the end of the paragraph allows the appeal on this basis alone.

My learned friends for the Crown say that no conviction has been overturned on the basis only of the absence of a direction but in our submission this case can be taken as – they say that none of the cases cited see a conviction overturned only on the basis of an absence of a direction that accident negates intent, but I think this case can be seen as an example of that.

There is a second ground for allowing the appeal that the Court also upholds but it’s very clear at paragraph 22 that the appeal is allowed on the basis alone that the question of whether accident negated intention had not been crystalised by the trial Judge.

WILLIAMS J:

Can you tell me what did the trial Judge say there?

MR HARRIS:

Yes, your Honour. That's covered at paragraph 7 to paragraph 16 and the question trail is set out at paragraph 13 along with a typewritten page including the elements of manslaughter, and I think relevantly to your question, your Honour, Justice Williams, what the trial Judge did say about intent is captured at paragraph 15. But perhaps that section should be read in whole to capture the entirety of the trial Judge directions.

I will just take your Honours in closing in reviewing the Canadian case called *Primeau v R* 2017 QCCA 1394. I think that's how you pronounce that case, but apologies if we have that wrong. That's at volume 2 in tab 5 of our bundle beginning at page 384. This is a case more about actus reus –

WINKELMANN CJ:

Sorry, what case was it?

MR HARRIS:

Primeau.

WILLIAMS J:

Is this the decision where the Court very helpfully sets out the evidence in French with the judgments in English?

MR HARRIS:

Yes, yes.

WILLIAMS J:

I don't do French.

MR HARRIS:

I was worried your Honours were going to ask me about the French translation, but I think there are some helpful passages in English. There are passages in French in some of the other cases as well. This is coming out of the Quebec Court of Appeal. The paragraph that I was going to draw your Honours'

attention to was paragraph 25. It's on Clickshare your Honours where it said: "Accidents are, by definition, not voluntary." And at paragraph 26: "Accident negates the element of conscious choice, or voluntariness, in action as much as it negates specific types of choices as defined in various concepts of mens rea."

I think relevantly also to this case it said at paragraph 30 that: "If the instructions had included a direction on accident with respect to the actus reus, the jury would have had a clearer understanding between the possible verdicts of murder or unlawful-act manslaughter." Noting of course some differences in the statutory context.

There's also I think a helpful passage at the end of that judgment possibly relevant to a question your Honour Justice Miller raised earlier to my friend Ms Epati where the Court says at paragraph 33: "Although the jury's verdict makes clear that it was persuaded that the appellant intended to kill his brother after planning and deliberation, instructions concerning all matters of defence supported by the evidence would have given the jury a more complete basis on which the jury could evaluate the evidence and the verdicts that were open. The effect on the jury of an instruction concerning accident and the actus reus is impossible to assess, but it is sufficient for this Court to order a new trial." In other words, in that case it could not be assumed from the jury's verdict that a direction would have made no difference.

WILLIAMS J:
I think the Crown says this is distinguishable on the basis that the scenario is, doesn't he bump his arm on a couch or something and the gun goes off?

MR HARRIS:
Yes.

WILLIAMS J:
Which is a little different from ours.

MR HARRIS:

Yes, it's a, that's right, the arm struck on the couch, said that the gun discharges by itself. Every factual scenario in these cases is subtly different and could be, and could give rise to a claim that the facts are different. What's important are the concepts about how accident can negate intent or actus reus and Ms Epati, and there's no suggestion in these cases that the comments made on accident are confined to a particular factual context, or legal context.

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Ms Epati will elaborate on this point, but it is in our submission that actus reus, or the question of whether there was a willed act, is an issue in this case. It's not as simple as saying Mr Kana did it. Ms Kaitai depressed the trigger, but there was evidence that Ms Epati will go into for why this issue of involuntariness or a willed act remained an issue.

So drawing the threads together from the Canadian case law, judges must instruct juries about the legal consequences that flow from a defence such as accident. That's from *Tennant*. Accident has a more complex specialised meaning in the law than in everyday life, meaning that its application goes beyond mere common sense. That's *Barton*, number 2.

The third point, where accident is raised in relation to mens rea, the mens rea in question must be addressed in some detail and where specific intent is required, accident may negate that intent and it's also *Barton*. Judges must instruct specifically on how an accident may operate to negate intent, that's *Roe* and *McKenna v R* 2015 NBCA 32, (2015) 324 CCC (3d) 452 and where relevant, a judge should direct the jury that accident may negate actus reus and/or negate mens rea. Ms Epati will say a little bit more, will say more about why in our submission no such guidance was provided.

Just before handing back to Ms Epati, I wanted to pick up one point that the Crown makes on the High Court of Australia in *Stevens v The Queen* [2005] HCA 65, (2005) 227 CLR 319 which I think is relevant to understanding the legal effect of accident on actus reus and mens rea. So in the Crown's

submissions, if I can take your Honours to the Crown submissions at paragraph 89, the Crown says: "Noting the legal differences in Australia that the most useful Australian discussion is in *Stevens v R*." Then the Crown says: "More relevantly Justice Kirby also commented adversely on the trial judge not "drawing to the jury's attention" that if they concluded the killing was accidental, the mental element required for murder was necessarily excluded." And the Crown says that Justice Kirby's comment that: "One way or the other, the jury's attention should have been drawn explicitly to accident and proper instructions given by the trial judge." And the Crown says: "This suggests a direction of relevance to intent should suffice." So that it is enough just to say accident is relevant to intention.

I just briefly want to take your Honours to *Stevens* to say that in our submission *Stevens* says quite the opposite of that. So this is at volume 2 of our bundle page 432. I think it may also be in the Crown's bundle. So the point there is what Justice Kirby says in *Stevens* does not stand for the proposition that a direction on relevance is sufficient and I want to take you to paragraph 85 of Justice Kirby's judgment. That's page 455 and if your Honours have that Justice Kirby says: "Accident was an issue that the accused was entitled to have specifically drawn to the jury's attention with appropriate directions on how they should consider it. It is true that the jury may have recognised as Chief Justice Gleeson and Justice Heydon infer, that the mental element for murder and the suggestion of an accident were, as a matter of strict logic, mutually exclusive. However, it was not appropriate to leave a key issue such as this to be deduced by implication." Analogous perhaps to the view that it is common sense that an unintentional act negates intention. Justice Kirby is saying here it's not enough to leave the jury to deduce that by implication. There has to be specific drawing of the jury's attention with appropriate directions on how the jury should consider accident.

We say more, your Honours, about the overseas case law in our written submissions, but being aware of the time I might pass it back to Ms Epati.

GLAZEBROOK J:

Your submission, just as a question, rests on the actual moment of pulling the trigger, doesn't it?

MR HARRIS:

That's right, Ma'am.

GLAZEBROOK J:

And so you say if it's involuntary it will always negate intention, even if the intention is recklessness? So if in fact in this case there's an intention to injure and recklessness, that can't be operative at the time of an accidental pulling of the trigger?

MR HARRIS:

I'd be cautious about saying it always negates but in cases like the present one I think it would always negate it in the way that you've suggested.

GLAZEBROOK J:

It's not very helpful to say it won't always be the case.

MR HARRIS:

Well, our submission, to be clear, is that judges properly direct juries when they say here is what is required by way of mens rea, in this case recklessness, running through the need to consciously appreciate the risk and running the risk, to consider at the point of discharge in this case whether that mens rea existed, then to say accident can negate that mens rea, it can negate that, for example, because it cannot be said that the accused ran the risk if accident occurred, but accidents do come in all shapes and sizes in these cases and our submission is that in jury directions accident has to be linked to mens rea and juries have to be instructed specifically that accidents may negate intent and how that can happen and then it's left for the jury.

GLAZEBROOK J:

But it's not a submission that it necessarily negates intent, it's just a submission that there has to be a direction or not. Is that what I understand?

WINKELMANN CJ:

On the effect of intent, on the effect of accident on intent?

GLAZEBROOK J:

On the possibility that it negates intent, not that it does necessarily negate intent.

MR HARRIS:

This does arise in the cases, and I imagine that's what your Honour is getting at, where there are some Canadian judgments.

GLAZEBROOK J:

Well, I just find *Stevens* goes a bit far. They decided that he had the actual intent but because the discharge was accidental somehow that actual intent is negated. It doesn't make much sense to me.

MR HARRIS:

Yes, and I know your Honour raised the question earlier that if there is an intent and then there is an accident what happens and I think our answer to that, your Honour, Justice Glazebrook, is that it's the time of discharge where the assessment has to be made, and so if the intent doesn't exist at that point, the mens rea hasn't crystalised, then intent has been negated.

WINKELMANN CJ:

O'Malley is the relevant authority, isn't it, going back to my law 1?

MR HARRIS:

There are statements in some of the Canadian case law, but they'd say accident negates intent, implying that it will always do so.

WINKELMANN CJ:

I suppose it would negate subjective intention to do the act but there are other specific forms of intent it might not negate, so are judges possibly bearing that in mind when they say it will likely negate intent?

MR HARRIS:

That's right, your Honour, and perhaps there going back to those categories of intent in *Barton* is helpful, and paragraph 187 there or 189, "where the offence charged requires proof of subjective intent the claim that the accused did not intend to bring about that consequence is legally relevant, as it could negate the mens rea". I think this case is a – subjective intent are the strongest for accident negating mens rea.

If your Honours have no further questions I'll pass back to Ms Epati.

WINKELMANN CJ:

Thank you, Ms Epati. Thank you, Mr Harris.

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MS EPATI:

I don't actually have any more to add. I'm really here in case there are any nagging questions that have been left over from our morning's discussion and I suppose to properly answer Justice Miller's question about is this a voluntary act or is it simply a matter of causation? My answer now is that no, I would say it is an involuntary situation, so it's not a matter of causation.

But I appreciate that I haven't had the opportunity to take you through all my notes which were going to go into the background but we've cut to the chase. Perhaps the only other helpful part of the casebook to look at is the discussion amongst trial counsel with the Judge prior to summing up about the iterations of the question trail. There's a discussion amongst counsel prior to summing up about what the question trail should be and there are a variety of iterations, and actually the very first draft of the iteration asked a single question: are you sure that on the afternoon of 10 May 2020 Moetu Kaitai caused the death of

Mr Kelvin Kana by an unlawful act? Note: there is no issue that Mr Kana was shot and killed by a gun held by Mr Kana. The issue is whether the Crown has disproved the reasonable possibility that the gun fired involuntarily as a result of it being grabbed by Mr Kana if not what follows.

As it happens, if that had been the original first iteration, we probably wouldn't have a lot to say here because in actual fact it starts the jury off where they need to focus. What then happened was I think because of the alternative careless use scenario there was then an attempt to important the causation test for careless use under that heading of unlawful act and causation. So it misfired in the sense that all of a sudden we got carried away with this.

WINKELMANN CJ:

Yes, so the point is that there's a bit of jumble of concepts and the ultimate question is whether the jury was appropriately assisted.

MS EPATI:

Yes, and we say that even if, and I'm just mindful of Justice Glazebrook's comment about it being more favourable because it talked about substantial and operative, the difficulty with that for us is that it's suggested, the risk is, it's suggested that the threshold for murder was quite low, and then if you get to murderous intent and you're not given enough assistance as to where you need to be then you glide through that too. So –

GLAZEBROOK J:

Yes, I understand the submission on intent.

MS EPATI:

All right. I don't want to repeat myself; that's not helpful. Thank you.

WINKELMANN CJ:

Thank you. Ms Johnston.

MS JOHNSTON:

May it please the Court, before I respond to what really is two grounds of appeal from the appellant, I propose to just cover two preliminary matters if I may. First, I'd like to briefly touch on the facts just so some aspects of the Crown's perspective are clear, and I promise I'll be brief on that, and then also to briefly address the appellate standard for review of the summing up which will be, of course, familiar material so I'll be again brief on that point.

In terms of the competing factual narratives at trial, the Crown's primary case was relatively straightforward and if the jury accepted the facts underpinning that, that the path to murder was relatively straightforward, there's been some mention this morning of the Crown not saying what the unlawful act was at the beginning. Now the Crown's case at the time the trial started was, of course, that this was a deliberate shooting, reckless intent, but that this struggle narrative, if I can call it that, there was no evidential basis for that before the trial started. That was something that came out during the trial. So in terms of if there is some criticism of the Crown not saying what the unlawful act was, it was, in my submission, obvious when you've got a homicide with a firearm that there would be an unlawful act and the Crown's unlawful act was careless use of a firearm. There's been some mention of section 198 and that's what my learned friend's put in her proposed question trail but that wasn't the Crown's case at trial. The Crown's unlawful act was always careless use of a firearm.

So on the Crown's case Ms Kaitai went to the address with a firearm and after an argument of sorts shortly after she arrived she loaded that firearm and pointed it at Mr Kana at close range. He tried to grab the gun. She pulled it away back over her shoulder facing the ceiling. In response to him trying to grab the firearm, she then brought it back down towards his body and the gun discharged at the moment that Mr Kana managed to lay his hands on the gun, and that discharge occurred as a result of what the experts call her placing distinctive pressure on the trigger.

So, of course, based on those facts the path to murder was straightforward. Is it a homicide? Her actions were plainly a substantial and operative cause of

death. It's one human being killing another. Presenting a firearm is an unlawful act. Careless use of a firearm. It's a culpable homicide. It's at least manslaughter, and then, of course, the final stage is mens rea, reckless homicide, that she intended to cause bodily injury, knowing risk of death and consciously running that risk, and on those facts it was plainly open to the jury, particularly bearing in mind the previous threat to kill Mr Kana two days before, for the jury to reach the verdict that they did.

So the questions that arise on this appeal arise from the factual narrative that came out at trial and were relied upon by the defence, and the ultimate issue for this Court, or issues for this Court, is whether that defence narrative was adequately encapsulated in the directions about whether you call it actus reus, voluntariness or causation, that's basically question 1 of the question trail, and then, secondly, whether they were adequately captured in terms of the mens rea directions, and the factual narrative for this primarily came from Mr Mihaere who told police on the day that he was playing darts and actually had his back to the others at the time and the firearm went off and he turned around as a result of hearing the bang. At trial he was a hostile witness for the Crown and he was the one who used the phrase that there was a tug-of-warring struggle over the firearm. Mr Lewis gave some support to this. He was the witness who did say at trial that Mr Kana was able to get his hand on the gun at this earlier time.

WINKELMANN CJ:

He'd already said that in his statement too, hadn't he?

MS JOHNSTON:

In his police statement he said that the hand got on the gun just before it discharged when it was at his torso. So the difference between his police statement was that he tried to grab it and then as it came down or in the instant, I think was the word he used, that it went off, he had his hand on it then.

WINKELMANN CJ:

I thought that the Judge had micro-analysed it and had concluded that it wasn't clearly inconsistent with what he said at trial. Am I wrong about that?

MS JOHNSTON:

I think so, yes, in my submission.

WINKELMANN CJ:

Was it put to him as an inconsistency?

MS JOHNSTON:

Yes, and I think the critical point here from the Crown's perspective is that when the potential inconsistency was put to him and his video interview was played that his words were, at notes of evidence 82, so when the police was interview was put to him: "I sort of like thought it might have been a bit of wrestling but it mustn't have been." So arguably he's backtracked and gone back to what he said in his police interview. But I acknowledge, of course, he did talk at other points in his evidence about the possibility of wrestling, and there was a point at which he said that he thought that she was, he was trying to grab the firearm at the earlier point in time.

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The Crown, of course, invited the jury to reject that narrative to the extent that he said that there was a wrestling over the gun particularly given, on the Crown's case, the relative strength of Mr Kana and the implausibility that if he had got his hand on the firearm at this point when it was facing upwards or any other point, that it is simply implausible that he would have directed the firearm to his torso rather than any other direction given the circumstances.

Now, it's important also just on the facts to note the evidence of the police armourer notes of evidence 235. So when first asked about the possibility of a discharge in the course of a struggle, his initial answer was that well, if the end of the gun is being pulled, the whole hand would move with it and that wouldn't require the depressing of the finger in order to set off the trigger. But he did

accept at page 235 that in the situation, and there's a relevant passage just under cross-examination: "What about the situation where the person holding the firearm is trying to pull back themselves?" "Well, that's possible." So I think it's important for the Court to remember that to the extent there is a voluntariness concern here, throughout Ms Kaitai's finger is on that trigger and on the struggle narrative here, she's still placing pressure, some pressure on that trigger by pulling backwards. So that's just a factual point that I ask the Court to bear in mind when consider the directions that were given.

Leaving then the facts I propose to touch briefly on, the appellate standard of review and of course this Court knows the miscarriage test and of course with the benefit of much more time and analysis and submissions from more parties, we can debate and analysis how the summing up might have been better, how the paths might have been clearer and of course that's an important part of the role of an appellate court to do and this Court in particular.

WINKELMANN CJ:

I'm glad to hear it.

MS JOHNSTON:

But of course the ultimate standard is whether a miscarriage of justice resulted and we have spent some time in written submissions addressing and yes, we have lots of footnotes to cases there and yes, those are general principles that may apply differently in different circumstances, but I think it's important to remember the standard that we're measuring the summing up against, not was this the most perfect summing up in the world, but did the summing up enable a fair trial, did it fairly present both sides, did it accurately address the legal elements and in doing so, did it remind the jury of the competing cases, and the decisions here talk about giving matters coherence for the jury or giving them an agenda for their discussions.

Another way of putting it might be for the jury to, their attention to be drawn to what is relevant to each element of the offence, which facts are relevant to this decision we need to make and there are, of course, particular circumstances

where a judge in summing up needs to give a particular warning to a jury and most of that is the evidential warnings that this Court has obviously considered in lots of other cases. But situations where there is a particular need for the Judge to direct because there is a risk that the jury might go awry. There is a risk that the jury might reach a prejudicial decision. There is a risk that the jury might decide on an erroneous basis.

The summing up also, of course, needs to keep close to the statutory language and keep close to the facts at hand and it needs to be understandable. It should avoid legalese. It's one thing for we as lawyers all here, lawyers and judges to be in this room and thinking about the exact terms of whether accident negates intent or relates to the absence of intent. The key point is that it needs to be understandable for everyday New Zealanders and it also importantly needs to, and I apologise if this seems trite, but it needs to respect the jury's role as a fact-finder. It should be sufficient for a jury's attention to be drawn to this is what the legal test is, this is what the facts are. It should be an exceptional case that the Judge needs to take a third step and say: "And this is the way you should decide this." That's the jury's role and it is only an exceptional case where there really needs to be some direction to the jury that no, you can't find this proved for whatever reason because most of the time it should be left to the jury to decide on all the elements.

So having rushed through those general matters, I propose to go to really the adequacy of the first part of the question trail and this is what…

WINKELMANN CJ:

So you started off by saying there were two grounds of appeal but I think you didn't give us your formulation of them, so you are now taking us to the first ground of appeal, are you?

MS JOHNSTON:

Yes, and my characterisation, and the Crown's in a little bit of a difficult position given the appellant's written submissions didn't thresh this out quite in the way that has been done today, but as I understand it really the concern here is

whether that first step in the question trail, so if we can go to case on appeal 280, which is really the substantial and operative cause of death question, so the headline point here for the Crown is that those directions were sufficient to ensure that the jury fairly considered the defence case that the gun went off as a result of Mr Kana pulling it. Now whether we view this as a voluntariness issue or a causation issue seems to be a matter for some debate. If it is a voluntariness issue, the first point is that it's a very limited voluntariness issue. The only involuntary point here is the point at which Mr Kana pulls on the gun. All of the other actions were, of course, perfectly voluntary. So this is where I would submit that a causation analysis is more helpful because that enables, and this is really how it was run by defence at trial, I think, enables the jury to consider that action of Mr Kana as a break in the chain of causation, a novus actus interveniens, and those directions were in the summing up at – I think 97 is the critical point.

WINKELMANN CJ:

So the Judge directed it as a causation issue?

MS JOHNSTON:

That's my submission, that really there's been some reference of the struggle narrative being relevant to the unlawful act but in my submission it's point 1, it's is this a killing? Is this a homicide? That's where causation has mattered. Did Ms Kaitai's actions cause death? Was this one human being killing another, definition of homicide, and so that's really where the focus of the causation voluntariness point should be in my submission and that direction and that first question in the question trail was, well, did she do something which was a substantial and operative cause of death encapsulates that together with the possibility that was left for the jury here at paragraph 97 that Mr Kana's actions could break the chain of causation on the basis that it was an intervening and unanticipated event.

Now pausing there, in terms of causation directions, and this is in my written submissions, but part of our response here is those causation directions were very favourable to Ms Kaitai. Usually an intervening cause of death or

intervening cause should be independent of what's occurred before and not constrained by –

WINKELMANN CJ:

Well, will be, I suppose. Not "should be" but "will be".

MS JOHNSTON:

Must be to be an intervening cause of death. Hypotheticals aren't perhaps helpful and perhaps I'll get trapped by going into them but an independent intervening cause is something like a lightning bolt, something like someone else coming in and shooting him, something like her dropping the firearm, Mr Kana then picking it up and him being the one to shoot himself, him actually grabbing the firearm and taking it and then deliberately shooting himself. That would be perhaps an independent cause of death, not –

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WINKELMANN CJ:

So that's to frame it quite differently to how it's been framed for us now which is, as I've said, accidental, careless accident/non-careless accident, so it kind of eliminates – it conflates – well, it eliminates the careless accident point which is – sorry, non-careless accident. The appellant now says and I don't know if – I ask you to help us as to whether they said it at trial clearly that if it was a non-careless accident, which is the scenario based on Mr Mihaere's evidence of the gun lifted and struggled down and brought down between them, if it's a non-careless accident then not guilty of manslaughter. Was that run at trial?

MS JOHNSTON:

I don't think so and I struggle to, I mean my learned friend can provide us with the references, but I don't understand where a non-careless accident comes from where here we have somebody with a loaded firearm and one of the reasons why, as a matter of principle, that's a criminal offence to present a firearm, so that's inherently dangerous and someone presenting a firearm at close range is always taking the risk that something is going to happen to set that off. It's difficult to see how what I would submit is a reasonable, reasonably

anticipated possibility of someone grabbing that firearm takes away the carelessness that occurred before. Perhaps I'm misunderstanding the point.

WINKELMANN CJ:

No, that's your point is that was really, whether, whichever scenario the Crown's case was on, either scenario it was a careless accident so the critical issue, first issue, is the one, so the Judge formulated as causation and that was the right way to formulate it?

MS JOHNSTON:

Yes and the Judge has said, you know did she do something and maybe that could have been split up in the question trail and did she (a) wilfully pull the trigger, follow one path, or if you can't exclude the reasonable possibility that the gun discharged as a result of the struggle, then go down another path. But either way you have an unlawful act that is a careless use of the firearm. So the separating out doesn't, might have been, I acknowledge, more straight forward for the jury but it doesn't mean that the jury was led to any legal error because either way they were invited to consider causation, whether there was an intervening act, whether it was an unlawful act and then invited to go on and consider murder, which I will leave, murderous intent, which I will leave to one side for the moment.

WINKELMANN CJ:

I suppose it's just very different to how it's been put to us now. It seems to me different to how it's been put to us now. This is a different formulation and Ms Epati has said in response to Justice Miller's question it didn't have anything to do with causation but is a causation direction.

MS JOHNSTON:

That's how I characterise it.

WINKELMANN CJ:

It seems to be a causation actually.

MS JOHNSTON:

Yes, I think it is.

WINKELMANN CJ:

Substantial and operative cause.

MS JOHNSTON:

I've just lost my train of thought, but there was another point I wanted to make there.

GLAZEBROOK J:

It will come to you later.

MS JOHNSTON:

Perhaps if I move on.

WINKELMANN CJ:

This appeal, yes, this appeal.

WILLIAMS J:

Yes, much later, probably tomorrow.

GLAZEBROOK J:

Hopefully not, hopefully not in bed at night or whatever.

WINKELMANN CJ:

Can I just say Ms Johnston, everyone has been struggling with losing their train of thought in this case because it's quite, it's very, these are difficult issues.

MS JOHNSTON:

Yes and I tried a lot with diagrams.

WINKELMANN CJ:

So take a moment to regather your thoughts should you wish.

MS JOHNSTON:

I mean part of what I'm tossing up is whether it's helpful for me to take the Court to some of the principles of causation that we've put in our bundle because as a matter of principle standing back, on any case the reason Mr Kana put his hands on that firearm was because it was presented towards him originally.

MILLER J:

From my part I would like to have you do that. It seems to me it's quite important for us to decide whether it's properly characterised as a voluntariness or a causation case.

MS JOHNSTON:

Thank you. So if we go I think to 259 of our bundle and I acknowledge what I've done here is I've put the textbook Simester and Brookbanks here. If nothing else, this will show the law students the importance of the textbooks that they are asked to read and that sometimes we do go to them.

WINKELMANN CJ:

And Simester is the leading textbook.

MS JOHNSTON:

So if we do this as a causation issue, the question is whether Mr Kana's acts that I characterise as in response to the situation he has been placed in by Ms Kaitai, leaving aside obviously self-defence for the moment, these are the applicable principles to intervening causes, and so the first principle is that for something to be an effective intervening cause it needs to be free, deliberate and informed, and this *Regina v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 AC 269 case here is one that I think was relied upon by trial counsel for Ms Kaitai when there was that request for a direction that if the immediate cause of death was the victim then that should result in an acquittal, and that was based on this case law which is a case of someone voluntarily ingesting drugs, having been – I'll go back to my notes – where the victim voluntarily injected heroin and the person who gave them the heroin was convicted of manslaughter, and the House of Lords overturned that conviction on the basis that that ingestion

of heroin was the free, deliberate and informed actions of the victim, and that really, stepping back and viewing it from a principles point of view, is really a recognition of the free will of the person ingesting – of the victim, because that victim has made that free, informed voluntary choice which is a profoundly different situation to that faced by the victim in the present case who was faced with a firearm pointed at him. His response to that cannot be characterised as a free, deliberate and informed act, in my submission.

If we can go to principle 2 – and perhaps before we do that, the other point is that the free and deliberate informed act must be sufficient to absolve the defendant of responsibility for what happened before. So an act won't be free if it's explained by the demands of the situation that a defendant is faced in. So it might be a particular cause but it won't be an independent cause. So another example, and I think it's in this extract somewhere, but at 264 there's the *R v Pagett* (1983) 76 Cr App R 279 (CA) case from the English Court of Appeal and that was that one which again is a bit of a law school example but where a defendant comes out using a hostage as a human shield and fired at police, police return fire, the hostage is killed, and so the question is whether the police actions in shooting back is an intervening cause and it was held that that was not a sufficient intervening cause to absolve the defendant of responsibility from what happened because the consequence that police would return fire was reasonably foreseeable when you're going out using somebody as a human shield in that sort of situation. So the act by the police in response to the situation created by the defendant is not sufficiently free to usurp the defendant's causal responsibility from –

WINKELMANN CJ:

So in this case you would say the fact the gun was presented, it was a foreseeable, reasonably foreseeable, consequence that there would be a struggle?

MS JOHNSTON:

Yes, and at close range is –

WINKELMANN CJ:

Yes, close range struggle and that the gun would go off?

MS JOHNSTON:

Yes. So perhaps moving then to principle 3 –

WILLIAMS J:

You were talking about principle 2 there when you just talked about the human shield?

MS JOHNSTON:

I think that was principle 1. Sorry, I'm jumping around.

WINKELMANN CJ:

Yes, and then you were taking us to principle 2.

MS JOHNSTON:

Principle 2 talks about –

WILLIAMS J:

Can you just help me with one small thing? In *Pagett* what was the defence? Murder or manslaughter?

MS JOHNSTON:

Good question.

WILLIAMS J:

Okay, perhaps that will come to you tomorrow as well. I can check, don't worry.

MS JOHNSTON:

It may be that we – I think it was murder but I don't want to guess. Perhaps if we just go up one more page it might have the answer.

GLAZEBROOK J:

It sounds a bit like a felony murder, if we can put it in those terms, rather than an intent, an actual intent murder.

WINKELMANN CJ:

Well, it was actions taken to assist at escape in New Zealand terms.

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MS JOHNSTON:

This is going to look like I'm trying to avoid the question but, of course, at this point what we're looking at is whether what happened was a homicide.

WINKELMANN CJ:

Mmm.

MS JOHNSTON:

So in terms of the principle, whether it was a murder or manslaughter or some complicated other country's way of framing it, the real question is whether we're at homicide at all at this point.

WINKELMANN CJ:

Yes, yes.

MS JOHNSTON:

So that's my attempt to avoid a question I didn't know the answer to.

WILLIAMS J:

Then you probably shouldn't have confessed to that. You've lost the entire advantage you were trying to achieve.

MS JOHNSTON:

I've lost all credibility now.

WINKELMANN CJ:

No, you've gained the advantage of honesty.

MS JOHNSTON:

So principle 2 talks about other human interventions. If a third party makes a mistake that contributes that's not free and deliberate and informed it will only be a novus actus interveniens if the occurrence was independent of the wrongdoing.

WINKELMANN CJ:

So that's a third party?

MS JOHNSTON:

And in a sense the same point. Yes, and if it's not reasonably foreseeable so it overlaps somewhat with principle 1. So we can go then to principle 3 which is important in my submission because of course we can have more than one cause of death. So even if we have an intervention on causation principles that was independent and unforeseeable, it will be no more than a concurrent cause if the defendant's contribution is still playing a direct contributory role at the time the harm occurs.

MILLER J:

So at what point in the sequence of events would these principles mean that Ms Kaitai is caught? Is it the point where she brings the gun to the garage, is that, is it as early as that, or is it when she loads it and threatens him?

MS JOHNSTON:

Like Justice Muir, I would invite the Court to not take an overly refined analysis and to view the act as a whole. The ultimate question of course is that at the moment the gun discharged was that, had that unlawful act been completed? Well, I can't go to unlawful act can I because I'm at homicide. So at that moment had she done sufficient to be, to have caused death to be a substantial and operative cause of death. So I invite the Court to look at the conduct as a whole and then really the question is when you're looking at Mr Kana's acts as a break in the chain of causation, is what he did sufficient to take away all what she had done previously?

GLAZEBROOK J:

Well of course it couldn't cause death if it wasn't loaded, so I suppose that might be the answer to, the practical answer to Justice Miller's question.

MILLER J:

It might be at the point where she takes the gun out from under her jacket and loads it perhaps. I appreciate that one isn't breaking it down completely, but in terms of this question of if you like one's moral responsibility for what's happened, I was just interested in where you would say she can't excuse herself by relying on his act.

MS JOHNSTON:

And I think all I can say to that is all of her actions must be taken into account starting from walking into the property carrying a firearm.

WILLIAMS J:

The trouble is it's hard to say that was enough all by itself.

MS JOHNSTON:

Of course, yes.

WILLIAMS J:

And so there is always going to be a question of proximity.

MS JOHNSTON:

Yes and a matter of degree.

WILLIAMS J:

Exactly.

MS JOHNSTON:

So then the next point you need to crystalise is at that point when she's presented the firearm pointing at him.

WILLIAMS J:

Right.

MS JOHNSTON:

And then he tries to grab it and she pulls it away so he can't.

WILLIAMS J:

Yes.

MS JOHNSTON:

And then it comes back down.

WILLIAMS J:

So your answer, your answer I presume is one on any test, this one satisfies it?

MS JOHNSTON:

Yes and just finally in terms of the concurrent cause, just to reaffirm the importance of that as a principle or the currency that is a principle, of course there are those examples where, and again it's a bit of a law school example, but the victim is seriously assaulted by the defendant, they go to hospital, the doctors undertake some kind of medical procedure that goes awry for whatever reason, that response fails, the victim dies and that defendant still remains liable for that homicide. It would be a factual issue for the jury to determine whether what the defendant did was still a substantial and operative cause, but it's possible that it is and becomes, the failing by the hospital if you like becomes a concurrent cause. But the fact that the hospital wasn't able to treat the injuries doesn't absolve the responsibility of the defendant for what they did beforehand.

WINKELMANN CJ:

So are you saying that if the matter was put at trial, it was not put in this kind of accident, careless/non-careless way, but it was actually put on the basis of causation and that's how the Judge instructed on and that was correct?

MS JOHNSTON:

Yes and that those directions at paragraph 97 on breaking the chain of causation talked about an intervening and unanticipated event. It didn't talk about it being independent. So there is an argument that the Crown might have made that the causation directions were overly generous because that independence of the act wasn't referred to there. The jury might have been directed that for it to be, for Mr Kana's actions to be an effective intervening unanticipated event, they needed to have been independent of the actions that Ms Kaitai had done or not in response to the situation she was placed in. Now I acknowledge of course that wasn't sought by the Crown at trial, but it might have been and perhaps another analysis is that it's captured in the use of the term "only". So when that direction where the note under issue 1, the issue is whether the Crown has disproved the reasonable possibility that the gun was fired involuntarily by reason only of it being grabbed by Mr Kana. So maybe there's an argument that all of that is wrapped into that "only" somehow.

MILLER J:

We've been worrying about the failure of the Judge to deal with it in a fact-based way where you separate out the two events if you like, or the two things that Ms Kaitai did and it occurs to me that that criticism of the summing up really supposes that we're dealing with a question of voluntariness rather than causation. So as you've been putting it to us, it's really just one sequence of events and responsibility attaches to what Mr Kana did, her responsibility attaches to what he did really at least at the point where she produces the gun and loads it?

MS JOHNSTON:

On the Crown's analysis I think so, yes.

WINKELMANN CJ:

What was that Ms Johnston?

MS JOHNSTON:

On the Crown's analysis, yes.

GLAZEBROOK J:

And are the Canadian, you'll probably come to this, but are the Canadian cases consistent with this?

MS JOHNSTON:

Yes. The Canadian cases don't really touch on this issue. Most of the Canadian cases are focused on the second issue, the directions on mens rea.

GLAZEBROOK J:

No, no, I understand that, but they also do, some of them say something about the actus reus and not necessarily in a causation sense but in that necessarily negates not only mens rea but the actus reus as well and you would say no I presume because it's a causation, it should be a causation analysis, is that?

MS JOHNSTON:

I think *Primeau* talks about the need for accident to be addressed at the actus reus stage I think, if I can put it that way and I don't know that that's materially different from viewing it as a causation issue. So it's really whether or not Ms Kaitai has done, has sufficiently contributed to the actus reus.

GLAZEBROOK J:

So you say that it is a causation issue in fact?

MS JOHNSTON:

Yes.

GLAZEBROOK J:

And a factual causation issue and that the directions on this were certainly adequate and possibly overly generous?

MS JOHNSTON:

Yes. This is where we've done a lot of hypothesising in preparing for this, but obviously there will be some situations where an accident is relevant only to actus reus or causation, if I can lump them together, and other situations where

it will be relevant to mens rea only and here I certainly accept it needed, there needed to be directions at both stages and I say there was direction, was, were directions at both stages because there is this direction at one to be sure that she did something that was the substantial operative cause of death and the need to disprove the reasonable possibility that the gun was fired by reason only of Mr Kana's actions. That's dealing with the actus reus/causation/involuntariness aspect and then there's the directions about mens rea that I will come to afterwards so I can try and keep them apart.

WINKELMANN CJ:

Right, so it's now 1 o'clock Ms Johnston, so how are we going? I think we're going reasonably okay?

MS JOHNSTON:

I think I'm probably half way through.

WINKELMANN CJ:

And is your junior counsel Mr Thompson going to be presenting any submissions?

MS JOHNSTON:

No, I'm failing the practice note on that.

WILLIAMS J:

Mr Thompson looks devastated.

WINKELMANN CJ:

No consequences will flow for you. We will take the adjournment now, and we will be back to 2 o'clock.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.03 PM

MS JOHNSTON:

So in terms of where we're at, I have two final points in relation to what I'm calling the first ground of appeal, and so I'll make those now and then move on to consider the mens rea directions point. If we can just look at paragraph 26 of the Crown's submissions, there's been some consideration of how –

GLAZEBROOK J:

We can hear you but I suspect you may not be – thank you.

MS JOHNSTON:

Sorry. Paragraph 26 of the Crown's submissions which addresses the way in which the defence was put at trial. So there was have an extract from trial counsel's submissions which really demonstrates the way in which the, if I can call it, the struggle narrative was put to the jury by the defence at trial. His death was not the result of an unlawful act, so he's tied causation to unlawful act, and the issue of whether the Crown cannot exclude the reasonable possibility, and he's described that as an intervening event, the pulling –

WINKELMANN CJ:

These are your submissions, are they?

MS JOHNSTON:

These are my submissions, yes, quoting trial counsel for Ms Kaitai.

The second point and final point I'd like to make on the first ground of appeal is really why on a principled basis it makes sense for victims' actions to be only permitted to break the chain of causation in a very limited way. Now the causation directions at paragraph 97 of the summing up was that the jury was told it was possible for the chain of causation to be broken by an intervening and unanticipated event, and the Crown today is saying that those directions

could, should have gone further and described it as an independent act, and that's those causation principles I've taken the Court through and I don't propose to continue on that other than to say that there's a further reason why that makes sense on a broad, principled, standing back, moral culpability point of view for that to be the case, and that's because there's an alternative way the Crown could have run this case. If we were going to separate things out and have two alternative paths, the first primary case would obviously still be intentional discharge of the firearm, but if the secondary case or the taking into account the defence narrative, if you can't exclude the reasonable possibility of the gun discharging as a result of the struggle, then the Crown might have framed the case under section 160. Instead of an unlawful act, which was the Crown's case, 160(2)(a) unlawful act, careless use, the Crown might have used 160(2)(d).

Now I accept that wasn't the way the Crown's case was run but what has happened here if not the victim by fear of violence having done an act which caused his death. So if you accept the proposition that Mr Kana has caused his own death by pulling on the firearm, he has done that because he was fearing violence from that firearm. So I accept that's not a conclusive point but –

WINKELMANN CJ:

I think your point is, to take it perhaps to perhaps a more fundamental point, is that the way the matter is now being run on appeal is different to how it was formulated at trial and if the case had been formulated at trial there would have been an issue for the jury as to whether it was careless on either scenario and that wasn't how it was put to the jury.

MS JOHNSTON:

Yes. It was put to the jury on the basis that the victim's actions intervened and took away the carelessness, if you like.

So just to close out on my point about 160, it's obviously not a conclusive point but to the extent the argument for the appellant, and I'm not altogether sure if

this is the argument, to the extent the argument is that the question trail didn't sufficiently give me a defence to manslaughter they should have had, to the extent the argument is that question 1 deprived me of a complete acquittal, it's relevant for this Court in considering whether or not there was a miscarriage of justice to consider that framed another way under 160(2)(d) there was no defence to manslaughter in my submission.

WINKELMANN CJ:

Your point that the question 1 direction was a little generous is probably on the question trail it might be but the Judge's directions certainly tend to be factually pointing at the need for independence, don't they, the way he indicates that the appellant had brought these circumstances about? You know, she brought the gun, she loaded it, blah, blah, blah…

MS JOHNSTON:

The reference, for example, despite someone loading and pointing a gun.

WINKELMANN CJ:

Mmm.

MS JOHNSTON:

I accept it's there to some extent but I still maintain the position it could have been stronger for the Crown, but there's only so far I can take that given that wasn't asked for by the Crown, of course.

WILLIAMS J:

Have you looked at *McKenna*?

MS JOHNSTON:

Yes.

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WILLIAMS J:

So there's a lot of similarities as you'll know. Stand-over to get the guy's PIN number or something. The person at the door, the standee, grabs the gun according to the narrative and boom, it goes off, and the Judge sums up on the basis of intervening event possibility, as far as I can tell on my quick flick through it meaning that *McKenna* could be acquitted of any homicide and the Supreme Court overturns it saying it distracted the jury from the real issue which was manslaughter-related, not full acquittal-related. It's a little bit like the argument you're running here which is if anything, the Judge was nice to Ms Kaitai, isn't it, and that sort of argument in the Canadian Supreme Court didn't wash, interestingly. Are you with me on this? Not agreeing with me, but understanding what I'm saying?

MS JOHNSTON:

Mostly. It's not the Supreme Court I don't think.

WILLIAMS J:

Sorry, the Court of Appeal of New Brunswick or something, isn't it?

MS JOHNSTON:

Yes. *McKenna* was riddled with problems, including that the Judge directed the jury that the unlawful act was murder.

WILLIAMS J:

Quite.

MS JOHNSTON:

Obviously circular, so there were lots of problems with *McKenna*.

WILLIAMS J:

Quite. But there's a definite narrative in the judgment about this particular issue, isn't there?

MS JOHNSTON:

My memory of *McKenna* is that the Court was concerned that the possibility of a complete acquittal was left open when the appellant wanted to at least be found guilty of manslaughter.

WILLIAMS J:

Well the appellant didn't run it because the appellant's lawyer knew –

MS JOHNSTON:

Right, but, yes.

WILLIAMS J:

– what, you know –

MS JOHNSTON:

Yes.

WILLIAMS J:

– was pretty good according to the Judge who wrote the judgment right, and at paragraph 21: "It might be argued that this error in fact favoured the appellant as it opened the door to an acquittal. I do not agree."

MS JOHNSTON:

Which appellate counsel criticised.

WILLIAMS J:

Yes, yes, quite. "An acquittal to the included offence of manslaughter was not sought and quite frankly was not an option in the circumstances of this case. To allow the jury to dwell on such an issue did nothing but allow them to lose focus on the only real issue."

MS JOHNSTON:

Yes.

WILLIAMS J:

In other words, being acquitted of manslaughter was never available?

MS JOHNSTON:

Yes.

WILLIAMS J:

This was a manslaughter or murder case. Your argument is essentially the same as that argument put in *McKenna*, isn't it, that what the Judge, what the trial Judge directed that you would get a full acquittal of either level was generous and we don't need to worry?

MS JOHNSTON:

My brain is slowly catching up I hope.

WILLIAMS J:

I might have lapsed mine.

MS JOHNSTON:

Unlikely.

WINKELMANN CJ:

It mean it is kind of, I think what Justice Williams is putting to you is effectively what the defence, what the appeal second ground is, that it is confused.

GLAZEBROOK J:

The defence – my understanding is that the argument in front of us is that an acquittal from both manslaughter and murder was available and so I would've thought that question 1 had to be put given what was actually run at trial which was a causation argument, as you say.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Yes, but just to go back to what I was going to say –

WILLIAMS J:

Before you go back to what I asked.

GLAZEBROOK J:

Unlike *McKenna*.

WINKELMANN CJ:

All right, I thought she had answered what you asked.

WILLIAMS J:

Yes, I just didn't get the answer.

WINKELMANN CJ:

Go ahead, Ms Johnston.

MS JOHNSTON:

If I stand here silently maybe somebody else will answer it for me. Maybe if I can just have a moment to remind myself.

WILLIAMS J:

So is this like *McKenna* is my question in which the prospect of there being a true intervening cause, whatever the arguments were, was never really available and the Judge had to be very clear about manslaughter and he wasn't. the Crown was, ironically, but the Judge wasn't.

MS JOHNSTON:

That point I can come back, that specific point I'm hoping I can come back to because it –

WINKELMANN CJ:

It is kind of a second ground of appeal.

MS JOHNSTON:

Yes. I'm trying to keep them separate.

WILLIAMS J:

Okay.

MS JOHNSTON:

The first –

WINKELMANN CJ:

Which was what I was going to say.

MS JOHNSTON:

What's relevant to the first ground, here there was a clear direction at question 1 that they needed to consider whether her actions were a substantial, were a substantial cause of death and whether the Crown has excluded the reasonable possibility of the alternative and that's I think what was missing in *McKenna*, isn't it, that directions, that direction that enables an acquittal for –

WINKELMANN CJ:

In any case we don't really have to decide the case in *McKenna*, so I –

MS JOHNSTON:

You're saving me.

WILLIAMS J:

You were doing rather well.

WINKELMANN CJ:

Were you onto your second ground? The second ground, not your second ground.

MS JOHNSTON:

I'm still grasping at trying to answer Justice Williams' question, to be honest, but…

WINKELMANN CJ:

I'm just conscious of the time.

MS JOHNSTON:

Yes.

WILLIAMS J:

Yes, it may be that just these two, these cases are more different than is apparent on a superficial read. I'm happy to retire on that basis.

MS JOHNSTON:

Okay, I'll give up there. I'll take the hint and give up there and move on to the direction on murderous intent. Now the most likely scenario, given the jury got to the result that it did, is that the jury accepted the Crown's primary case because they've said "yes" to murderous intent. So the question though for this Court is has the possibility that that isn't the way things went been adequately covered here. To put it another way, has the possibility that the jury moved on from question 1 – and I'll go back to question 1 – on the basis of a reasonable possibility of the struggle narrative? So is it possible, and I think I have to accept some limited possibility that the jury have looked at question 1 – are you sure her actions or that she did something which was a substantial and operative cause of death – that there is some possibility that the jury said: "I'm not sure whether the Crown's primary case of a wilful pulling of the trigger happened. There's a reasonable possibility that this struggle happened. I'm nevertheless still satisfied that her actions were a substantial and operative cause of death so I'm going to move on the question trail," and that's the point at which the Crown had said if you're at that point you shouldn't convict of murder, you should convict of manslaughter, and the Crown made that clear concession of that. So the concern is whether the jury adequately understood –

WINKELMANN CJ:

So the question is whether when they – there still remains factually possible some accident which is a substantial and operative cause of death and that whether –

GLAZEBROOK J:

No, her other actions would be a substantial and operative despite the pulling of the trigger being an accident.

WINKELMANN CJ:

No, when the Judge gets – when the jury is thinking about the third point he has to allow the possibility the jury has not excluded in their minds the possibility it's an accident if an operative and substantial cause of death.

MS JOHNSTON:

Yes. I mean I wouldn't use the word "accident" myself. I'd prefer Justice Glazebrook's formulation of it, but yes, I think we –

WINKELMANN CJ:

What is that formulation of it?

GLAZEBROOK J:

I've forgotten now.

MS JOHNSTON:

That her other actions were sufficient.

GLAZEBROOK J:

Yes, it's that her other actions that were a substantial and operative cause of death despite the trigger having been pulled by Mr Kana's actions.

WINKELMANN CJ:

Yes, but it's still an accident defence. At the end, they haven't excluded the reasonable possibility there was an accident. If the jury thinks, well, it might be an accident, they have to have the assistance that that would negate the intent.

MS JOHNSTON:

Yes, but I'm deliberately trying to avoid the use of the term "accident" because it is one of those terms that's ambiguous, means different things to different people. It's not – and I know that some of the Canadian cases talked about a

defence of accident but it's only in Australia where there is a specific statutory defence of accident. To the extent in Canada or New Zealand there's a defence of accident –

WINKELMANN CJ:

It was the struggle that caused the gun to go off.

MS JOHNSTON:

Yes, also a defence of accident might mean "I didn't have the required mens rea" and so that's the second ground of appeal and it's not on my formulation a defence of accident, it's a denial of the Crown having proved that element of the offence.

WINKELMANN CJ:

The mens rea?

MS JOHNSTON:

Yes, and I know that's a technical difference but I think it's an important one and because in some of the Canadian cases where they have talked about defence of accident the trial Judges have gotten themselves into problems with the burden of proof by calling it a defence of accident and the jury being misled into thinking that's something the defence have to prove –

WINKELMANN CJ:

Yes. All I'm really putting to you, without the need, and I understand the point about why it's important, but once it's ground 1 saying: "Yes, we've excluded that," does not exclude a narrative, a factual narrative, which negates intent. They're not – yes.

MS JOHNSTON:

It's still possible the jury –

WINKELMANN CJ:

It's still possible. It was a live issue by the time they got to that point and they needed to be assisted about it.

MS JOHNSTON:

Yes, and the headline point for the Crown is that the jury were sufficiently assisted by really two things happening: one, the jury being accurately told what the elements of the offence were and, two, the Judge reminding them of what the respective cases were.

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Now I wonder if I can go through here the summing up in a little bit of detail. If we can start at paragraph 84 of the summing up, case on appeal 247 and some of this I hope will respond to points being made. So at paragraph 84, that's when the Judge has introduced the three elements of in proving the charge of murder and that the third element is murderous intent: "You will only get to consider that issue if you have found his death was a culpable or blameworthy homicide." So unlawful act and rejected self-defence.

Then if we go to 85, that's where the murderous intent by way of recklessness is introduced and the burden on the Crown to prove that. Then if we go to paragraph 127, so the Judge has then –

WINKELMANN CJ:

It's a pretty hard direction.

GLAZEBROOK J:

It would be quite good to have the question trail as well given it's tied into the question trail, or do you want to deal with the question trail separately?

MS JOHNSTON:

The question trail on intent?

WINKELMANN CJ:

Well if you can take us back to 85 because my eyes were –

GLAZEBROOK J:

It's just that 86 then takes a –

WINKELMANN CJ:

I was rather surprised about 85. It seems like a lot, so, but I assume they had the question trail to help them, so –

MS JOHNSTON:

Yes. So in terms of the structure, this is where the Judge has introduced the elements and then he's gone through the question trail in more detail.

WINKELMANN CJ:

Yes.

MS JOHNSTON:

So this is the introduction and I'm just taking the Court there to be clear that the Judge has made it clear you need murderous intent to get, to transform manslaughter into murder. So this is the introduction and then at 86 it is just saying we're going to go into more detail on each element and then that's when the Judge goes through issue 1.

So if we go to 89, or 88 and 89, that's question 1 of the question trail. That's what I'm calling the first ground of appeal and then, all right, I'm not going too fast, if I can then skip over that because I'm trying to move on from to intent is to then go all the way to 127 which is where the Judge comes back to intent and I'm not sure we have the technological capacity to show –

GLAZEBROOK J:

No, I think that's the problem.

MS JOHNSTON:

It isn't the question trail, but the question trail is at paragraph 77 of our submissions, if that helps. So there's a reminder at 127 that we're only getting there if we have satisfied unlawful act and rejected self-defence.

MILLER J:

The question trail actually focuses on the shooting: "Are you sure that when Ms Kaitai shot Mr Kana." So he's confining this direction to the first scenario presumably in light of the Crown's concession that it is manslaughter if we're in the second.

MS JOHNSTON:

Presumably, yes. So then the Judge has gone through the detail of the three steps of reckless homicide which there is no criticism of beyond whether accident has been highlighted here. So the critical paragraph then is 136 and this is where my learned friend focuses the criticisms, or this is the portion of the summing up that is said to have been inadequate. Now here the Judge has highlighted the defence contention that it is an unintentional act: "Even if you decide, if you nevertheless thought it was a reasonable possibility that the gun went off as a result of him pulling the barrel towards him, then that would clearly be an issue relevant to whether, at the time the gun discharged, she intended to cause bodily injury."

Now it's said on behalf of the appellant that more needed to be said, that the jury needed an explanation of what that meant, that the jury when asked to consider intent needed further explanation of what the relevance of an unintentional act is. Now if it was put perhaps on the basis of "accident", and that's how it's framed in some of those Canadian cases, and that the jury needed to be told that an accident is relevant to intent.

WINKELMANN CJ:

So what does he mean when he says: "So, you have to come back to consider those issues again"?

MS JOHNSTON:

The issue of whether the struggle narrative, if I can call it that, was a reasonable possibility. So that's an invitation, in my submission, for the jury to be considering the possibility of accident again. It's not called an accident. It's called an unintentional act which is the way it was framed by trial counsel. So it said that jury needed to be told how it was relevant.

GLAZEBROOK J:

How was it relevant? I mean it's not very useful, is it, to say it's relevant without explaining how or why or how you consider that? And I'm not sure that putting the actual cases helped very much on that.

WINKELMANN CJ:

Well, I think you're going to come on to that next bit, are you, Ms Johnston?

MS JOHNSTON:

Putting…

WINKELMANN CJ:

His summary of the case is the next leg of your argument, isn't it? The Judge's summary of the parties' cases.

MS JOHNSTON:

Yes. In terms of the question of the jury needing to be told how it was relevant, there might be some question in the jury's mind when – if the way the defence case was put was it's an accident, perhaps the jury need to be told that something accidental is unintentional but the jury were told the defence was this was unintentional and the difficulty I have is seeing why a common sense jury needed further explanation.

WINKELMANN CJ:

Well, perhaps it's because of the questions that they were being asked to answer. I mean how would they know how to deal with those questions in relation to that because they're being asked –

GLAZEBROOK J:

And timing is probably the main issue here.

WINKELMANN CJ:

They're being asked particular questions, so perhaps if you relate to the questions they're being asked.

MS JOHNSTON:

Issue 3, intent, question 1: are you sure that when she shot Mr Kana: (a) Ms Kaitai intended to cause bodily injury? So they're being asked intent at stage 1, intent to injure, and my –

GLAZEBROOK J:

Although there's an assumption in the question that she shot him rather than that Mr Kana – or the struggle shot him, if that is a better way of putting it.

MS JOHNSTON:

And that might have been a better way of putting it.

WINKELMANN CJ:

And then it's also relevant to (b), isn't it, because if she's shooting – she's not intending – if she's not pulling the trigger, that's a – bear in mind whether that means – how does it bear on that point?

MS JOHNSTON:

I'm not sure you're getting there. If you're accepting that she didn't intend to injure him, you're stopping at (a) and you don't need to consider recklessness.

GLAZEBROOK J:

But if she did pull the trigger she was clearly intending to do all of those things. If she didn't pull the trigger, I think there's still possibly a possibility – I mean if she was going to pull the trigger two seconds after the trigger got pulled for her then maybe at the time the trigger was pulled for her she had all of these, but it's not obvious that's the case, is it?

MS JOHNSTON:

No, and obviously the Crown didn't invite a verdict on that basis.

GLAZEBROOK J:

No, exactly.

MS JOHNSTON:

Yes.

ELLEN FRANCE J:

The appellant puts it the same way, don't they, in their revised draft in terms of intent?

WINKELMANN CJ:

Yes, I don't think there's anything wrong with the questions. It's just how the accident, and I'm going to use that word because I think we all know what I mean, relates to that. So the case against you is that the Judge sort of said: "And, of course, if you've got a reasonable doubt that she didn't intend to pull the trigger, that it was pulled as a consequence of the struggle, then that would negate the intent," which is set out at 1(a), issue 3.1(a).

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MS JOHNSTON:

Yes. In my primary submission, I guess I'm repeating myself, is that it's obvious enough for the jury to see the relevance of unintent to intent, if I can put it like that. But the use of the word "negate", I wonder if I can touch on that because in my submission negate is simply the wrong term. If somebody didn't intend – did something accidentally and didn't intend it –

WINKELMANN CJ:

They didn't have it.

MS JOHNSTON:

They didn't have it so there's nothing to negate.

WINKELMANN CJ:

Well I don't, again I think that won't take us all that far that argument, will it? I mean your point is well made, but is it significant?

MS JOHNSTON:

It's significant in the sense that we're talking about directions that should make sense for a jury and when we're adding words like "accident relates to the absence of intent" and "accident negates intent", in my submission, that's making the summing up less accessible for a jury than simply saying she said she didn't intend it, she said it was unintentional discharge and that is obviously relevant to whether she intended it.

WILLIAMS J:

If you, if you think that's a reasonable possibility, this is manslaughter, is what he should have said.

MS JOHNSTON:

And in a sense 138 –

WILLIAMS J:

Even the Crown said that.

MS JOHNSTON:

But the Crown said, and perhaps the Judge could have repeated that in more strong terms, but it is in 138 to some extent is a summary of the Crown case on intent. The Crown say it was a reckless murder. If you don't accept that, he says it's nevertheless the unlawful act of careless use and she is at a minimum guilty of manslaughter. So I take the point that that's not an exact repetition of the concession but it's still making very clear to the jury that if you're on the careless path, the Crown says manslaughter and perhaps…

WINKELMANN CJ:

It's not as clear as the Crown said it though, is it?

MS JOHNSTON:

No.

WILLIAMS J:

It's also not really a concession. It's, I mean of course it's a concession, but it's a concession that's required because that's the law. There's no doubt about that.

WINKELMANN CJ:

Possibly.

MS JOHNSTON:

Unless we take Justice Glazebrook's hypothetical of –

WINKELMANN CJ:

Which we're not going to.

GLAZEBROOK J:

Which was not put, so…

MS JOHNSTON:

Yes. But, so that's the only caveat I have to that. So I think we were around to that the Judge might have said more and what the Judge would have been doing if he would be saying more is: "Logically, ladies and gentlemen of the jury, if you have decided this is careless and without –

WILLIAMS J:

Reckless intent.

MS JOHNSTON:

Yes, but we're not there yet, are we. So you've decided it's a culpable homicide on the basis of carelessness alone, and you're –

WINKELMANN CJ:

I mean wouldn't it be better if he actually related the facts if you decided the gun, she didn't pull the trigger, the gun went off in the course of the struggle?

MS JOHNSTON:

Yes. Okay, so if the jury have accepted that narrative and you're here, then as a matter of logic, ladies and gentlemen of the jury, you're obviously not going to find that intent is proved here. So the Judge might have gone on to do that. But, the issue for this Court is was the Judge required to in order to ensure a fair trial and, in my submission, by going that step further the Judge is telling the jury what to decide. The Judge is essentially taking that element of the offence out of the jury's consideration.

WINKELMANN CJ:

I can't see how that is.

WILLIAMS J:

That's not right.

GLAZEBROOK J:

No, I don't think so because surely the way this is put is if the jury excludes the struggle –

WINKELMANN CJ:

As a reasonable possibility.

GLAZEBROOK J:

– and accepts, as a reasonable possibility, and accepts the Crown position that there wasn't a struggle and she pulled the trigger, then intent, they still have to consider intent.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

But it would be relatively difficult to argue that it wasn't there.

MS JOHNSTON:

But it's still taking away from the jury, if they accepted the alternative factual scenario of the struggle, or didn't exclude the reasonable possibility of the struggle, it's still telling the jury that they may have to decide no intent, which, look, is legally where we're at, but still a factual issue for the jury to determine.

WILLIAMS J:

But isn't that what, because you're not saying you must determine the facts this way, you're saying judges do this all the time. If you find that the defendant intended to stab the victim in the heart, you will find the defendant guilty of murder. Every judge says that, right? You're not constraining the jury, you're giving them, you're asking them to calibrate their factual findings against the law and that's really all this is doing.

MS JOHNSTON:

But also in a case where the defence haven't raised any narrative of consent by a complainant, we still need to put that element of the offence and leave it to the jury to decide. *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 right?

WILLIAMS J:

Yes, exactly. I was the one overturned in it. But that doesn't really get you to the point I'm making because all the Judge is saying is if you come to this view of the facts then the correct verdict is manslaughter.

MS JOHNSTON:

Yes.

WILLIAMS J:

Because it's unquestionable. That's helpful.

MS JOHNSTON:

Yes and I think all I can say is that that wasn't necessary to ensure a fair trial.

WILLIAMS J:

Right, I understand that.

WINKELMANN CJ:

And you say that when you look at 85, 127 and 138 today together, it's obvious enough for the jury that if you are on the accident path, using it in a sense, meticulous sense, the Crown accepts it's manslaughter?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

See it is manslaughter.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

And that's really your answer to the second ground?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

And it's for us as to whether we think you are right?

MS JOHNSTON:

Indeed. I think the only remaining points left in my notes are about the over-complication of using the term accident relates to the absence of intent just, given that accident is really only capable of working in one way, if accident is relevant to intent, the jury don't need to be told it's relevant to the absence of intent, because an accident can only really take away intent, it can't enhance

intent. So it's a redundant word to say it relates to the absence of intent. Simply relevant. I appreciate the various Canadian courts are against me on that, but in terms of those Canadian cases, they are all cases where very little or almost nothing is said about accident at the mens rea, at the time when the mens rea directions are given. So the suggested wording that's used in the Canadian cases and my learned friends invite this Court to adopt, that suggested wording itself wasn't intensively considered by those cases because those are cases where basically nothing was said and then the judges have said, the appellate courts have said there should be a direction that accident relates to the absence of intent. That exact formulation itself hasn't been debated. What the cases are really saying in my submission is that there just needs to be a linking and the words here that that is relevant or are considered again are sufficient link.

GLAZEBROOK J:

So is the submission that it's clear enough from the whole of the direction that if they don't think she deliberately pulled the trigger, it's manslaughter?

MS JOHNSTON:

Yes.

GLAZEBROOK J:

Because it doesn't say that.

MS JOHNSTON:

It doesn't say that, but it says the jury need to consider whether she intended to cause him injury and the jury's attention is drawn to the fact that she says: "I didn't intend to discharge the firearm at all." And so if that's accepted, then the answer to –

GLAZEBROOK J:

But she might have intended to discharge the firearm. I mean the jury could think she intended to discharge the firearm and she was just gazumped.

MS JOHNSTON:

Well –

GLAZEBROOK J:

Which wasn't the Crown case.

MS JOHNSTON:

I mean they weren't invited to, by the Crown to reach that view, so it's –

GLAZEBROOK J:

Because it's not very clear, well to me it's not terribly clear it's relevant to intent. There's been two scenarios put but no help on what you do as a juror if you come to one view or the other.

WINKELMANN CJ:

About the two scenarios – oh, sorry, just answer Justice Glazebrook first.

MS JOHNSTON:

I'm probably getting to that point where I'm just repeating myself and it's not working. But the jury –

WILLIAMS J:

It may be working.

MS JOHNSTON:

The jury are asked to consider did she intend and if you accept her case: "I did not intend, it was unintentional," the end.

WINKELMANN CJ:

So the question I was going to ask you, we've heard a lot about the two scenarios, you know, the lift, about whether the gun was grabbed up here and dragged down, but was that much of an issue in the, did that feature, did those two scenarios and their legal consequences feature much in the closing addresses of counsel?

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MS JOHNSTON:

Yes. The scenario – the difference between the pulling down and the pulling towards?

WINKELMANN CJ:

Yes.

MS JOHNSTON:

No. No, that was news to me today that there's a distinction there.

WINKELMANN CJ:

Because I was struggling to relate the summing up to the appellant's case, so, and –

WILLIAMS J:

The debate at trial –

WINKELMANN CJ:

– and you said really that wasn't debate at trial, which was the two scenarios being very significant to how the defence is played out.

MS JOHNSTON:

The two struggle scenarios. No.

WILLIAMS J:

The debate at trial was whether the barrel was grabbed high or low, was it not?

MS JOHNSTON:

Yes, and the –

WILLIAMS J:

The Crown saying it was low, the defence saying it was high –

GLAZEBROOK J:

Well, that's the two scenarios though.

MS JOHNSTON:

Yes, and – yes, high.

WILLIAMS J:

– on the basis of Jerry Lee Lewis's…

MS JOHNSTON:

High and bringing down, yes.

WILLIAMS J:

That's what I mean.

WINKELMANN CJ:

Well, my point is that in a way the case we've heard from the appellants today bear little relationship to the case as summed up by the Judge to the jury and we've heard that because Ms Epati says, look, it's not causation, it's – I can't remember what she now said. Anyway, she eschews causation, and you say no, it is causation and it was causation that was put to the jury on that basis.

MS JOHNSTON:

Yes. I mean I guess –

WINKELMANN CJ:

Sorry, it's not causation. It's really carelessness because the defence was up here, he brings it down, therefore it's not careless so it's complete acquittal.

MS JOHNSTON:

Yes, I guess the difficulty I have with that scenario is standing holding a loaded firearm at close range pointing to the ceiling is still careless.

WINKELMANN CJ:

I know the difficulty you have with the scenario but I mean in terms of the facts and the law even as to whether it's careless, but what I'm trying to get to is whether those two scenarios were contested in that legal way, as has been articulated today.

MS JOHNSTON:

I don't understand them to have been articulated in that way at trial and part of the difficulty I have is they weren't articulated in this way in a way that I understood in the appellant's written submissions so that's why I'm –

WINKELMANN CJ:

Yes, and you've taken us to your paragraph 26, yes.

MS JOHNSTON:

And that's – yes.

GLAZEBROOK J:

Well, they do seem to have been though, don't they? From what you're looking at in paragraph 26 they say no causation so acquittal and then the second one is no intent, all predicated on the gu – she didn't fire the gun. The gun fired in the struggle.

WINKELMANN CJ:

But that's different to how it's now been articulated by the appellants today, I think.

GLAZEBROOK J:

Well, no, I'd understood.

WINKELMANN CJ:

Well, we'll hear Ms Epati in reply.

GLAZEBROOK J:

Well, I think it's been articulated today that the causation took away the concentration on intent that should have been there.

WINKELMANN CJ:

Which is the point that I think Justice Williams was raising in relation to the case, Mc something or other, whether the –

WILLIAMS J:

McKenna.

WINKELMANN CJ:

– *McKenna*, whether the focus on one defence led to some smudginess around the critical defence. It's not a technical term, smudginess.

GLAZEBROOK J:

Although causation was specifically put in this case as against, I understand, *McKenna*.

MS JOHNSTON:

Yes, I guess we're –

GLAZEBROOK J:

And so it's difficult to say that you have to ignore what has been put as a defence, I think, and not direct on it. I mean if the defence says there's no causation then it's very difficult to say, well, I don't need to direct on the causation or it might be unfair for me to do so because the jury is then left saying, well, what about causation.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

We've probably stumped you, Ms Johnston, with our confusing questions.

MS JOHNSTON:

I mean I guess what I haven't understood is quite on what basis the case has been put today for the appellant. There seems to be some distinction drawn between whether it was simply a pulling towards him or pull down and I'm not sure, for my part, I see why that makes a difference to the directions that were given. It's still someone carelessly holding a firearm presenting at somebody and things happen and anything that happens, in my submission, is happening

as a result of what she has done. I'm not, I don't understand from what's been said today why, where the distinction is there.

WINKELMANN CJ:

And what Ms Epati has said is that their argument is that it's not careless. If she has got the gun up here, and he wrestles it down into the position that results in him being shot, that's not careless, and I know what you say about that.

MS JOHNSTON:

Yes, and I guess all I can say in addition to that is that the jury is still invited to consider whether it was an unlawful act, careless use and so to the extent –

WILLIAMS J:

It's the intervening event though, isn't it? The idea that he pulled down and then struggled with it, you pull it towards you, towards your chest and struggle with it, it's on you, that's the intervening event.

MS JOHNSTON:

Right.

WILLIAMS J:

And you know, I mean whether that is, as Ms Epati said, it wasn't their best argument, but that's the way she articulated it.

MILLER J:

It seems to me that in 136 the confusion is that the Judge has gone back to an issue which by this stage of their deliberations the jury have already passed. We're only at question 3, intent, and at the point where the jury has found that she pulled the trigger.

MS JOHNSTON:

I think on the appellant's argument there's a possibility that the jury was at 136, having not excluded the reasonable possibility of him not pulling the trigger, and so it's that scenario.

MILLER J:

So they say, but it seems to me that the, just reading the question trail, although the Judge hasn't laid this out clearly, it's a sequential thing.

MS JOHNSTON:

Yes.

MILLER J:

The background is that the Crown has conceded that if we're in the second scenario it is manslaughter. Murderous intent isn't even relevant.

MS JOHNSTON:

And that's perhaps something the Crown could rely on if the Court gets to consider whether there was a miscarriage given the, in my submission, unlikelihood that the jury would have got to paragraph 136, or that point in the question trail, if they were not sure the trigger was pulled deliberately.

GLAZEBROOK J:

Under question 1 they could certainly have come to that view. They could have come to the view that even though the trigger was pulled in the struggle, what she had done up to that point was a real operative and substantial or whatever cause.

MS JOHNSTON:

Would they not though have –

GLAZEBROOK J:

Because it was left, that was definitely left open for them to decide under question 1. Whether they did decide that or decided that she pulled the trigger is another matter.

MS JOHNSTON:

The jury, of course, under question 1 would have needed to consider the notes under question 1 that talk about it being fired involuntarily by reason only of it

being grabbed by Mr Kana. So I think they would've had to of perhaps overlooked that on that scenario.

GLAZEBROOK J:

Well, no, they decided it wasn't *only* that. It was because she had loaded it in the first place and put herself up for a struggle and it was, as you've actually said, if you bring a loaded gun and start pointing it at people then either the person sort of goes, shoot, at close range, either they shoot me or they try and do something about it. It must be quite clear that you might try and do something about it.

MS JOHNSTON:

I think I have got past the point where I'm useful.

WINKELMANN CJ:

Thank you, Ms Johnston. You have been very helpful, thanks.

MS JOHNSTON:

Thank you. May it please the Court.

WINKELMANN CJ:

Ms Epati, you can now come and tell us how many times we've misrepresented your submissions.

MS EPATI:

The danger of being knocked off course from your notes.

WILLIAMS J:

Oh, are you going to blame us.

MS EPATI:

If we can just go back to the beginning and understand how the Crown actually ran its case. So, the way it opened is no mystery, it was an intentional shooting and they said this, and this is at volume 2 case on appeal and I can't read the numbering.

WINKELMANN CJ:

It's quite large.

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MS EPATI:

Right, so case on appeal volume 2, 87, so this is what they said: "The defendant pulled the shotgun out from under the jacket or bag on the table. She loaded it with a single round and she told Mr Kana to get back. Mr Kana reached out to grab the barrel of the gun. The defendant pulled it up and away out of his reach. She then aimed the gun directly towards Mr Kana at very close range and she fired." So no question opened on intentional shooting.

In contrast the defence did a brief opening statement and this is at 102, and I am reading from paragraph 64: "And the most serious charge that you will need to consider, charge 4, on this occasion the defence say that Mr Kana approached Ms Moetu Kaitai, again in an aggressive manner. Ms Kaitai repeatedly told Mr Kana to back off. When Mr Kana didn't retreat, she grabbed a firearm. Again, she asked him to back off. When he didn't back off, she loaded the firearm," didn't retreat, continued advancing, grabbed for the gun. "There was a struggle over the gun – toing and froing – and it was during that struggle that the firearm was discharged. As my learned friend has said, there is no dispute here that Mr Kana died from a fatal wound shot. The issues that you will need to decide in respect of this charge is, did Mr Kana's death result from an unlawful act on the part of Ms Kaitai? Secondly, you'll need to decide whether she was acting in self-defence." So quite squarely, involuntary discharge is put up as the issue going to the trial.

When the Crown closed, and we'll go to – in fact, I think the clearest indication of how it then closed on its primary theory – if we go to 173, Mr Harris, paragraph 36, 173: "The Crown theory obviously emphasises, and I've made this a lynch pin of the case in terms of murder, that it was just as Mr Lewis said to police. Up, back, bumph, in an instant. She pulled the trigger. It was a heavy trigger and this whole defence theory of her somehow being manipulated by a struggle doesn't stack up."

Then we go over to page 175, 42: "So the Crown theory of the case," and remember, this is murder: "The Crown theory of the case then is simply that this is a reckless action. The action is pulling the trigger. The person who pulled the trigger is Ms Kaitai and in the weeks and days leading up to this, she had built up some form for carrying a gun and carrying ammunition when resorting to those things under provocation of perceived conflict." The action is pulling the trigger.

Then finally, we go to the Crown resorting to its alternative theory which I call the intermediate position. It sits in between intentional shooting and the pull down and struggle, and this is where the delineation occurs. It starts on 180 at paragraph 59 and goes over the page to 181, and what Mr Macklin says is this: "Maybe Mr Kana got this gun, put his hands on it earlier than what Mr Macklin says, maybe despite the fact he's stronger and he's such a threat that a gun is the only reasonable defence, maybe even then he still doesn't manage to point it away from himself and it goes off because he's jiggling it around and she's got her hand on the trigger. What I need to tell you is that it's not enough to be found not guilty because there's lots of carelessness built into that," and 60, he then goes down and he sets out all the preparatory acts: she loads it, she cocks it, closes the gun, and that's what cocks the action, "but regardless of the WWF wrestling/grappling/swinging/gun-pointing wherever, she pointed it at Mr Kana. And, not only that, she did it after she had initially taken it out of his reach and then she intentionally points it back down and she had her finger on the trigger. What you'll hear from the Judge is that it's illegal. It's unlawful in New Zealand to handle a firearm carelessly." So having your finger on the trigger, loading it in close proximity while you're squabbling, and having it pointed at them, is all careless. But the key here is that the Crown provide a hybrid position of they disallow the pull down but they allow for the possibility that there's a struggle once she re-presents it.

So the way it was actually put at trial was there were actually three scenarios: intentional shooting, a struggle after it's re-presented, which is 100% careless

use, and then the defence theory, which was the pull down and the struggle, and then just to finish off this piece of how the Crown ran its case –

GLAZEBROOK J:

Can we just go down a bit further on that paragraph that we had up? So they're still saying that it's murder at that stage, are they?

MS EPATI:

No, this is their alternative theory of manslaughter.

GLAZEBROOK J:

Right.

MS EPATI:

But I need to clinch it for you where they say it's manslaughter.

GLAZEBROOK J:

Yes, that's what –

MS EPATI:

Yes, that's what you're looking for. It's actually over when they deal with intent, but it relates it back. So if we go to page 187 and we go to paragraph 78. Sorry, I'm starting to lose my voice: "We then turn to intent and you'll be asked a question to the effect of when the gun was discharged, did Ms Kaitai intend a bodily injury? Now, from all of the facts, you will have before you your unlawful act and it's going to assist you a great deal here. I note for you and I concede this for the Crown, there will only be an intentional body injury if your unlawful act was recklessly pulling the trigger. So, do you remember way back at the start when you picked your unlawful act, if that was pulling the trigger, then you're going to ask these questions. But if it wasn't pulling the trigger, if something else set the gun off but it was caused in part because her finger is on the trigger – that careless handling of the firearm – then there's no intention to cause a bodily injury. All right, because that's where the rubber meets the road in terms of murder/manslaughter."

So, the submission that the Crown case always relied on careless use of a firearm as the unlawful act, in my submission doesn't stack up to the way it was run at trial and whether you paint it as 198(2) or not, the reality is the Crown shows the pulling of the trigger as the act for murder and it said if you couldn't be sure of that it was manslaughter and that just didn't translate into the summing up and the question trail for the jury.

WILLIAMS J:
Right, so you're saying 198(2) was live?

MS EPATI:
I'm saying, I'm saying that what the Crown painted –

WILLIAMS J:
Was 198(2)?

MS EPATI:
Was 198(2).

WILLIAMS J:
The Judge summed up on 59, or 56 or whatever the section is.

MS EPATI:
53.

WILLIAMS J:
53.

MS EPATI:
53(2).

WILLIAMS J:
The Arms Act 1983.

MS EPATI:

Yes, careless use.

WILLIAMS J:

So the Judge wasn't aware of this.

MS EPATI:

The Judge doesn't, it appears nowhere. The Crown did not nominate the unlawful act in the charging notice but it opened quite clearly on intentional shooting.

GLAZEBROOK J:

Well not necessarily intentional, but on she, she pulling the, she discharging the gun.

MS EPATI:

She voluntarily pressed the trigger and she was reckless as to whether safety ensured. That's 198(2). So it's the perfect fit for the Crown's primary theory in the case.

WILLIAMS J:

It doesn't discount careless though.

MS EPATI:

It doesn't discount careless, but in order –

WILLIAMS J:

As pulling the trigger can be careless to even if 198(2) is the much more appropriate charge, what's wrong?

MS EPATI:

Yes, but in this case the Crown conceded if they couldn't, if that was not a willed voluntary act, it was manslaughter.

WILLIAMS J:

So what you're saying, that 53(2) –

MS EPATI:

53(2).

WILLIAMS J:

Was excluded on that scenario?

WINKELMANN CJ:

No. Well, at 36 they do say: "She pulled the trigger. It was a heavy trigger and this whole defence theory of her trigger finger somehow being manipulated by a struggle doesn't stack up." So that's their primary case.

MS EPATI:

That's their primary case. No struggle. He never gets his hands on it until at the end and there's no struggle because if you go back to Jerry-Lee Lewis' police statement and they said: "Our entire case rests on that police statement, no question. That's it." But if, because Jerry-Lee Lewis has come along today and Carlo Mihaere, they both say there was a struggle and Carlo Mihaere says the struggle happened while the gun was in the air. So Carlo actually strengthened the foundation for the pull down. Ironically, the struggle after the re-presentation was sort of backtracked by Mr Lewis. So the Crown relying on that as the hybrid theory was probably not, wasn't, the evidential foundation wasn't quite clear I have to say. But the point that I'm making is those three scenarios were absolutely put and relied on.

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WILLIAMS J:

The way you argued this morning was basically had to prove discharge.

MS EPATI:

Yes.

WILLIAMS J:
Relying on 198(2).

MS EPATI:
And I still say that now.

WILLIAMS J:
Right. The Crown says: "No, no, no, she's got that wrong, it's 53 in the Arms Act, just careless use," right?

MS EPATI:
Correct.

WILLIAMS J:
Are you saying that effectively careless use is not a subset of discharge and therefore could not be relied on because on your theory of the case, that makes a difference to the way the question should have been put?

MS EPATI:
On this, on the scenario that the evidence provided it was barely there that careless use could have been there as an alternative, but I suppose one could say well, from the fact that the gun discharged into the abdomen it had to have been placed there somehow and then for an involuntary discharge to have occurred at that point there had to have been a struggle there.

WILLIAMS J:
Right, so that's really the point that I was asking you about because does that mean that section 198 is a distraction because if she pulled the trigger, she will meet section 53 as well and so you have an unlawful act with or without the trigger?

MS EPATI:
I'm not sure I'm following.

WILLIAMS J:

Well, perhaps I'm not understanding you. But you said, I took you to be arguing under 198(2) you have to prove discharge.

MS EPATI:

Yes.

WILLIAMS J:

Which mans pulling the trigger?

MS EPATI:

Pulling the trigger.

WILLIAMS J:

You said that's the only basis upon which they ran the case.

MS EPATI:

The Crown ran the case for murder.

WILLIAMS J:

The Crown ran the case, yes.

MS EPATI:

Correct.

WILLIAMS J:

Correct?

MS EPATI:

Correct.

WILLIAMS J:

The Crown says: "No, no, no, that's not right."

MS EPATI:

It is careless use.

WILLIAMS J:

"It was just careless use under the Arms Act." My question is –

MS EPATI:

Oh, could it be careless use?

WILLIAMS J:

Yes. Could the unlawful act for the purpose of question 1 simply be careless use?

MS EPATI:

It could have been, but the Crown didn't run it that way.

WILLIAMS J:

Well, I'm not understanding your point. It doesn't seem to me the Crown referred to section 198 at all.

MS EPATI:

Yes.

WILLIAMS J:

It just said: "She pulled the trigger." Now, it does seem to me that that fits the elements of careless use as much as it fits the elements –

MS EPATI:

Of 198.

WILLIAMS J:

– of discharge.

MS EPATI:

Right, okay, let's just, can we just put 198 away then.

WILLIAMS J:

Oh, okay.

MS EPATI:

All right, no, no, no, but we're still back to the fact that the Crown relied on a voluntary act –

WILLIAMS J:

I understand that.

MS EPATI:

– of intend, of pulling the trigger.

WINKELMANN CJ:

Intentionally pulling a very heavy trigger.

MS EPATI:

Yes.

WILLIAMS J:

Yes. No, I understand that, but the formal elements are different.

MS EPATI:

Right.

WILLIAMS J:

Because I took you to be saying you had to ask the question did she pull the trigger because that offence required you to ask that question. The Crown says: "No, no, no, it doesn't."

MS EPATI:

Okay.

WILLIAMS J:

You just had to be careless in which case presenting it was going to be sufficient. They didn't have to prove she pulled the trigger even if that was the case.

MS EPATI:

Sure. But for the case of murder –

WILLIAMS J:

That's right.

MS EPATI:

– they had to prove –

WILLIAMS J:

Yes, we're not, of course.

MS EPATI:

They had to prove that there were a series of voluntary willed acts for it to occur.

WILLIAMS J:

Yes, I took you to be saying this morning there was a question missing, a specific question missing. Perhaps I misunderstood what you were saying, in which case disregard our exchange and move on.

MS EPATI:

I still say that the better way to run the question trail was to ask that question right at the outset because you engaged with involuntary discharge right at the outset.

WINKELMANN CJ:

Well, he did ask involuntarily discharge right at the outset, but you say he didn't ask it clearly enough?

MS EPATI:

Well it got overtaken by a causation test.

WINKELMANN CJ:

But when you look at the defence, they talk about causation. They are running a causation. If you look at the defence closing, they are running a causation argument.

MS EPATI:

They are, but they do, no doubt it will be apparent when you go back through the closing addresses, they do say that it's the inadvertent discharge that the Crown cannot disprove as a reasonable possibility. They make that statement. Now, they go on to say that she has broken the chain of causation with the intervening acts, but they do make a statement right at the outset that, as they did in opening, that it's the involuntary discharge.

GLAZEBROOK J:

So that's more on intent, isn't it? I mean once you get rid of involuntary discharge means there isn't any actus reus, and that's a causation argument, I would suggest, though it mightn't have been put as well as you think it should have been, but it was put, then you go on to say, well, in terms of the mens rea, if it was involuntary, and this was never put because there was a possibility at the end that the jury decided that the Crown hadn't excluded the reasonable possibility of the gun going off in the struggle rather than through a conscious act of the appellant, then it should have been made much more clear than it was that there couldn't be intent. That's the argument, isn't it?

MS EPATI:

That's right, and in fact if we then say that I'm wrong about the first question and that in actual fact the unlawful act is careless use all the way through, it only makes the leap towards murderous intent even bigger.

WINKELMANN CJ:

So how Ms Tahana put it at paragraph 65 of her opening is pretty much how it's dealt with in the summing up: "The issues that you will need to decide in respect of this charge is, did Mr Kana's death result from an unlawful act on the part of Ms Kaitai?" So that's causation. "Secondly" – or, yes, however, we won't argue that. "Secondly, you'll need to decide whether Ms Kaitai was acting in self-defence.…Only then, if you're satisfied that Ms Kaitai was not acting in self-defence will you go on to consider intent, the murderous intent that my learned friend has referred you to. And the case for the defence is you won't get that far."

GLAZEBROOK J:

And you say on intent, if it was involuntary or went off in the struggle rather than through a conscious act of hers, then, as the Crown said, it had to be manslaughter.

MS EPATI:

Had to be manslaughter, yes, and 136, which is the only part that deals with this defence of accident to intent, is wholly inadequate and the respective summaries of the cases that are then provided in two brief paragraphs to 139 do not capture the issue at all very well either, remembering that it was only to 139 that the jury got once they asked about intent. Once they asked a question about intent they got it in writing and that's all they got.

And in fact in 139, when you think about what the defence actually was, it doesn't really capture it at all. "By contrast, Mr Jenkins says there was no recklessness in what Ms Kaitai did and therefore no reckless murder." She was confronted by an angry violent meth-fuelled man who wouldn't leave her alone and then attacked her first. "She armed herself for protection and never intentionally discharged the weapon." The fact she pulled it away and up in the air and he grabbed it and didn't discharge it at that point is telling, as her emotional reaction in the immediate aftermath and he referred to all the evidence in that – that's more self-defence coming through. That's not actually the important lynch pin issue that the Crown have made a concession about.

GLAZEBROOK J:

Well, you would also say that even in the intermediate, as the Crown conceded, it would still be manslaughter anyway.

MS EPATI:

Yes.

GLAZEBROOK J:

Because there was no question but if you look at it at the exact moment the gun was discharged that there wasn't intent, or at least the Crown accepted or didn't try and argue there was still intent at that stage.

MS EPATI:

Yes.

GLAZEBROOK J:

And there possibly wasn't even an evidential foundation for that in any event, even on the scenario that she pointed it back at him.

MS EPATI:

Well, the re-presenting and then a struggle had a pretty sketchy evidential foundation in and of itself.

GLAZEBROOK J:

No, no, I understand that. I'm just saying the intent didn't necessarily have an evidential foundation at that stage.

MS EPATI:

No.

GLAZEBROOK J:

Because – and anyway the Crown conceded it was manslaughter.

MS EPATI:

That's right, that's right.

GLAZEBROOK J:

It would be manslaughter if there was still a reasonable possibility that she didn't pull the trigger herself through a conscious act.

MS EPATI:

That's right. All right, I think we've thrashed this around as much as we possibly can.

WILLIAMS J:

We were just getting warmed up.

WINKELMANN CJ:

Those are your submissions?

MS EPATI:

Yes, that is the case for the appellant. As the Court pleases.

WINKELMANN CJ:

Thank you, counsel. Thank you all counsel for the very helpful submissions and the Court will take some time to consider its decision.

COURT ADJOURNS: 3.10 PM