IN THE SUPREME COURT OF NEW ZEALAND

SC 41/2006

BETWEEN **QIU JIANG**

Appellant

AND **THE QUEEN**

Respondent

Hearing 15 February 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel W G C Templeton and K M Muller for Appellant
J C Pike and A Markham for Respondent

CRIMINAL APPEAL

10.06am

Templeton May it please the Court I appear for the appellant, together with Kristina Muller.

Elias CJ Thank you Mr Templeton, Miss Muller

Pike May it please the Court, I appear with Miss Markham for the respondent in this matter.

Elias CJ Thank you Mr Pike, Miss Markham. Yes Mr Templeton.

Templeton As the Court pleases. At the outset I want to emphasise there are seven aspects of prejudice that apply in this particular appeal. They are touched upon in submission but I wish to amplify them. The first is that the Crown relies in its submission under claim that the accused acted in different legal capacities, that is as a principle in the Burger King incident and as a secondary party or procurer some five weeks later in relation to the phone calls, and in particular the phone call that

perhaps related to the procuring, that is for 'male A', which has been identified in the additional chronology that I filed. So that highlights in my submission the fact that the Crown case depended upon more than one single offence.

Elias CJ Are you referring to a particular submission of the Crown there? I would just like to

Templeton Yes paragraphs 48 and 49, and 48 on page 14 on the fourth line it refers to the fact that those persons, that is the other persons, were independent, 'those persons' independent offending was caused by the appellant', and it goes on to say 'this case involves an abstract proposition that the appellant committed the crime by dint both of s.66(1)(a) and ss.(d), the prosecution put its case on one basis – the appellant made the first threat and procured, or rather procured the others to keep it in full force and effect'. And down in para.49, last line, 'if the jurors accept the proposition that the appellant with mens rea procured the subsequent intimidation'. So my submission at this stage that the Crown case clearly depended upon more than one single offence. Different legal capacities, different occasions five weeks later. In my submission the count because therefore that case plainly should have been the subject of a separate count, that is the second charge that should have been subject of a separate count. If there had been separate counts between the Burger King incident and the others phone calls all of the other matters as to when the incidents occurred would have received closer scrutiny and in my submission the question of the defence would have been approached in an entirely different way and on an entirely different basis. For example if it was the Burger King incident alone then the importance of the accused giving evidence at trial is increased. Either she knew and made the threat on the particular occasion or she didn't. The charge in relation to the procuring in relation to 'male A' was the only person who evidence shows made the same threat, or the alleged threat of breaking legs. That would require the Crown to either find 'male A' or allege a specific conspiracy. The defence in that situation would be, or could be, either the appellant didn't know 'male A', or if she did he exceeded the authority of what he was asked to do on that particular occasion. So different considerations arise in respect of the two different incidents. Burger King personal situation one to one. The second offence, the procuring and getting 'male A' to make the call relates to whether is there any degree of authority in relation to her at law being responsible for procuring, that is that 'male A' carried out the actions with her authority and knowledge. So there are different issues.

Tipping J Is the proposition in para.19 of the Crown submissions, on the second page of that paragraph, that on a common law analysis the anonymous callers were secondary parties, the appellant being the principal offender which with respect I find difficult. I would have thought the persons who actually made the threats were the principal offenders or if

she was the promoter or procurer or encourager or whatever, she was the secondary party.

Templeton Correct, and as a matter of fact in my submission that's what they say in paragraph

Tipping J It seems to carry through some sort of misunderstanding of what this was

Templeton I agree, paragraph 19 conflicts what they say in para.48 and 49.

Tipping J Yes. Anyway I just thought

Templeton Is that a question mark Your Honour?

Tipping J Well I got more than a question mark.

Templeton But in essence looking at paras.48 and 49 is really much what they're arguing at. They're arguing that she carried out and indeed it's the only way they can argue it in terms of the actions of the others, that is 'male A', as a procurer, that is a secondary party. So given the fact the count rolled these up as it were, these two incidents, without distinguishing them, prejudiced the basis in which the defence then approached the case, and if there had been separate counts in my submission the approach would have been entirely different, and indeed for obvious reasons.

Tipping J You'll just need to develop that that a little bit for my benefit Mr Templeton. You say for obvious reasons – is this primarily the issue about whether the accused was going to give evidence?

Templeton It does, yes it heightens the, in relations to the separate Burger King count if it was it would heighten the importance of whether she gave evidence or not

Tipping J Because I think the key to this case may be what prejudice if any there was from this rolled up count, or the key to this point.

Templeton Yes, I agree, and to answer that question if you look at the situation as to the way the count was presented, it was a rolled up mixed bag of undefined incidents. As the evidence unfolded it came down to the Burger King incident and five weeks later the call which appeared to be primarily hinging on 'male A', that is the breaking of the legs threat. Now the only way she can be a party or responsible for that is a procurer as the Crown now say, but that involves different mens rea. It involves a different approach by the defence as to have they got 'male A'? Is it now a conspiracy charge or is simply a charge in relation to procuring. If she has the option if in fact were specified, did she know ' male A', and if so what knowledge did she have about these

statements? Was he in fact authorised by her or the company to talk to the complainant about the debt? Did he go beyond

Tipping J But say the counts had been divided, she is still then facing the same difficulty as to whether to give evidence. She might have been advantageous on one count and disadvantageous on the other.

Templeton That may be so, but not necessarily. If the two separate counts then the analysis of what was going to be an issue and whether there was a real need to call defence evidence or not would have been heightened.

Anderson J We've got no idea why she didn't give evidence. It's pure speculation and in those circumstances how can you say she would have given evidence?

Templeton I didn't say she would have. It heightened the importance of giving evidence. At the moment you have this rolled up mixed bag of incidents over a six week, seven week period. There was no need for her to address as it were the apparent until the evidence came up, the question of 'male A'.

Anderson J Sometimes people don't give evidence because they lack confidence and particularly so if English is their second language.

Templeton Well that may be true but

Anderson J I used to tell juries that.

Templeton In the context of this particular case, my submission is that the issues would have been approached from a defence point of view entirely differently

Anderson J May have been is as far as you could take it surely.

Templeton Well I accept may have been but rather the importance of being able to address separately the Burger King incident on its own, and this as it transpired a spurious call from 'male A' was tucked away and buried in the rolled up count.

Blanchard J I don't see how you can say that it would have been possible to address the Burger King incident on its own because even if there had been no charge relating to or extending to the Burger King incident, it would still have come in as evidence in relation to a count charging on what had occurred afterwards.

Templeton Not necessarily. 'Male A' had no relationship or connection to the Burger King incident at all.

Blanchard J Yes but the Crown would surely have been able to attempt to show that you got an understanding of what occurred later and the linkage with

your client via the evidence of the threat said to have been made at Burger King.

Templeton That's on the assumption that the Burger King count didn't apply.

Blanchard J Yes.

Templeton That just the 'male A' one.

Blanchard J Yes.

Templeton The phone calls. Well in my submission the phone calls ought to establish that. The relevance of 'male A' having a connection to, in fact 'male A' had no connection to the necessary the subject of the dispute at Burger King.

Tipping J But I think what my brother's putting to you is would not the evidence of the Burger King affair have been admissible and relevant to a count limited to the anonymous threats?

Templeton Well I understand that point. The question of relevance is a matter of fact in degree. In my submission the answer would probably be no if it was some six weeks earlier. The 'male A' count, if it was a separate count on its own, would relate to her procuring or cajoling 'male A' to make these threats.

Tipping J But didn't she say in the course of the Burger King, or towards the end of Burger King, that she was going to get people to do things?

Templeton Well that call was in terms of its circumstances pretty much a spontaneous emotional outburst, and she referred to

Blanchard J Well that would be your argument on defence, but the Crown would endeavour to portray it a different way and would be entitled I would think to try to do so.

Templeton Except that the emphasis of the Burger King incident was on her breaking his leg. It was only a sort of throw-away comment later as I read the evidence in the car is that the Burger King incident was over. She's going to threaten to break his leg. They're travelling away and she gets out of the car again some time afterwards and says 'I will break your legs or I'll get someone to do it'.

McGrath J You don't distinguish I take it between those two aspects of the Burger King incident? You're happy for them to be treated as one incident are you, what happened within Burger King and what happened later, or are you suggesting we should have a separate count for what happened later?

Templeton I'm just saying the Burger King incident is in itself was not hinging solely upon 'I will get someone to break your legs'. The initial emotional outburst was that she was going to break his legs, and then

Blanchard J And then she refined it a little.

Templeton And then she qualified it a little driving the car later, but so to say that the Burger King in itself per se started off as it were getting someone to break legs is pretty tenuous to justify as part of the res jesti or whatever some five weeks later on a separate charge involving 'male A'

Anderson J Mr Templeton at each level of hearing your client has been represented by very experienced counsel. It was never suggested in the High Court that the form of the count was an embarrassment. It was never suggested by replacement counsel in the Court of Appeal that it was an embarrassment, and indeed it wasn't even suggested in submissions on the leave application that it was an embarrassment.

Templeton As I understand the position that is correct Sir but I make this point, that I don't think on the authority of *Crossan* at that stage it would have been open for them to make it leave because *Crossan* said the circumstances of this case fell into a prefered category therefore outside subsection 330(1) and Justice Somers decision in 1981 re *Bennett* said that that general power didn't apply when the third category applied, so it wasn't any helpful use to the defence counsel at the time. I don't know the answer to Your Honour's question.

Anderson J Counsel could have said to the Judge in the various pre-trials that occur in these cases, here is one count purporting to cover incidents spanning six weeks. This is an embarrassment to my client in relation to her defence. Please require the Crown to file an amended indictment severing the counts. I mean that's what one would do, and it wasn't done. The inference that one might take from that is that in fact it wasn't an embarrassment.

Templeton Or, or it was the competence of counsel, or the instruction, I mean we're second-guessing as to what may have applied at the time and I can't say that the counsel decision at that time was correct or not.

Anderson J Well anyway the point against to is that ultimately you have to show that this has led to a miscarriage of justice.

Templeton Correct.

Anderson J And not just that there's been some pleading error.

Templeton No, not some pleading error, and what we've got now from the Crown is we have two distinct separate offences – principal party and five weeks later secondary party as a procurer.

Elias CJ I must say I haven't read the Crown's submissions in that way. You're relying on para.48 are you?

Templeton Yes para.48 and 49.

Elias CJ Ah yes.

Tipping J I don't think this case was properly analysed and I think the whole thing was a bit of a mess and I don't know what precise stance the Crown took. It seemed to be this together with others which clearly can hardly apply to Burger King. My anxiety is that this thing just went off and I'm not at all happy with it but what I need to be persuaded about is the prejudice.

Templeton I accept that, I accept the position and that comes back to I think in another way which is the second point that I want to refer to, a second aspect of prejudice, that is the possibility of the jury being able to convict on the distinct factual alternatives arose only in the Judges that appear in the record, the trial Judges summing up after both counsel had addressed the jury. In other words the possibility of distinct factual alternatives, that is the blackmail from Burger King, or the phone calls, was not clear in the face of the count and the prospect of those alternative bases for the offence of blackmail arose only at the summing up in paras. 28 and 29 of Her Honour's summary and in the written issues left for the jury, particularly written issue 1 which clearly gave the jury a choice that was not apparent on the face of the count. As I said before neither counsels recorded the summing up as addressing jury on these factual alternatives.

Tipping J But the Judge effectively said didn't she that if you convict her in relation to the Burger King, I couldn't quite follow exactly what she was saying. Was she saying if you convict in relation to Burger King in isolation that's enough?

Templeton Correct. If you look at para.28 she says

Elias CJ It's only 29 really isn't it?

Templeton No para.28 starts off and says 'if you're satisfied the accused did make the threat that was described in Burger King then this element of the charge will be proven regardless of what you decide in relation to the identified callers who were said to have made the threats'. She then

Elias CJ Well that could be on the basis that that was simply supporting the evidence.

Templeton Yes but then you go to issue 1, the issue she left with the jury at the back of the case

Elias CJ Yes, can you just remind me where the issue 1 is in the bundle?

Templeton Right at the back, the last page of the case headed up 'Issue for the Juries'.

Blanchard J Is this the case in the Court of Appeal?

Templeton No this is our case for the Supreme Court. The very last page of the

Elias CJ Well I don't see what's wrong with that.

Templeton Well issue 1 is 'did the accused either alone or in concert with the others threaten *Shibing Wang?'*. If you tie that in to what she told them in paras.28 and 29

Elias CJ Well in 28 she says 'if you're satisfied that she made the threat at Burger King that's it'.

Templeton Correct, and then she goes on to say in para.29 after that and in relation to the others you had to be satisfied of those calls and talks about Mr Wang's evidence and talks about how the callers made the same threat of breaking legs etc and inferring the concert based on the Courts doing the same. When it comes to the issues then given to the jury at the end they're presented with a choice.

Blanchard J Is your point in relation to issue 1 that it's not consistent with the indictment?

Templeton Correct. In fact the issue of the alternative factual bases seems to have only come apparent from the address at the end of the trial. Her summation of the counsel addresses makes no reference to this choice at all.

Elias CJ Well Mr Templeton I don't see a problem with issue 1, I see the problem as being with para.29.

Tipping J Just before we move on to issue 1 if we could, and I'm troubled by 29 in the summing up, but it wasn't open on the indictment for her to be convicted of having acted alone because the indictment says together with others.

Templeton That's exactly right.

Elias CJ Yes, I see, yes.

Templeton Exactly right and I appreciate Your Honour clarifying that point. That is my point.

Tipping J That's the point. Where it gets to is another matter but that is a good point.

Templeton And again that impinges upon the questions I raised before and perhaps struggled with, it emphasises the prejudicial nature of the defence whether or not to call the accused, because if in fact there was going to be a choice given, and that was clear from the outset which it wasn't, certainly not in the face of the count and certainly not in the way the trial appeared to be conducted, then the issue of whether she gave evidence in relation to the Burger King incident alone because that was an alternative part of the charge now disclosed at the end of the trial, then it emphasised again the importance of her giving evidence on that. As it was it was all meshed together.

Elias CJ I don't understand that I must say.

Tipping J Well I don't think on the face of the indictment she was not vulnerable to Burger King on a stand-alone basis.

Templeton Correct.

Tipping J That's the argument isn't it?

Templeton Correct.

Tipping J And the Judge has neither severed so as to make that distinction, nor has she given counsel the opportunity to address on the premise on which she left it to the jury.

Templeton Correct.

Elias CJ But just forgetting about para.29 which troubles me much more and just looking at the issue for the jury and concentrating on the matter of prejudice, that would have been sufficient to constitute the charge. If the evidence was there what's the prejudice if the indictment had been amended to confirm with the proof, what's the prejudice if she's convicted on the basis of the threats she alone utters?

Templeton Well the prejudice comes back as I said before to the question of it and in fact there was a clear factual alternative choice in relation to Burger King, it accentuated the need to give evidence. If she was facing

Elias CJ But what's the factual choice?

Templeton Because the choice that the jury were given to say is she guilty because by virtue of Burger King alone or is she guilty because of the others, or both.

Tipping J I think counsel's suggestion that the prejudice lies in the fact that this was put to the jury after counsel had addressed and therefore presumably counsel addressed on the basis that it was a charge where she was a participant with others and that you wouldn't presumably

then, if you've got any skill as defence counsel at all, dabble in Burger King very much, if at all.

Templeton Correct, and indeed that's reflected

Tipping J You wouldn't want to highlight Burger King because strictly speaking Burger King wasn't as a stand-alone issue facing you, that's as I see them, the people.

Templeton That's exactly right and that's reflected I think in the summation of both counsels' addresses by the Judge in her address to the jury. There is no distinction made there at all. The other

Tipping J And did not counsel protest though, surely, if this strategy had been as subtle and astute as we are now predisposing Mr Templeton, I would have thought counsel would have immediately said 'good gracious Your Honour, we can't have that, or at least not without us being given an opportunity to consider our position'.

Templeton Again we're second guessing at trial with counsel, but certainly it appears on its face it wasn't raised. But if I can make

Tipping J Well if I had been as cunning as we're now suggesting that counsel might have been, I would have been hopping mad.

Templeton Well it's not so much cunning. It comes back to a simple point. Either there's two separate alternative different legal charges here. Burger King, and five weeks later in a different legal capacity, a procurer. Now on its face they're two separate matters. They should not be rolled up together, particularly when in relation to 'male A' we have a mixed bag of other calls going into the mix as well which in themselves do not amount to threats at all which I'll come to. The other area of prejudice that follows on from that perhaps is this is that the trial Judge then did not direct the jury, and this is the third aspect of prejudice, did not direct the jury that they had to be unanimous on either or both factual alternatives - that is the possibility of Burger King incident or the phone calls being the basis for blackmail. She didn't direct them at all of the need to be unanimous, and that comes into later on the question of the *Brown* issue which I will turn to shortly. So she never addressed the jury on the need for unanimity on either or both factual alternatives.

Tipping J Are you coming to the summing up later as a separate issue of prejudice?

Templeton Yes. Again, as I said before, if the appellant knew that there was a possibility of conviction on the basis of Burger King alone, that would again heighten the way the defence approach would have been entirely different in my submission. And that wasn't apparent until the very end of the trial after counsel had addressed.

McGrath J Mr Templeton at Burger King there were three people were there not? The appellant's boyfriend was also there?

Templeton I'm not sure if it was the boyfriend, except there's a third person there, that's right.

McGrath J I think the Crown describes the man as a boyfriend. So there's another party there. Is that not relevant to the way the count was expressed at all?

Templeton No, that person was called but the real issue in the mind of the juror I would imagine would be what the accused would have said to them in the box

McGrath J But it wasn't as though on the Crown's evidence he was an entirely passive observer was it? Didn't he take some steps to impede the complainant from departing?

Templeton No, the way I read the evidence Sir, he was a passive observer

Anderson J He was an aider. He stopped them going out of the restaurant and then he drove the car for an extended period down the street while she's allegedly uttering threats out the window. Now if she was firing a gun out the window he'd be undoubtedly seen as an aider.

Templeton Well with respect Sir I think that's a bit strong. The evidence shows in relation to this third person that he wandered out of Burger King first, leaving the other two talking. He stood in the door to wait for them and then they came out after him and the accused had travelled in his car to get there and then he drove her off and there was an issue, a conflict over whether they follow this chap down the road for a wee way when the second verbal incident occurred with the woman getting out of the car on a crutch and having another go at him.

Anderson J I know there is a conflict there and this is on the supposition that there was evidence to that effect. Whether it was acceptable or not is another point but it looks a bit like aiding to me.

Templeton Well if it was he was never charged.

Anderson J Yes.

Templeton Now the fourth aspect of prejudice is the Judge in her summation talked about what the caller said in a very generalised way, particularly para.29. Some of the call evidence shows, in fact some of those calls are quite legitimate and innocent, as noted in the additional chronology file by the appellant and certainly do not contain any threat. They're acting as a referee or offered to act as a referee. They had no connection with blackmail. Now quite apart from the Judge failing to

distinguish between these types of calls in her summary, she also made two errors in my submission of what the caller was supposed to have said. She first of all said that callers per se, that is all callers, in describing rather to be fair, not what the Judge said, she's describing what Mr Wang the complainant said and she said in para.29 'Mr Wang said the callers made the same threat of breaking legs and told him that he had to pay the accused'. Now the evidence shows in fact all callers did not make the same threat of breaking legs, that was simply 'male A'. 'Male B', 'female A' and 'female B' did not. She then went further in describing his evidence as saying this similarity was the basis for inferring that the threats were made in concert with the appellant, but as I said before that is simply 'male A'. None of the untaped calls, and this is the second point, including 'male A' said that money had to be expressly paid to Linda. There was reference to Linda being of course the Burger King incident, but none of the actual callers, taped on or untaped, expressly said you have to pay the money to Linda, and bearing in mind this debt was due not to Linda but due to the Immigration Consultancy Company back in China. And her connection with that was simply that her brother had a connection or a shareholding of whatever it was in this Immigration Company. She was not owed specifically money at all and she said as such too.

Anderson J She was out to collect it though.

Templeton She was out to collect her IOU, which is a different issue which we'll come to.

Anderson J Well that is a different issue because the defence wasn't that she was prejudiced in any way but that the complainants were liars with a devious purpose.

Templeton Well interesting about the IOU is that the complainant had retained the IOU when she was in China, long before the issue of the deal arose and she comes back and discovers that he's got the IOU, broken into her baggage and she goes off to Burger King to talk about that, but the conversation records the issue of relation to the money owed to the Immigration Company. So coming back to the

Tipping J The complaint is essentially that this direction was too loose or too generalised?

Templeton Very generalised, too generalised, it's unfair because the way it was described to the jury is that all callers made the same threat, all callers said pay money to Linda and in my submission the evidence does not support that generalisation at all.

Elias CJ Well that's a mis-statement of the evidence is it that you're complaining of?

Templeton It is but I'm talking here in the context of prejudice.

Elias CJ Yes I understand that.

Templeton It's part of the direction.

Elias CJ But what is the prejudice? Is it that she's mis-stated the evidence?

Templeton Yes in essence that's correct.

Elias CJ Well again you really need, and I'm sure you will develop further, why

it's prejudicial because she is saying in para.29 that it does all hang on whether you believe the complainant's evidence, so she's treating the evidence of threats if they're accepted as ancillary to the continuing threat allegedly made by the accused.

Templeton Well not so much the continuing aspect. She says that the complainant said all callers made the same threat.

Tipping J The point is this is it Mr Templeton that the Judge is unfairly portraying a degree of consistency which didn't exist?

Templeton That captures it perfectly.

Tipping J Which may have been important to the jury and that they weren't invited to examine the differences if you like as part of whether or not this was all part of a pre-conceived plan?

Templeton Correct, and when they go to address issue 1 they retire and they were given the choice of Burger King or acting in concert they have in mind what they've been told earlier that all callers made these threats, that is the unknown others.

Tipping J Well the more closely the threats matched each other, the stronger the influence of a plan

Templeton True.

Tipping J And this I think is what the point you're seeking to make.

Templeton Correct, and what we have is four callers but only one of whom made the so-called same threat of breaking legs, not them all.

Tipping J Yes. The next paragraph about hearsay is that going to feature a little later is it?

Templeton Yes it is, it is. Turning to the fifth aspect of prejudice the jury were not specifically directed as to the use they could make of the hearsay evidence as admitted and this caused prejudiced in at least three ways. First that the Burger King incident as I submitted earlier

Tipping J No, wait a moment. What are you treating as hearsay evidence for the purpose of this submission that they weren't directed as the proper use?

Templeton That is the unknown callers hearsay used as we begin to touch up on now in para.29 and 30.

Tipping J But what the callers said is not hearsay, it's a primary fact. 'A' is alleging that 'B' said something, but the issue is whether it was said, not whether it was true. It's not hearsay.

Templeton Well the way the Judge put it to the jury was that the hearsay evidence of 'male A' also referred along the way to referring to Linda, some actions by Linda.

Tipping J That was hearsay.

Templeton Yes.

Tipping J Now then we've got to be very very clear as to what we're talking about here that's why I intervened.

Templeton I accept there was a distinction and that distinction was not made clear to the jury. There was a roll-up as it were that the callers per se had hearsay. Some of that information, some of that content I accept was not hearsay, some was, so what I'm saying now is that as part of the fifth aspect of prejudice in the first element of 3, is that the Burger King incident was spontaneous, plainly an emotional outburst and not part of any defined common attention, yet by virtue of the trial Judge's direction it's likely that the later unknown callers hearsay evidence could be used to bolster the Crown's case on the Burger King incident. In other words she had the reverse effect. Second, the trial Judge's statement that hearsay was allowed because in effect a conspiracy existed, usurped the role of a jury in relation to the element, while not part of blackmail per se, was crucial, nevertheless the determination of the issue relating to the factual existence of pre-concert a combination. In other words she's saying because a conspiracy exists, telling the jury there and then that obviously the pre-concert must have existed.

Tipping J Is this the statement in 31 'where there has been a conspiracy implies the Judge is telling them there was a conspiracy'?

Templeton Yes, yes, because she's telling them in effect and so far as the pre-concert is concerned this hearsay's allowed when you have hearsay and therefore jurors in effect the pre-concert must have existed.

Tipping J I don't know why Judges keep telling jurors why they've admitted evidence. It causes all sorts of trouble. The evidence is either in or it's not in. It doesn't help the jury to know why it's in, other than proper use.

Templeton Yes, and with the greatest respect to the Judge in this case, I think she plainly erred by, there was no need for her to have referred to the rationale for admitting evidence at all and what she's done by it in terms of prejudice is told the jury the pre-concert does exist. The aspect of this particular point of the use of hearsay. The reference to hearsay being allowed when there was a conspiracy immediately bolstered the credibility of the complainants to the disadvantage of the accused when credibility was such an important issue in the case. It immediately gave the complainant that much more kudos of credibility in the eyes of the jury.

Tipping J Do you make anything of the fact that para.30 is based on an erroneous legal premise, because the direction there is that it's hearsay because the anonymous callers did not themselves give evidence of what they said is only partially correct. It's not hearsay in part. I take it you don't make anything of that per se, it's the collateral if you like aspects of that

Templeton Yes, yes, that's correct and probably in fairness to the Crown she should have distinguished between what was hearsay and what was not.

Tipping J Yes.

Templeton She wrapped it up as it always

Tipping J Yes, that if anything is favourable to you.

Templeton It is, it is, but it's the collateral point that I'm relying on.

Anderson J If she had said after where, allegedly, you couldn't complain could you?

Templeton Perhaps not.

Tipping J But that would be a totally different direction. That would be putting it on the basis there was an argument about it. You're case is that this puts it on the basis that there is no argument but there was a conspiracy.

Templeton It's fait accompli.

Tipping J Because unless there is a conspiracy the evidence can't come in.

Templeton That's exactly right. The sixth aspect if I may turn to that of prejudice relates to mens rea

Elias CJ What other explanation if they accept the evidence could there be?

Templeton Well they were told because there was a conspiracy.

Tipping J Which in a sense

Elias CJ No but then it would have to be a conspiracy if the evidence was, oh they'd also have to draw the inference that it was connected to the threats made by the accused.

Templeton Yes the others and the accused. Burger King and the latter.

Elias CJ It links the Burger King episode.

Tipping J No, with great respect it does more than that. It suggests to the jury the very point that is under consideration.

Templeton Exactly.

Tipping J It begs the question that is ultimately for the jury, because this type of party allegation is so close to an allegation of conspiracy that it doesn't really matter. If I'm accused of inducing, or persuading, or encouraging you to do something unlawful, we are in effect conspiring to do it.

Elias CJ Well that's really what I meant.

Tipping J Sorry.

Templeton And with respect I thought I'd tried to say that in the second point on the fifth aspect.

Anderson J You have to take it to the point of saying when the jury went out they might have said oh well the Judge believes it's a conspiracy anyway. So that's something to go by.

Templeton Well it's a bit more than that. She said the evidence is allowed when there has been conspiracy.

Anderson J But the issue before the jury is whether there had been one involving the appellant.

Templeton Correct.

Anderson J I mean do you think that solved it for them, that's why they were out for five hours.

Tipping J Oh who knows.

Templeton Who knows.

Tipping J Who knows.

Templeton Turning if I may to the sixth aspect. That is the question of mens rea and the inadequate directions in relation to that resulting I say in further prejudice. First

Tipping J Where in the summing up are we looking at now Mr Templeton?

Templeton Yes, but it's mens rea in the summing up plus two other aspects of it.

Tipping J But where do you want us to look at in the summing up?

Templeton Well I'm not summing up at the moment except in relation to para.33 and 34 sorry. First in relation to the Burger King incident is concerned which was more in the nature as I've said of a spontaneous frustrated outburst, the two necessary mens rea elements namely the intention that the complainants act on the threat and the intention to obtain a benefit should have been considered pursuant to directions in regard to that incident separate from the position of the unknown callers. The trial Judge did not make that distinction between the two separate incidents. She simply referred in her summation in 33 and 34 that in terms of the intention that the complainants act under threat, that must be decided by inference based on the facts that have been proven. There's no distinction made between the two incidents. The second and separate point in relation to mens rea, no explicit direction was given at all to consider, for the jury to consider under s.237,ss.2 whether the statements or threats made were or were not reasonable demands in the circumstances and that of course has greater impact in relation to the Burger King one than one might think in relation to 'male A', but certainly there was no direction as to the statutory element under ss.2 of 237.

Elias CJ I'm sorry, I'm just really a bit behind on this but I don't know why, the Crown put it on the basis that the Burger King threat was the operative threat. Your defence was that it was an emotional outburst and there was another unconnected threat, but the Crown case was that there was one threat acted on throughout, wasn't that right?

Templeton Well they're saying it's a continuing actus reus but the reality they're now accepting is that there are two separate entirely different legal offences and in different capacities.

Elias CJ And you're relying on that from the passage you took us to the submissions in this Court, is that right?

Templeton No, no, sorry, paras.33 and 34 of the trial Judge's summation I'm referring to – her summary. Because the point I wish to make in relation

Elias CJ Because the subsequent threat is really an answer to the accused's case that Burger King was an emotional outburst. All of the subsequent

conduct really was just to on the Crown case as I understand it, was that there was a continuing threat acted on. The Burger King episode wasn't an emotional outburst and that's why it seems to me that the trial Judge says 'if you accept that that threat was made, you know you're there'. Now there's a lot of muddling in terms of how the indictment was framed but I don't really see why you are insisting on there being two different bases here.

Templeton Because she told the jury that in issue 1, and she said

Elias CJ Well I don't read issue 1 like that

Templeton Well in my submission if that is the correct interpretation of issue 1, and she's referring to Burger King in the first part of that question, then the question of addressing the two separate, in fact, three separate mens rea elements which I'll come to applies distinct from what she supposedly had been involved with five weeks later in relation to 'male A's' calls, because there she's acting as an alleged procurer and that requires a different mens rea element yet again.

Elias CJ Are you going to take us to that in the mens rea criticism you're making?

Templeton Well I'm saying there were three points about mens rea and I should perhaps mix them up slightly. The first one I've made in relation to the fact there is no failure to make a distinction between the two incidents. The second point is that in relation to

Elias CJ So you say that she should have made a distinction between two separate incidents constituting in your submission two different actus reus's.

Templeton Correct.

Elias CJ Even though it wasn't put on that basis?

Templeton Not even further than to actus reus. Two separate offences.

Elias CJ Yes, I understand that but I don't understand the Crown to have been putting that forward in the case and I don't understand how the jury could have been confused into thinking that they could have convicted on the basis of the subsequent threat, there's only one really, if they didn't accept the Burger King.

Templeton Well that goes back I think to para.28 where she said that the jury can be satisfied in relation to Burger King, this element of the charge is proved regardless of what you decide in relation to the unidentified callers

Elias CJ Yes

Templeton So there the jury had been told look at Burger King on its own.

Elias CJ Well I think it's because if Burger King fails, if that wasn't a threat, the Crown has lost. It all hangs off that. I think that's what she's saying.

Blanchard J Well I'm not sure about that. I think that putting in a paragraphing hasn't been helpful here. The first sentence of para.29 really is connected with 28 and then I think she's moving to a different subject matter which she's foreshadowed in 28 but doesn't get to until the second sentence of 29.

Tipping J I agree with that.

Elias CJ But it all depends on whether you believe the complainant's evidence which hangs off the Burger King episode.

Blanchard J Well the complainant's evidence related to the whole series of events

Elias CJ Yes, and so did the Crown case.

Blanchard J Yes but if you see the jury as not having the written text of this in front of them and simply hearing it, you don't necessarily have the break at the point between 28 and 29 and they could have understood complainants evidence in what is now 29 as simply being related to the threats by the unidentified people.

Templeton And that with my respectful submission is compounding it because what they argue with when they walk out is this written list of issues, which the first one says

Elias CJ Yes but the issue, the issue doesn't set up two different factual bases for the crime. It is affirming that there's the one continuing threat. It doesn't segment it.

Tipping J Well the issue 1 actually sets up alternatives.

Templeton Yes, it does, and that's my point.

Elias CJ Well I think that is a slightly different point myself but

Tipping J Well it may be slightly different but it doesn't help the whole shebang.

Templeton No it doesn't, and if I can perhaps re-emphasise on the question of mens rea where I say another error arose. In relation to the relevance

Elias CJ Sorry, perhaps if I could just clarify what's bothering me? It seems to me that the case was put by the Crown and that the Judge was saying the only difference was whether she acted alone or in combination, so it was the Burger King threat plus other threats or not plus other

threats. Only I don't think there's any suggestion that the jury could have convicted on these directions if they didn't believe that she'd made the threat at Burger King.

Tipping J Unlikely but left to them.

Templeton Leaving aside the question of the erroneous rolled-up nature of the threats, putting that aside for one moment, going back to issue 1, they're plainly given a choice as to alone or in concert.

Tipping J The way the Judge's mind was working, and I don't know whether these headings were or were not part of the text of what was actually spoken and that's not helpful, but the heading above 27 is made by or on behalf of the accused. Does the Judge say anywhere whether she's headed it or this actually does represent what she orally said?

Templeton No, there's no evidence of that, no record of that.

Tipping J That's something perhaps

Elias CJ Was this supplied to the jury, the written summing up?

Blanchard J Summing up?

Elias CJ Oh no, sorry.

Templeton The issues were. That last document in the case that's headed issues for the jury were given to them. That's what they walked out with.

Tipping J And that's their road map.

Templeton Yes, that's their road map.

Tipping J That's the whole purpose of issues and you've got to be very careful with them because that's what the Court must assume they work by.

Templeton Exactly. If I can just

Tipping J But why if it was one continuous threat, a single threat, having as it were a continuum of manifestation, why are we talking in alternatives? That's my puzzlement.

Templeton That's my submission, because

Elias CJ Who's talking in alternatives?

Tipping J The Judge.

Elias CJ Where - in para.28?

Tipping J In 27, 28 and 29 are clearly alternative ways of looking at it and issue 1 reinforces that.

Templeton And given the fact that the count starts off

Tipping J As my brother Blanchard put it, sorry

Templeton Sorry, emphasised and highlighted by the fact that the count starts off not emphasising any alternatives at all.

Tipping J And the Judge says in relation to the other threats. She's not talking about the same threat, she's talking about a different species of threat. I mean with great respect I think it's

Elias CJ What species?

Tipping J Well she talks about the other threat. She's not directing the jury that this is all one threat with a sort of series of manifestations, she's directing them that were two threats, one personal at the Burger King and others vicariously later. I shouldn't use those words but that's the effect of it.

Templeton That's with respect Sir, that comment is enforced, or reinforced now by the Crown submission because they say these other threats were independent of Burger King but instigated or procured by her albeit in relation to "male A', not the others, but certainly 'male A'.

Blanchard J I don't think we should put too much on the word 'independent'.

Templeton Well that's the Crown's, that's the Crown's description, not mine.

Blanchard J Yes but it probably just not the felicitous choice of word.

Tipping J It's what the Judge told the jury that's sits in the forefront of my thinking, because the jury must clearly have approached this on the basis that she could be convicted either on Burger King or through the mouths of the others.

Templeton Yes, that is my submission.

Blanchard J Mr Templeton I didn't understand the submission you were making about s.237, ss.2 in relation to Burger King.

Templeton Well could I just recap this mens rea point because there were three aspects of it and 237 was the second of that. The first one in relation to Burger King saying there was no distinction in terms of mens rea between that incident and the second incident and particularly when the mens rea was a spontaneous emotional outburst and the callers were more deliberate as it were and plainly the question of mens rea would apply. But she made no distinction on that and if in fact it is an

either/or situation, it is of real importance. The second mens rea point was in relation to 237(2) where there was no direction at all to consider, for the jury to consider whether it applied, that is the statutory element, not a statutory defence, but a statutory element of the offence of blackmail whether the particular threat or demand in the circumstances were a reasonable demand or not. That's a jury

Blanchard J How could a demand coupled with a threat to break somebody's legs be a reasonable and proper means.

Templeton Well the language of 237(2) says if they are threats then the jury had to go on to consider whether or not they were reasonable in circumstances

Blanchard J But isn't your point that these really weren't threats they were just a spontaneous outburst?

Templeton And particularly exactly in terms of Burger King and the jury weren't told of the difference at all.

Blanchard J If they were threats they couldn't possible be reasonable and proper means.

Templeton The word is 'demand' I think there in 237 from memory.

Blanchard J No, 'threat'.

Anderson J Just help me with this Mr Templeton. What of the four approved grounds of appeal does this argument relate to? I've just lost my way a bit.

Templeton Part of a second heads.

Anderson J Rather extrapolated.

Templeton Yes.

Anderson J I just mention this because this isn't really a Court of error correction.

Templeton No I accept that Sir but it certainly is crucial to the question of the general directions of unanimity that are given to the jury.

Tipping J I think it's relevant to whether or not there's been ultimately a miscarriage of justice from this mess, if I may put it rather colloquially?

Templeton Yes I think that's crucial to that.

Blanchard J Anyway I don't think there's anything in this 237(2) point

Anderson J Otherwise everyone will be able to get out and debt collect by threatening to break people's legs.

Templeton Well what reason did Parliament put it in there for if it wasn't to be considered in this particular circumstance? You may

Anderson J It wasn't relevant in the case.

Templeton Yes it was relevant in the case

Anderson J Was there going to be a defence? Look it's perfectly reasonable to demand debts by threatening to break people's legs. Perfectly acceptable in our society.

Templeton That is not with respect the issue. The issue here was that there were two separate incident. The Burger King thing was a spontaneous emotional outburst. Whether she

Blanchard J Yes well in that case it wasn't a threat, that's your point.

Templeton Well that's the part of the direction to the jury. The jury should have been told if Burger King was a threat they need to go on to consider the question of the reasonable means or otherwise of that particular circumstance.

Blanchard J No, either she was making a threat or she wasn't. If she wasn't making a threat you don't get to 237(2); if she was making a threat it couldn't possible be reasonable.

Templeton In relation to Burger King.

Blanchard J Yes.

Templeton But it's a

Blanchard J A threat to break someone's legs if they don't pay a debt can't possibly be a reasonable means.

Templeton But with respect that's a mens rea question and is very much important in relation to Burger King.

Tipping J It's not a mens rea question, it's an evaluative question for the jury upon the evidence on the premise that we're talking no reasonable jury could possibly have come to that conclusion Mr Templeton.

Templeton Yes, and

Tipping J I think you have better points than this one.

Templeton I'll move on to the third aspect of mens rea. In my submission it should not be forgotten the relevance of mens rea when it comes to procuring is a separate intention by her entirely to help her encourage the principal party to commit the principal offence, namely 'male A'. The Judge did not direct the jury at all on that second type of mens rea when acting in that secondary party capacity.

Tipping J I think your best point on mens rea is that the Judge which is rolled up with this non-distinction is that when you get to the secondary liability there is an additional step required so as to bring you into that secondary liability and unless I'm not grasping it properly, I'm not at all convinced that the Judge actually directed on that. She directed on if the woman was doing it as a principle, but did she actually explain to the jury how she could become liable as a party?

Templeton No she didn't, no she didn't.

Tipping J No, that wouldn't be necessary, well it might even if it is all one continuous but it makes it all the more difficult that we haven't subdivided the count, because if we had subdivided the count we would have had a direct party element involved in the second half of it and the necessary directions on party liability would presumably then more likely have been given

Templeton Correct.

Tipping J But I see nothing in here directing on parties.

Templeton Nothing at all.

Tipping J Or on conspiracy.

Templeton Correct, and that's part of the prejudice.

Tipping J And I personally see that as one of the more aspects of this case that on one view of it she's in there as a secondary party and there's no directions on parties at all.

Templeton In fact, well it's not until this stage do we actually get the Crown to acknowledge for the first time the party position.

Tipping J That seems to me to be the strongest point on mens rea that is you need to have the mind of a party, not the mind of a principal when you are charged as a party.

Templeton Correct, and that's the problem here because we have the two offences. We have the principal party one and we have the procurer, the secondary party one and there's different mens rea that applies to both.

Tipping J And the Judge wasn't helped to be quite blunt by the rather peculiar way in which this count was drafted.

Templeton I couldn't agree more. That is the submission I'm making.

Tipping J Speaking for myself, and it's very easy to be wise in hindsight, but I have to say that I thought this current count was crying out for subdivision. Whether there's any ultimate prejudice is another matter.

Templeton Well in terms of looking at the tests on that, the statutory tests, and s.330, ss.3, the ends of justice require it. Now if that was apparent

Tipping J No but the test after the event is whether there's been a miscarriage of justice.

Templeton Yes, yes.

Tipping J Because no-one asked her to subdivide it.

Templeton No, but again at what point in terms of applying 330, and in the submission I said before *Crossan* didn't help, and the state of the law at the time didn't help the defence because it would have fell within that third category.

Tipping J Yes I know but everyone's been dodging *Crossan* for 50 years Mr Templeton. I don't think robust counsel would have let *Crossan* stand in their way.

Templeton Well except that Mr Justice Somers in *R and Bennett* said that there is no such thing as a general power. It would be confined in relation to ss.

Tipping J There's a general power to subdivide counts.

Templeton And it's what 335?

Tipping J Yes.

Templeton But you've got to show prejudice don't you? And at that stage of the trial it may not have been really apparent

Tipping J But if there had been a request to subdivide then the whole basis on which the Crown was putting would have been identified

Templeton But the rub here, the rub here is that it appears it's not until the last few minutes of the jury addressed as the Judge herself put the factual alternatives.

Tipping J I appreciate that point.

Templeton So that's when the manifestation of prejudice arises, or begins to really hit home.

Tipping J Well I understand that point but I have to say I'm very curious that no-one thought of subdividing this, counsel or the Judge.

Templeton If that is at all a possible criticism of trial counsel I note in *R and P* that didn't stop the Court then

Tipping J Oh no, no, it doesn't stop it but all I'm saying is that it's curious to have a point like this raised on second appeal, but nevertheless you're raising it and it has some force.

Templeton Well I am raising it.

Anderson J This no doubt wasn't the matter in issue at trial because the defence was not along those lines. The defence was it's all lies.

Templeton Not necessarily. I'm not quite sure one can say that because the way it's been painted to the defence at that stage was that Burger King in a hotch potch of ill-defined calls and discussions, some of which were very innocent, there's only 'male A' that really is in that category of offending and that wasn't defined.

Anderson J Well some of the communications were contextual and some of them were capable of being considered specific threats and some might have just been jogging things along against the background.

Templeton Well yes but in fairness to the defence to know where the second unknown others' offending arose, that was never defined, it was simply a hotch potch.

Anderson J I agree with Justice Tipping that it would have been better if there had been one count specifically Burger King and one that covered the rest. This would have then turned people's minds to the need for directions on parties, particularly a second motional count. People did this but you have to be sure that she put them up to it and hear what they were going to say in substance

Tipping J Well he did say in concert

Blanchard J In para.29 she does make it pretty clear that in relation to the latest threats the jury has to be satisfied that they were made at the direction or behest of the accused, that she organised for them to be made. It seems to me that that really overcomes potential prejudice from failure to direct directly on parties.

Tipping J Well that's why I was curious about this point because there is a direction on parties in a sense but the Crown's case apparently was that she was a principal.

Templeton Exactly.

Tipping J I mean it's a terrible muddle.

Elias CJ Well it seems to me that the Crown case was that she was a principal and the evidence of the threats was called by the Crown in support of their contention that she was a principal. It was evidence which responded to the defence case that the threats at Burger King weren't meant. Now that is why things proceeded as they did. It's why there's no mention to the party provision in the indictment and so on because that wasn't the Crown case. The Judge may well have muddled things in the way she's dealt with things in paras.28 and 29 but I'm not sure that she wasn't simply saying 'you can't use the evidence of the phone calls unless you're satisfied that they were at her direction'. I'm not sure that it wasn't a direction, or intended to be a direction on the evidence and the use they could make of the evidence and that it wasn't suggesting, or wasn't intended to suggest that there were two possible bases on which she could be convicted, both as a principal and as a party. Now that's not the end of it of course because if the jury could have been left in doubt by the way she expressed it if it was ambiguous, then you may get there in any event. But I think what the Judge says is probably entirely consistent with this being a direction simply on the basis that the accused was a principal, not a secondary party.

Templeton Except that the first line of para.30 goes on to say however I need to say something to you about this evidence. That is the evidence that the callers are making the same threat and then she goes on to say referring it to be hearsay evidence and going on to say and referring to that normally being accepted. Now if that's got nothing to do with principal offending, that's got to do in my submission with the secondary position that the only direct threat we have here is the Burger King incident. She's then now talking about the others' evidence and she qualifies that by in the way she does in relation to supporting as hearsay, but it's only applying where there's a conspiracy. That's not the principal party situation. It can only be as a secondary party.

Elias CJ Well because she's charged with others

Templeton Yes she is

Elias CJ And the Judge is making a direction on evidence here and explaining why the evidence was admitted. She needn't have said anything about that.

Templeton That may well be true

Elias CJ Yes.

Templeton But what has happened is that the charges as you said, inferring they're all principals on undefined days, the evidence shows it comes down to perhaps two incidents, and then she goes on describing the second category of evidence as being hearsay evidence and allowed when there is a conspiracy. It's got nothing to do with the direct threat.

Elias CJ But that's so, leaving aside the fact that it's not hearsay, so we're sort of nonsense on stilts really, but

Templeton Well some part of it might have been

Elias CJ If it were hearsay then this is consistent with how you can use this evidence in support of an offence in which she is a principal. It's not directed at the main point that you're putting to us which is that there were these alternative bases. I don't see that it affects that.

Templeton Well with respect it does in a sense when it comes to the question of the jury being asked to consider solely whether did she act in concert issue 1, the only evidence that it related to was in the question of this issue of these unknown callers threats, which is considered to be hearsay, not direct evidence.

Elias CJ Well really the point of making this direction to the jury is the use they can put this evidence to and she says favourably to the accused be careful in the use of this evidence because it's hearsay evidence. That's why she's giving the direction.

Templeton Well in my submission it wasn't favourable, she should have been a lot stronger than that if she was going to say it at all. She didn't have to say it but if she was going to say it she should have gone further in terms of warning about the possibility of the complainant making up the issue, lying, he had a motive to do so, that the jury should have been warned about relying on the sort of evidence, some of which was said in the absence of the accused. There should have been a lot stronger warning given on the use that would be made of that evidence.

Elias CJ But there's no prejudice because it wasn't hearsay.

Templeton Some of it was.

Elias CJ Some of it was, yes.

Templeton Particularly on some of the aspects of the breaking of legs because the reference is that Linda is either with me or Linda has paid me $10,000 to break your legs. That's talking about the accused in her absence. It's referring to her. It's relying on it, quite apart from the co-conspirators rule issue it's hearsay.

Elias CJ Well it's hearsay if admitted as to the truth of its contents but it's not hearsay as to the threat that was made.

Templeton Correct, but the jury were told as if it was, this is the evidence that's come in, and you need to take it into account and the only qualification you need to consider, be careful because the person hasn't been cross-examined.

Elias CJ Well that's just muddled.

Templeton It is.

Tipping J The only direct evidence that these people were acting in concert as opposed to what one might infer was the evidence out of their own mouths that they had been put up to it by Linda. That is the malice in admitting it against your client. This is quite separate from whether it should have been admitted but no direction has been given on that point at all.

Templeton Yes, that's correct. I want to turn to perhaps the last example of possible prejudice and that is a general point in relation to the application of the Co-conspirators Rule where here the application relied entirely or virtually entirely on the word of the complainant. Unlike other cases in this area there was no corroborative evidence such as documents or other witness evidence or taped called clearly tending to support the existence of a common intention. In fact the taped calls don't advance the matter at all. The Crown case relied upon the complainant who had a motive to buy and the issue here when looking at whether or not on the first threshold of even accepting evidence, or rather to allow the application of the Co-conspirators Rule, the test clearly should be as has been made clear in the written submission reasonable evidence which is safe to admit, and the safetyness aspect apart from being spelt out in detail in the written submission comes from at least five Judges over a period of ten or 15 years, separate from the issue of balance of probabilities. So we have a situation here where the application is to be triggered on the back purely of one person's version of events. Now I'm not saying that in some situations the rule cannot be triggered in that situation, what I am saying that where it is dependent upon one particular person, it requires the exercise of a lot of caution and care by the Judge before applying the rule to begin with and that's demonstrated in my submission in the Australian case in the Crown bundle of *Pektas* which the Court probably are familiar with where Justice Murphy talked about the need where it requires a judgment call by the Judge in assessing whether or not the rule should be triggered. It requires, and he said amongst other things that at some degree of determination on the reliability or otherwise of a person in this position, and the second aspect of it is obviously if it is admitted plainly it would require very careful strong directions to the jury of the use of it if it was admitted. And that applies whether we're talking about the first or second threshold but is

very crucially dependent upon the nature of the test, the legal test that should apply. Because if it's simply the balance of probabilities for example it may be more probable than not that Joe Bloggs says the Judge is likely to be telling the truth. If however that the test is their reasonable evidence which is safe to admit given the constraints on the application of the rule on any event of the need to make sure that the rule applies fairly, and there's limits on the rule, then in my submission the safety to admit the test would probably exclude the application of the rule applying in the first place because how can the Judge know it was safe to admit simply the mere say-so of one person uncorroborated? Because this case unlike all the other conspiracy cases, the Courts as we know have a huge wealth of evidence put before it, which generally tends to justify it as indeed in *Morris* with Justice Blanchard, where there was a bunch of other corroborative evidence and taped calls and what have you that showed that. Here we have the say-so of one person. His version of events. Now if the relevant test is reasonable evidence which is safe to admit, in my submission it shouldn't have gone in, or if it did go in there was a need for a very strong careful direction.

Elias CJ The Judge didn't suggest that the evidence the complainant gave of the other threats which all came in through the complainant was corroborative of her evidence, sorry I said complainant, yes the complainant, was corroborative of the evidence of the Burger King thing. I mean she didn't muddle that. She said it all comes down to the complainant's evidence.

Templeton That's correct, particularly on the others. They're talking about the others' evidence which is the application of the Co-conspirators Rule. That depends entirely on the complainant's version of events

Elias J I just wonder whether the proposition you're advancing is not a lot wider than the Co-conspirators Rule point. That is a more general proposition that where the sole evidence is the evidence of one person there's a need for particular warning in the manner of sort of the eyewitness accounts, that sort of thing.

Templeton But I'm saying there are two parts to this exercise. I'm saying in relation to the triggering of the application of the rule the case as the authorities make it very clear and plain that the Court have to be satisfied it's fair and safe to let the evidence to go into the jury. That's clear from the authorities and there's a whole line of them which some of which have been referred to apart from His Honour Justice Cooke in the decisions I've cited plus *Uea* and others. So there's a limitation, a clear limitation as to when that rule can be applied, and the test that has been historically used is reasonable evidence, but there's where the conflict arises as to what that phrase means. Some authorities say

Elias CJ But that's generally because in those cases you're looking at different threads of evidence which may be ambiguous as to whether their point

is to a conspiracy or not. Here you have, yes I see, I suppose it does, it just seems to me that really you're arguing for a wider proposition.

Templeton No not entirely with respect because here we're talking about a non-conspiracy case as well not to forget and a conspiracy case is a lot easier than a non-conspiracy case where you can use this rule. My submission is when it comes to a non-conspiracy case where the elements are blackmail, not conspiracy, the Judge if the relevant is is it safe to admit and the application depends purely on the verbal say-so of one person uncorroborated, I say it doesn't get over that high first threshold.

Tipping J In the area where the Courts have in recent times developed the general hearsay rule, and I'm thinking of cases like *Manase*, we have adopted a phrase which I think is apparent, enough apparent reliability as one of the steps in the inquiry. It's just been crossing my mind as to whether that is a helpful concept in this area to, because we're talking about much the same thing. You don't let it in unless it has sufficient apparent reliability to go to the jury.

Templeton I accept that entirely indeed and as I have said in the submission that seems to be now enshrined under the new Evidence Act as I mentioned the new s.18, which is the new exception, which uses that phrase

Tipping J Does it, yes.

Templeton That's the test. Actually I stand corrected Your Honour. I can't recall whether it has the word 'apparent' or not. Seeing the word the emphasis on reliability of this in the circumstances

Blanchard J Are you referring to s.122?

Templeton No section I think 18 from memory.

Blanchard J You dealt with this in your written submissions and I'm trying to find where you dealt with 18.

Templeton 18 is in para.103 and 104 on page 31 of the submission.

Tipping J Reasonable assurance that the statement is reliable. Well it's the same sort of concept.

Templeton Correct, and if you apply the *Manase* test, s.18 is it safe to admit. They don't get off first base.

Anderson J If it's probably true, doesn't that mean that it's a reasonable assurance of the liability for the purposes of admission?

Templeton Well that's going to be for this Court and other Court to determine what that means. My submission would be if you look at the historical

interpretation of the test of reasonable evidence, as I have said, five Judges who say that means is it safe to admit, if that's the touchstone/reliability, then it's not going to be qualified any other way. It comes back to the circumstances providing reasonable assurance that the statement is reliable. Now if the Court's going to look for assistance as to what that phrase will mean, apart from *Manase*, is there going to come back to 'is it safe to admit', and I say in this case, they fail at first base.

Tipping J 'Safe to admit' must mean that it's not so obviously unreliable that the jury shouldn't even consider it. We're talking here about whether it should actually go before the jury, not whether it's ultimately going to be accepted as true.

Templeton Yes that's true but

Tipping J That's got to be very carefully worked into

Templeton And then the debate in *Buckton* as I understand it as I recall was this question of how high does this evidence have to go short of actual proof I think the words of Justice Somers, but it's pretty high up. It's stronger than a prima facie case but it's short of actual proof beyond reasonable doubt. It's in that no-man's land. Now if that's the position, if that's the test now and in the future, then it's a lot tougher in my view of the lower standard of balance of probabilities, and what we have in our case with our trial Judge, she does use this rather interesting phrase 'the lower standard'. A lower standard as to what is unclear, but in her trial ruling in, I think it's in looking at the Court of Appeal index, I think it's on page Roman numeral 47, XLVI. At the bottom of the page she talks about para.17. 'Given the lower standard that I'm dealing with in relation to this application', and she goes on and talks about in para.17 her conclusions as to why there was participation I might add, now three points. But leaving that aside, she's not clear to what she means by the lower standard. Was she meaning the balance of probabilities which she addresses herself

Tipping J No, no because she then talks about balance of probabilities as if that was the higher standard. I think she takes the view that reasonable evidence is a lower threshold than balance of probabilities which is a debatable point.

Templeton Well she addressed herself on the basis of balance of probability. She doesn't refer to reasonable evidence at all. She relies on of course *Morris* who in fairness to Justice Blanchard, reading *Morris* he didn't say balance of probabilities was the appropriate test at all. He relies in fact to reasonable evidence in his decision and says in the circumstances of that case there's no difference. That might have been true in that case

Blanchard J I think that was probably because I wasn't sure which is higher than the other. I actually think I prefer reasonable evidence which is safe to admit because it's a more direct expression. It tells you what to look at whereas balance of probabilities is a bit floppy in this context.

Templeton Well *Morris* is cited often as being the authority for balance of probabilities, but a reading of it doesn't

Blanchard J Well it wasn't because all we were doing was acting in accordance with the majority decision in *Buckton* and saying it doesn't matter in this case.

Templeton I'm not saying it, I'm saying the reasonable evidence, but it seems pretty clear from whether it be *Morris* or not, the reasonable evidence has been an historically appropriate test. It's only the majority in *Buckton* that talked about the balance of probabilities. Justice Cooke in his subsequent decisions goes away from that and relies upon his minority decision in *Buckton* referring to the reasonable evidence test and safe to admit, which is then followed in a number of other cases.

Blanchard J He obviously didn't consider he was bound in the same way that I did.

Elias CJ I still don't understand I'm afraid why we're mucking around with the Co-conspirators Rule. I would have thought that this is all about the failure to identify what information to direct properly on the aspects that were hearsay in this case. It's not a case where you've got anyone else, it's all coming in through the complainant

Tipping J Well if it didn't fit the Co-conspirators Rule or the parties equivalent of that rule, it shouldn't have been admitted at all insofar as it was hearsay.

Templeton Correct, exactly.

Elias CJ Well, yes I'm not sure that it should have been admitted but some of it wasn't hearsay so there was a need to differentiate the two. But I mean it's all bootstraps here. It's not a case like authorities of evidence being given of what co-conspirators have done outside the presence of the accused, because on your view there are no co-conspirators. This is just the, I just think it's getting conceptually over-refined.

Templeton Except that we're talking here about the question of prejudice that occurred in this case and we have here an application of an evidential rule, which is tricky at the best of times, used by the Crown to prop up it's case in order to get in the nebulous others' evidence. No other reason than that, and by doing so in my submission they have stretched the rules. Not only have they presented a case in the wrong way, the count in the wrong way, presented the case in the wrong way, the amount of prejudice, the accumulative prejudice that's occurred I say is strong and clear, and this is just but a classic example at the end of it all

when they go to get this evidence in to the extent it is hearsay, they rely on a rule which traditionally in terms of a conspiracy charge has a whole bunch of evidence supporting it, corroborative or otherwise, and here in a non-conspiracy charge they are relying solely upon the word of one person, and I'm saying in terms of prejudice at this level the submission is this is not how the rule should be applied, when you look at the approved ground of what is the relevant legal test. Is this a good point to stop Ma'am?

Elias CJ Yes we'll take the morning adjournment now thank you.

11.35am Court adjourned
11.53am Court resumed

Elias CJ Yes thank you Mr Templeton.

Templeton I just want to turn briefly to the point I had made earlier in the context of the unanimity ground which has relevance to the *Brown* direction and in turn the effect of prejudice by the failure to have separate counts. As is submitted and is contained both in the oral argument and the written argument, the position of the appellant is that there were the two separate factual alternatives for the jury to find guilt were never explained to the jury that the jury had to be unanimous on either one or both or either, so my submission is this. This Court cannot be confident that the jury was unanimous on either or both. There was no direction to that effect and that in turn comes back to this position where as illustrated in the written submission following *Brown and the Lord Chief Justice, Lord Bingham and Smith* where half the jury possibly could have been not satisfied that Burger King involved guilt, but were in relation to 'male A' and the other half for whatever reason thought Burger King was involved but were not satisfied on the callers. That was open, but the jury were not told they had to be unanimous on whatever factual alternative was put to them by the Judge at the end of the trial. And that failure to separate the counts as it were, particularly right at the beginning of the trial, had the prejudicial effect in relation to mens rea, as I said before because if Burger King was on its own, the defence would have been simply lack of mens rea for that particular incident and in relation to the separate count of the others, there's the different mens rea element in terms of did she have the mens rea of procuring. It is cajoling the principal offender, namely 'male A' of making the threats. Now because it was all wrapped up together and not split, those important elements got confused and lost sight of, all emanating from the way the count was drafted, right from the outset and indeed the way the case was then addressed by the Crown

Tipping J There's a link here isn't there with the need to have a direction for separate consideration of counts, and if you're too loose on what you

can charge under one count, you're in effect subverting the separate consideration of counts requirement?

Templeton Yes.

Tipping J I mean the thought's just struck me. I mean if there had been two counts they would have clearly had to be given a conventional direction

Templeton Yes.

Tipping J But if you allow it to be done under one count there's a risk

Templeton Huge risk.

Tipping J You won't have the jury's mind properly focused according to what would have been the position if there had been two.

Templeton Correct, and I say because of that failure and the failure to direct, this Court can't be confident that the jury were unanimous on either one or the other. That was the summary of the oral submissions I proposed to make at this point. Unless there's anything else that I can assist the Court on?

Elias CJ No thank you Mr Templeton. Yes Mr Pike.

Pike Thank you Your Honour. Yes may it please the Court, the primary contention for the respondent is that this was in fact a simple case. The appellant had a simple plan. It's a common or garden extortion with anonymous callers roped in and it's endemic in the way this crime works. The appellant was accused of one crime, not two or more crimes. The indictment charges her that between two dates together with others she threatened to endanger the safety of the complainant with intent to obtain a benefit. There is no alternative count in it and with respect the Crown's case is that while the trial Judge was possibly economical with some of the way the directions were set out to the jury, this was a case which has been described as I understand it by the Chief Justice today as one where the simple issue was whether the Burger King threat was credible in terms of being made with mens rea. That's all the Judge was trying to say to the jury and I think all the Crown was trying to say to the jury, because of course the posit was that if you looked at it alone it was just a so-called exasperated comment.

Tipping J Why the words 'together with others'? If the actus reus was the threat at Burger King and all the rest of it was simply evidentiary, why the words 'together with others' in the count?

Pike Well I'd submit that there was a continuing actus reus type of event that continued. It certainly can be chopped up into discrete,

unrealistically it's submitted into discrete events. One could have said that each threat was a repeated actus reus but would have been entirely artificial so to do because the simple reality of the Crown's case, or the allegations, were that the appellant at Burger King immediately with another person who was also a threatening presence, because he was alleged to have or said to have stood and block the path of the complainant to get out and then the threat was made

Elias CJ But he's clearly not the other is he, because he's not named? I don't know that you're answering Justice Tipping's point as to why the charged contained the combination?

Pike There was a question, there was always a question in this case and nobody is trying to duck it I hope. There's always the question of whether the evidence of Burger King was strong enough and you would have to rely on the fact that other people committed were participants in the crime and that she was also at that time a participant. I don't think we can duck away from them and I certainly don't want to be seen to do that but it is not the correct analytic path in terms of this is a clear incident A, incident B case. It comes about because once she leaves Burger King well that's behind her and about

Tipping J This isn't the point. The question is whether the evidence of the anonymous threats if we can call them was purely evidential or whether it was intended substantively to support guilt and that to me is quite unclear.

Pike Well I think it's both the way it's come out

Tipping J Well that's why it's got into such a muddle.

Pike Well it has but it's a muddle without a consequence if one wants to look at it that way, because on either basis

Tipping J An inconsequential muddle.

Pike Well I don't go so high as to say it was a muddle with respect but the reality is that so it had to be accepted there was a continuation of events. It was the same threat. It's not as if different threats were made, or different combinations of threats, the Crown's case was that the Burger King threat to break legs is the one that's made in it becomes the sort of continuing note throughout the entire transaction

Tipping J Well why do you call it the Burger King threat then? My note is that you say the simple issue was whether the Burger King threat was made with the necessary mens rea. That's precisely what you said.

Pike Yes.

Tipping J Well now what was the other evidence doing?

Pike The other evidence is as I said has a dual purpose which is said to have confused the issue and I submit it hasn't confused it quite as materially as might be seen by a somewhat more refined analysis at this level. What I'm say is that certainly the Judge left it to the jury on the basis that if it was satisfied that the Burger King threat was made with the appropriate mens rea at that time without even looking at the continuation or the other acts, then the accused could be found guilty on that count. That's what she seems to be saying in paras.27 and so on.

Tipping J But were they entitled to take account of the other later evidence in considering the Burger King issue?

Pike Yes they were, definitely they were, but there was a question mark in possibly the Crown's mind or in the Judge's mind as to whether they really had to, because strictly speaking if the jury was satisfied, and the reality of this case which is a word I don't want to overuse, but the point is that nobody it could be supposed to conclude that if the Burger King evidence was positively disbelieved or set aside by the jury that there would ever be a conviction.

Elias CJ No there couldn't possibly be because it all came in through the complainant. No they either had to accept her evidence or

Tipping J They might not have been sure about Burger King or about the other threats, but you're saying they could be sure on some sort of rolled up basis?

Pike Well you see it's not so much rolled up, the fact is it's relevant, the evidence is relevant to that because it is the same threat and the Judge is satisfied that these people are acting in concert, which of course is critical, but it's possible that the jury, or not all the jurors, would have accepted the Burger King threat in its own terms as proof of guilt. They would have gone on to say well it could have been exasperation and it's most likely that by itself the count would fail. If you couldn't look at anything else it's my submission that it's probable that the Crown wouldn't go forward with it or if it did it would be rather thin pickings because there's nothing else

Tipping J If they thought Mr Pike that it could have been exasperation at the time it was made, then it hardly becomes deliberate mens rea by dint of what happened later or you'd need a very careful direction not to retrospectively attribute which sometimes you have to give as you know.

Pike No with respect Your Honour that wouldn't be the reasoning path. It's not a supervening mens rea. What they would say is that looking at it in itself can we be satisfied? Some may well not have been. So we're not going to look at it in itself. We're not going to fix guilt on the

respective Burger King and push aside the rest. We have to look through the rest of the evidence and on that basis the Judge has said if you do that you must be satisfied that this evidence was, or these threats were made at the behest and is a continuation of the appellant criminal purpose. If you're not satisfied with that you can't use it nor could

Tipping J But you would then have to direct that the later evidence should be used as illuminating the state of mind at the time of Burger King. That would then be the proper direction.

Elias CJ And that's what should have happened. The Judge should have made it clear that there was only one threat and that the evidence was relevant to the mens rea

Tipping J At Burger King.

Pike Indeed.

Elias CJ Well it's the whole actus reus isn't it. It's a continuing threat

Tipping J Well not on the way Mr Pike's just put it that the simple issue is whether the Burger King threat was made with the necessary mens rea.

Pike Well we'll put aside the Burger King. If the threat was made. It started at Burger King.

Tipping J Oh well you're now shifting your ground.

Pike Well I'll shift it if I must with respect

Elias CJ Well it must be common when you have blackmail that there is a threat that current during the period pleaded and then there's evidence which supports whether, yes

Pike Well indeed I mean

Tipping J And it was a genuine threat for example.

Pike If we want to look at threats, a threat is made. Is it accompanied with mens rea? Now there seems to be that that's accepted by the defence case that the Burger King incident occurred in as much as she might have said 'I'll break you legs', but she didn't mean there was no intent that this actually happened. It was just an exasperated comment against a person who truculently refuses to pay her money. Now in that case the threat is made. If it is continuing then we come back to the *Fagan* analysis around at 1969 in respect of which of which *Kaitamaki* is founded of a continuing actus reus, i.e. where the policeman's foot is perched on by the car wheel and then the person said I did that by accident and the policeman said will you move the

car please and then with an unambiguous expletive he refuses to move the car and in which case the House of Lords says well of course now the mens rea has tacked on because these physical events are occurring. This is not dissimilar from this case. There is an utterance 'I'll break your legs'. Is it with mens rea; is it the completed crime? It's an actus reus but it's not complete. Now as it goes through the process without attenuation then there becomes evidence that this is serious. Windows are broken, phone calls are made and there's following and so on.

Tipping J But the actus reus and the mens rea must coincide. You can't have an actus reus which is subsequently topped up by developing mens rea when there was no mens rea at the time of the actus reus.

Pike Well you can indeed with respect Your Honour and that was *Kaitamaki's* case and also *Fagan*.

Tipping J Well *Kaitamaki* was a very serious case where you continue to have intercourse after it's become clear that the woman is not consenting. I don't really thing with respect that case supports your proposition.

Pike Well certainly *Fagan* does with respect. The physical events that occurred

Tipping J I know the case of the chap who drove over the policeman's foot.

Pike But there is with respect, if analytically can bear it one can have a mens rea supervening over an actus reus. It's not quite that case because really what the jury is finding is that by dint of the whole of the evidence the actus reus and mens rea certainly were there at Burger King and continued.

Tipping J But the Judge didn't direct them did she that the evidence of the later events was relevant to whether or not there was mens rea at the Burger King.

Pike Well not in specific terms but I'd rather read what she said in those paragraphs, I think it's 27 sequentia was that what she was telling the jury was that if you look at the, you can't look at the second lot of evidence, so you can use it to look at whether there was mens rea for the thread. You look at the second lot of evidence if you like, the post Burger King evidence, only if you're satisfied that these people were parties as it were at the behest of the appellant, so in that extent you can't use this evidence unless you're satisfied of that but she didn't say it wasn't relevant or how it was to be relevant to the proof of mens rea in Burger King.

Tipping J No she didn't tell them that that was the only basis on which they could use the evidence. She told them that there being a conspiracy they could use the evidence.

Pike Well indeed. Well with respect she

Tipping J That's the whole problem.

Pike Well with respect she didn't do that either Your Honour. What she said was quite favourably was having found as a preliminary issue there was evidence sufficient to admit the evidence under the Co-conspirators Rule, she actually left it to the jury as well to decide whether in fact there was evidence these people were acting in cahoots as it were with the accused before they gave the evidence any, before they used it.

Tipping J Having told them that they were.

Pike Well having told them that it was admitted she then left it to them to decide whether they could use it. Now that was a mistake but it was one that could hardly harm the appellant's position it would be thought.

Elias CJ Except the process by which she gets there is an existing conspiracy, that's the problem.

Pike Well certainly she's found that there's evidence sufficient to admit it.

Elias CJ When it's wholly unnecessary to go there.

Blanchard J The final sentence of para.31 does go a distance towards rescuing the situation because having said that the evidence of the other people hasn't been tested by cross-examination, she then says 'remember that before you accept the evidence you need to be satisfied beyond reasonable doubt that these callers were acting in concert with the accused and that they did make the threats that Mr Wang gave evidence about'. The jury would have been pretty confused by the beginning of that paragraph but maybe by the end of it they had sufficient direction.

Elias CJ With great respect the last part of that is completely wrong. It begs the question. She's saying they can't accept it until they're satisfied it's true.

Elias CJ Beyond reasonable doubt.

Pike Well they couldn't accept it unless they were satisfied there was a conspiracy which is not their task

Elias CJ But the worrying things is that not having explained that this evidence was relevant to mens rea in the one count, she's compounding it by telling them that they have to be satisfied beyond reasonable doubt which suggests that it's a different count. It's not an evidential direction, it's a onus of proof direction.

Pike No, no, as I said I don't think one can shrink away from the fact that there appeared to be two paths to liability and in a sense there were because if the Burger King incident was not in itself sufficiently firmly based without going on to look at all the other subsequent events, then of course one's looking at all these subsequent events to see if the accused became culpable as a part of that continuing offence.

Elias CJ Well then there has to be another count.

Tipping J I was just going to say Mr Pike that all this demonstrates the clear need for two counts.

Anderson J Well it depends how you look at it. It's open on the indictment and I think it may well be realistic to look at this situation as a continuing threat, episodically exemplified and reinforced. It was the same threat throughout and because there was no response to it, it was reinforced – 'we're going to do this, we're going to do this – and to split it up into discrete acts or words I think just doesn't capture the reality of the position that was occurring.

Pike Well that is the Crown position in a nutshell Your Honour, yes.

Tipping J But I'm not

Elias CJ But then the Judge had to direct them on the use the evidence could be.

Anderson J But that would be a subsequent issue but I think conceptually it's a continuing threat

Pike Yes.

Tipping J But I think it's very unwise and I've always understood it to be strongly discouraged to have a single count with two conceptual bases of liability, i.e., principal and party.

Pike Well with respect Your Honour I'm not certain that they are so conceptually removed. This is more common purpose. This is not much different from a case where one would allege that diverse people known and unknown kicked somebody to death for instance Sir 'A' together with 'others'

Tipping J Oh with great respect it's completely different. You have here a clear personal threat at Burger King and clear vicariously threats elsewhere.

Pike Yes, well

Tipping J Two counts, very simple, none of this problem would have arisen.

Pike Well the vicarious threats are such that there is still a link in as much as that when there's a complaint made about the windscreen of a car

being smashed and the windows of the house being smashed independently, there was evidence independently of these events, then if one can rely on the credibility of the complainant the accused is alleged to have said you know 'what can you do about it' in that sense which indication of a closer link than simply people acting without any reference back to this person or any knowledge of the person, and it's not so clear cut, but the devil in the case as well with respect is that there is a persistence amongst the counsel in this country at least to talk in terms of principal and secondary parties. We don't have them in New Zealand as the Court is clear about. We have no such concept it was abolished years ago in the criminal code and I would submit it was one of the genius of the old codifers that they got rid of it and simply

Tipping J We don't have it structurally but it's a perfectly appropriate terminology to demonstrate para.A as opposed to paras. B, C, forget D

Pike Well respectfully at times it can be helpful to clear thinking, I wouldn't cavil at that at all. But the point of s.66 is that it rules that everybody is a party to and commits the offence who does one of these actually commits it and so on and so on.

Tipping J Yes, yes.

Pike So no distinction is being made between committing an offence by any particular route so the principal you don't find someone guilty as a secondary party, you find them, they committed the offence, not as party and conceptually in this case it's rather important with respect to perhaps draw to the Court's mind or attention that that part of it is s.66 because it is what we rely on here. These are essentially people who with common purpose have combined to continue to make, or not to make, but to, on one part to make and the other part to continue a threat.

Tipping J But the Crown conventionally invoked s.66 in the indictment if they're seeking to make the person liable other than under para.A. I mean practice supports this conceptual distinction too Mr Pike.

Pike Indeed, I'm not suggesting it hasn't got its place, I'm just saying that at time it can lead counsel to make submissions that are unfounded, especially having regard to counsel's submissions as the need for a different sort of mens rea from secondary parties, because in New Zealand there isn't unless it's strict liability which we're not into. But here with respect what we're submitting in the case is that no substantial miscarriage has occurred by reason of the way the indictment was framed. Certainly one can take the criticism and one must from the bench that it was a case for separation and I don't want to simply labour the point that it was properly laid. The real question is whether assuming that it ought to have been separated what would have happened differently at the trial? In our submissions with respect there's almost nothing except that the question which goes to

unanimity might have been set to one side, it wouldn't have arisen because there would be two counts and so it would come out of the equation. But the real argument here with respect is on the unanimity rule, it doesn't arise on the evidence its submitted because it doesn't matter whether the appellant was convicted on the basis of the so-called Burger King or as the basis that she, the others as her agents, which is the Crown put the case, by way of agency, that people acting at her behest and with mens rea, her mens rea being proved, made the threat. Even if the six jurors example which we won't go through, or some combination thought that different routes to liability it wouldn't matter because all jurors, all 12 jurors would have concluded that the appellant with mens rea made a threat to extort the sum of money from the complainant, and there could be no issue of a *Chignall* type case or those rare cases where in fact the Court stumbles in trying to determine whether in fact there are two entirely different sets of actus reus and mens rea as in *Chignall* and the jury plainly half could have believed one and half the other, in which case there is no unanimity. But *Chignall's* a rare case.

Tipping J Are you asking us in effect not to follow *Brown* and to put Lord Bingham, or Sir Thomas, as he was then aside in *Smith*?

Pike They're different cases with respect. *Smith*'s arguable but I mean one can understand it. There were different events than the same people or some different combinations turned up, somewhere else, sometime later and so on and one can take the criticism that the Lord Chief Justice made in that case and accept it. I do with respect submit that *Brown's* wrongly decided. I think the Court in that case misunderstood what Lord Justice Lawton was saying in the case that they relied on. The difficulty is that it is simply a case of different paths to liability. If one for instance the Crown, the starting point is that the Crown is not obliged to particularise count, to put particulars in count. It does so. One is not at all certain whether there would be a problem for instance if the Crown said to defence counsel 'I'm not going to particularise the count so that they're quite complex, what I will do is I will give you my opening and then you can have it in advance of the trial'. So that's laying out our whole roadway to conviction. There it is. Now on that basis one couldn't say that one would have thought that the Court could say that there's unanimity issues, that's an element of the offence, that it hasn't been proved, because the Crown has got it in its opening. You couldn't do that, but it would immediately say well if you're going to put it in the indictment – oh yes it is, and I don't think the Court of Appeal in *Brown* was right in that and it certainly hasn't been followed and it's caused some distress to all of the commentators and the Court it seems with great respect to have sidelined *Brown* as being of limited relevance. But in *Brown* the difficulty is that there are four particulars of false pretences. As long as any one of them with mens rea would have induced. Now a jury had to believe that unanimously and it's possibly an argument that unless that's made clear then you're running into trouble, but as long as all jurors believe

that one of them was made and maybe were not satisfied about others and that one induced the complainant to part with a sum of money, then all jurors are satisfied that money was obtained by a false pretence.

Tipping J Does this suggestion of yours apply even if the pretences or physical events are disjoined in time?

Pike Yes indeed it does.

Tipping J I can understand if what you might call a rolled up inducement is given, you don't have to subdivide, but the idea that you can as it were have separate inducements, separate pretences on separate days

Elias CJ Which is why I think *Brown* is right, but I don't think we're in that sort of case at all here.

Pike No, no, well the point is that ultimately it's a matter of trial fairness I think that point was made by Your Honour the Chief Justice and the Crown accepts that. There are times, and they're hard to predict because of the generality of the crime. There are times when it's proper to indict separately and at times when it's not. It is proper in the public interest, in the interest of justice, the wider interest to indict on a number of different bases. But it goes to trial fairness and the real critical point is with respect now is that we have all of the pre-trial protections in the world to have the indictment sorted out, including going to the Court of Appeal pre-trial, to get it right, so really the focus here as the bench has observed is that nobody saw any difficulty with this, either Mr Kaye or the trial counsel are both very experienced criminal lawyers, saw any difficulty with the count and possibly that's why we really don't need to get as I say I don't want to labour the points about cases like *Brown* or *Mead* or anything else because they're not truly engaged.

McGrath J Mr Pike just coming to *Smith,* Lord Bingham seems to be indicating that the problem will arise not only if the conduct falls into different sequences, but if the character of the conduct in each sequence differs, that that's the crucial issue. I'm really wondering how you would apply that proposition in this case. I'm looking at page 17 of *Smith.*

Pike Oh yes indeed, oh quite, yes I would say that the, yes, I mean taking that as a positive fairness if nothing else and noting that there are extreme differences between their laws as to indictments in England and in new Zealand, they don't have anything equivalent to our 339 and never mind. They don't have anything equivalent that certainly the character here did not change. This is the point and possibly one of the most important points in the whole case is that there's nothing really different and if the Court accepts as I'm sure the Court of Appeal did, and indeed counsel, that the real threat, 'and I'll break your legs' and then there's a whole lot of different combinations as to how that is

dealt with. If that hadn't been the case then more difficult issues arise, but this case was a single threat and so that's

Tipping J I have to put you on notice that I have difficulty with the proposition that you can say it's a single transaction or you can call its character the same if in the one instance it comes out of the accused's own mouth and in the other instances it comes out of an agent's mouth to use your words.

Pike Well with respect Your Honour all I can say about that is that the dominant force in this case is the appellant. Everyone else is and that's the sense I used the words secondary party which has not been received well but what I want to say to you is the principal offender in the sense that the money is for her; she is the one with the grievance; she is the one who makes the threat in its form; it is kept in that form all the way through it and in that way to say that because somebody else makes it, so long as one is satisfied that they're doing it as a ventriloquist dummy for the appellant then with respect the transaction doesn't alter so much that one could say look it's different people for different purposes.

Tipping J Oh it's the same purpose, the same objective in sight but a continuous transaction, that's what I have, a single continuous transaction, that's what I have difficulty with over a period of six weeks, or with an interval of about four weeks I think in between the first and the second bit.

Pike Well with respect that's evidential but the point is that to the extent that the jury accepted the testimony of the complainant, there has been the repetition of broken legs and there's been the repetition of the fact that it was the appellant who was the person who was inducing the threat to be made by the anonymous callers. Now that really is just here acting, it's basically conceptually her acting, it's her threat, it's her. It's not these other people, it is the appellant.

Tipping J But if I am trying to kill someone and I try myself on day one ex hypothesise I fail I suppose, and then I employ a hit man on day 30, I suppose that you might say that's a bit far-fetched and not the facts of this case, but it just seems to me you're stretching it Mr Pike, but I hear what you say. You say ultimately there's no miscarriage which is probably your best submission.

Anderson J It's typical of blackmailers to work by attrition until they get what they want and that's the reality of what happens, so the threat is always there and it's exemplified in little way and big ways and subtle ways and indirect ways. It's all threatening.

Pike Yes, this is an instance where the Court will meet more and more in New Zealand unfortunately. That type of situation will continue in criminal cartel. There's always someone behind it and that people that

we see in the Courts are so often just the henchmen, but no-one would doubt for a moment that the brains behind it, if one can use that word, is the most culpable person, and that's what we're saying in this case and I don't want to compare it with major organised crime or anything. It's a petty and nasty little piece of extortion but it's hardly organised criminal endeavours**,** but that is the way the Crown often is forced to deal with it by dealing with anonymous people and by indicting others with anonymous people. But we want to make the submission with respect and I don't want to detain the Court on it that ultimately the unanimity issue is not a real one; that the Judge and everyone dealt with this case on the basis that if the Burger King incident didn't occur, there's no possible way we could speculate reasonably that there would have been a conviction and that the difficulty with the case is simply that we have left ourselves open to the fact that it looks as if on the way one looks at it on paper, it looks as if we've indicted on two different bases and in a linguistic and analytic sense that is true because she does become committed as a party to the offence if you don't accept the Burger King evidence, she would have to be liable by that other route, but I don't think for a moment that happened, but the risk is there and analytically it could be read that way, but really with respect the four points that were left to be argued today I just simply sum up by saying that as to the allegations properly included in a single count, well arguably they were but I certainly hear the Court's concern that they ought not to have been and I can accept that in some ways it might have helped but it is almost impossible to conceive that the trial would have looked materially different, because one still would have used the evidence that the second count is relevant to the first because plainly it was. There would not have been severance, so the jury might have been reminded of something which was obvious on the case as it was run, of the need to make sure that they knew what they were doing if they were going to find that she had mens rea at Burger King, that they had to use that evidence of the second one for that purpose and they could only do it on the basis there was co-conspirators. Well they couldn't use it. If they thought she wasn't guilty of that for some reason they had to come at the secondary evidence in exactly the same way it was come at in her directions which I say were economical perhaps, that's the worst one would say about it, because it reflected the way the respective cases were run. Both sides put their cases very simply and that's reflected in the summing up. As to unanimity, that point's been covered. As to whether there should be corroboration requirement, we respectfully say well no

Tipping J No-one's saying there should be corroboration Mr Pike but

Pike No, I sufficiently directed that case which depended essentially on the evidence of the complainant. That would have been obvious and the Judge made it plain many times that it's their credibility that's the crucial thing, you must consider that, and that would be sufficient and the co-conspirators it would seem first that the trial Judge most likely used the balance of probabilities in any event but whatever the case one

in the academic debate about that, certainly one would support a reasonable evidence test and for the reason I think gratefully seize Justice Blanchard's observation that it does focus the mind on what the Judge is to do, that is most likely the hearsay test in the new evidence.

Tipping J Do you see reasonable evidence as being a more demanding or a less demanding requirement in the balance of probabilities?

Pike I think it we change from case to case, well what it does do, and I certainly gratefully accept the line thrown out is that it may be more demanding in some ways.

Tipping J Well I've always understood it and rightly or wrongly as being less demanding and I think that's the tenor of *Buckton* isn't it?

Pike It is but in some cases it's

Tipping J Well that means it's a wholly vague and waffly test if no-one knows whether it's more or

Elias CJ Well it's in the evidence now so we'll have to use it.

Tipping J Well never mind that

Blanchard J Well I think it only becomes vague when this strange comparison with balance of probabilities comes in. It looks like a fairly straightforward test until somebody says well what about balance of probabilities and then you say oh I don't know, because balance of probabilities doesn't fit very well.

Elias CJ No, that's what I think.

Pike No it doesn't

Blanchard J In this context.

Pike It is asking a judicial officer to judge. It's a question of judgment like the test for the unfairness of evidence which the Court of Appeal long ago said oughtn't to be on the balance probabilities but on judgment, not on a normative evidential basis

Tipping J Well that's the point isn't it, that a crucial issue is reliability not the standard of proof that the evidence reaches?

Pike Yes, yes I'll accept that. In some ways

Blanchard J New Zealand's out of line with balance of probabilities in this. The Court's elsewhere have tended to go for the reasonable evidence.

Pike They have and as I said that is quintessentially because it is a matter for judgment as is the admission of hearsay evidence, ultimately it's judment.

Tipping J Well it's got to be sufficiently reliable to suggest that there is in fact conspiracy because the co-conspirator's problem is that you're almost begging the question in proof of whether there is a conspiracy you are sought of assuming for the moment up to a certain level that there is a conspiracy.

Pike Well we have done that and there are cases and I've done them with the late Professor Orchard where it's clear that the Court was actually looking at the evidence it shouldn't have looked at to decide whether there was a conspiracy in the first place, because simply the human nature and the reality screamed out for that and nobody then criticised it and I think reliability does bring that reality back to it and I'd certainly support it.

Elias CJ Mr Pike I'm more bothered by the penultimate point you raised which is the need for some fairly firm direction because everything depended on the complainant's evidence. There was no other independent evidence

Pike Well sorry yes there was just a little. I wouldn't put it too high. There was the corroboration of the timings of phone calls that he said he had received. So there was that and there was the fact that the car and the windows were smashed. That was independently seen, so

Elias CJ I had in mind though and I might be getting muddled about it but I had thought the High Court of Australia in a case like this would actually require much stronger directions, because although the Judge says it all depends on the complainant, there's no sort of additional warning brought in

Pike No, that's

Elias CJ And really all this talk about co-conspirators and so on in a way rather dignifies, or suggests that there is more evidence. It doesn't really emphasise that it all comes down to what she said.

Blanchard J He said.

Elias CJ He said, yes.

Pike Well I don't suppose both because his wife did testify. I submit with respect Your Honour that we first put up juries at the baulk of our freedoms and most important determine to justice in between and so then we tend to rather mistrust them in a large number of areas.

Elias CJ Oh no, no, it's more rather helping them with their function

Pike But yes I certainly submit with respect that it would be clear to the jury that there was very little else in this case except the word of the, the Judge did make it clear how important the credibility was of the complainants, but it would not be lost with respect on the jury. There wasn't much going for the Crown except the two complainant's testimony in some peripheral corroboration and it would be seen as a case which was short, uncomplicated, where the jury would not have missed the point and were likely for some reason because of the absence of a strong direction, and I'm not at all sure what one would say if it had to be said, that by reason of this they were cavalier or did not consider very carefully whether beyond a reasonable doubt the complainant's testimony could be believed. There's nothing to suggest that in the

Elias CJ No, but that answer is directed more at whether there was a miscarriage of justice in the circumstances of the case because it would have been obvious to the jury, but what about on the wider policy issue of whether some more assistance should be provided to juries in this sort of case?

Pike This brings us with respect to a clash of perspectives sometimes and I would certainly submit that the less technical directions that are required from a judicial officer summing up the better. I haven't got it to hand but there's a wonderful pungent article from I think Justice Moldaver from the Ontario Court of Appeal, it is a rather bitter article, but it points out that in Canada there are 102 standard Supreme Court generated sets of directions that have to be looked at by every Judge in every trial.

Elias CJ Well the same complaint is made of the High Court of Australia in Australia. I just wonder whether we are not a little cavalier? If those jurisdictions are much more careful than we are

Tipping J The Judge actually does go through implicitly when discussing the defence case and slightly when the Crown. She doesn't specifically endorse counsel's remarks but she certainly doesn't disavow them apart from the need for care because of this complainant, you know it really all turns on the complainant and so on

Pike There is that. There is a passage in our case at 66 where we do make the point I'm sorry I overlooked where there was at least some, the English practice, at least there was a helpful case in Eastern recorded there that in cases involving an unreliable witness, obviously the Judge will have to make a call about as a matter of discretion, but the Court there did apparently say or were recorded, they're saying that attempts to reintroduce the straightjacket of the old Corroboration Rules are to be deprecated, so there's a concern that it might get back to a standard bench book type of approach which has trial Judges directing a respective of what the trial Judge actually thinks of a particular witness

out of share caution and I think that was the point Justice Moldaver was making that bench book standard and axiomatic, and the High Court of Australia hasn't gone that far but I think certainly appellate Judges in Canada are concerned that the Supreme might have. But I certainly would say that the trial Judge here, or no-one would be left under any illusions just how critically important it was that these people be believed beyond reasonable doubt, but I really don't want to detain the Court anymore.

Elias CJ Thank you Mr Pike. Yes Mr Templeton.

Templeton I will be brief. On that last question of whether there is a need for specific directions I would draw the Court's attention to *Ahern*, the decision of *Ahern* which is under tab, in the Crown bundle under tab 16. Page 104 of *Ahern.* Page 104, last paragraph, lefthand column. It starts of "It may be argued that not leaving the question of admissibility to the jury in that the jury may see the independent evidence of participation as unconvincing and may yet act; upon the acts and declarations outside the presence. Any such danger however would be avoided by appropriate direction of the trial Judge. It will be proper for him' – this is the point I'm really coming to, from this point on – 'It will be proper for him to tell the jury of any shortcomings in the evidence of the acts and declarations of the others including if it is the fact, the absence of any opportunity to cross-examine the actor or maker of the statement in question and the absence of corroborative evidence. Where appropriate it would not be difficult to instruct a jury that they should not conclude that the accused is guilty merely upon the say-so of another nor will that be an instructions which is difficult to follow'. So what *Ahern*

Elias CJ That's a bit rough.

Tipping J That's going a bit far Mr Templeton.

Blanchard J There was in fact a mention of the absence of any opportunity to cross-examine the actual maker of the statement

Templeton Yes there was but the question of the absence of the

Blanchard J It's really a question though of whether that wasn't so blindingly obvious as not to need anything more than the Judge pointing out as she did that it all depended on the credibility of the complainant.

Templeton Well this passage I've just drawn your attention to. The passage goes further and says 'where it is appropriate it will not be difficult to instruct a jury that should not conclude that an accused is guilty merely upon the say so of another

Blanchard J Yes but what

Templeton Particularly in the context of this case that has a lot of relevance against the background or backdrop of this application of a co-conspirators rule on a matter which is not a conspiracy charge.

Blanchard J I don't know that I'd read that passage as being something that was mandatory

Templeton I'm not suggesting that but in the context of this case it does have relevance, real relevance.

Anderson J But here there were two others, not one, there were two people and there was broken glass more or less contemporaneously and I don't think there could be the slightest risk that any juror would say well I'm not satisfied beyond reasonable doubt that he's telling the truth but I'm going to convict him. It's just nonsense. That's what the whole case was about. What other evidence could they rely on?

Templeton If the starting point is Burger King for example my friend as I understood to say was that he accepted that may be construed as a statement in exasperation, not necessarily a threat

Anderson J But that's a different issue from whether it was said.

Templeton Correct, but if in fact there's no mens rea at the time it's simply an act of frustration or a statement at the time. In terms of so-called the continuing threat, if there's no mens rea at the time, it's not a question of continuing at all. The continuation stops. If there's no mens rea at the time that that statement is made in a moment of frustration and exasperation there's nothing to continue on. It might be part if there was a separate count of the background, the relevant background, but it is not a continuing threat.

Tipping J If it doesn't start it can't continue. What's the point?

Anderson J I accept that the direction relating to just Burger King is problematical.

Templeton It might be a bit more than that. So if my learned friend is conceding the fact that the Burger King incident could be construed and is construed as an act of frustration exasperation it is not a threat. It's not continuing.

Tipping J I don't think he conceded that. He simply said it might be possible for the jury to take that view.

Elias CJ If there had been no further evidence. There'd be a huge coincidence. They're entitled to infer.

Templeton I accept that, I accept that. He was also saying that the threat was made at Burger King and it was a continuing threat. The evidence doesn't support that at all in my submission.

Elias CJ Well on the Crown case the evidence does support that.

Tipping J Properly used.

Templeton Yes, properly used, that's the essence. The third point I want to just draw attention to is that he said that the *Brown* position doesn't apply and reference was made to *Chignall*. I just want to draw your attention to a passage in the appellant's submissions at para.76 which cited party *Chignall*. If I understand the Crown's submission correctly he said it didn't make much difference at all which route the jury got to in terms of finding guilt and the passage cited in para.76 of the appellant's submission the last sentence says, and it's talking first of all about the alternative count in Auckland which of course doesn't apply here. All jurors who favoured one count there's be no verdict of guilt. The third sentence, the position cannot logically be different where there is one count which is understood as incorporating alternatives. And that is the position here. I say this is a *Brown* situation and plainly the last sentence of *Chignall* encapsulates what I've been saying. There were to the jury of the one count various alternatives and there was no direction that they had to be unanimous on particular alternative that formed the basis of the blackmail charge. And as to the submission that *Brown* hasn't been followed in *England*, I think that is with respect wrong. It's followed certainly in *Smith* by Lord Justice Bingham – followed in *Carr* in 2002, which is referred to I think in the *Mead* decision. There are at least two or three English cases that have followed the application of, the principle rather than of *Brown*, since *Brown* whilst being a subject of legal debate and some contention, it is quite wrong to suggest *Brown* has not been followed.

Blanchard J It's really a question in the end and in particular cases of deciding what was the transaction which is the actus reus and in *Chignall* it may have been appropriate to say well there's one possible actus reus in Auckland, one in Taupo, and therefore they have to be divided up. It can't be regarded as a continuous transaction, but it's very difficult to know when that is the case and when on the other hand it's more appropriate to regard something as continuous. Mr Robertson's article that be cited to us demonstrates that. I find it an extraordinarily difficult question and it largely depends upon the conclusions you draw on the particular facts of a case. It's hard to lay down a hard and fast rule

Templeton I accept that.

Blanchard J In this case it's a matter of judgment whether this was really one transaction, taking place over a considerable period of time or whether it's more appropriately dissected.

Templeton I accept that. The point was made as to whether this was a continuance course of conduct of the same character. I'm not so sure that the

character of the callers is the same, because we had that mixed bag of callers. Some innocent, some simply pursuing and raising the question of a civil debt. It is only the call of 'male A' who turns to the question of the broken legs. That is consistent with or similar to or the same as the appellant at Burger King. The other callers had nothing to do with that at all, so to say that it is of the same character all the way through my submission is wrong. It's a mixed character in relation to the callers who the trial Judge banged together loosely as saying or used the same threat of breaking legs. Leaving that aside

Tipping J All to do with trying to extract the same money though.

Templeton All to do with trying to obtain money due to a company in China. Some of the calls were quite legitimate and innocent as I said. It is only 'male A's call out of four that fall into the category of some degree of criminality.

Elias CJ No, no that's overt. It was open to the jury to see the other phone calls in context as threatening.

Templeton True, but 'male A' is the only person who made the so-called threat.

Elias CJ Yes.

Blanchard J If there's a sequence of events in which there is a threat which let us say looks like blackmail, and then there's a legitimate attempt to extract a debt that's owing and then there's a reversion to blackmail, why shouldn't it be regarded as a continuous transaction? Why should the fact that there's been a legitimate attempt in the middle break the sequence?

Templeton That's fair, except that in this case this there's no break in the middle to be discussion chronologically in relation to the legitimate attempts I think were at the beginning. The 'male A' comment was made towards the end. There wasn't a breaking as it were along the way.

Blanchard J I don't know that I follow that.

Templeton Well your example was that there was the threat, innocent discussion threat again. I think the sequence is innocent discussion insofar as the callers are concerned, then 'male A'.

Blanchard J Ah well you start with Burger King.

Templeton Yes, excluding Burger King. I'm talking about the callers' evidence. The callers' evidence is innocent discussion then we get to Burger King, then we get to 'male A'.

Tipping J And the Judge was really quite with respect spartan in her directions on the evidence on that point but that on its own would probably not be significant but it's a very spartan summing up

Templeton And it just underlines the need for separate counts because then in fairness the Burger King could be isolated and looked on its own and address the callers 'male A' threat would have

Tipping J Well I'm looking at what I'm calling the vicarious ones just as a group of them Mr Templeton to say just 'the callers' in what you might call a broad way, when some of them were of one character and others were not, is well not totally helpful, but you know that on it's own wouldn't really get one very far. It's just part of the whole picture.

Templeton Yes but one thing I'll say about these calls, although it's not really apparent is there is a mixed series of motives it would appear for the money discussion. There is the money owed to the company in China. There is the claim about the return of the IOU note which the appellant found that the complainant had taken that belonged to her, she says unlawfully. There was also the discussion about the immigration status generally, so you have a mixed series of topics for these calls. So it's not a situation of the breaking a leg threat for the money. What money? It's continuous all the way through. It pops up but it's not continuous. And the last point I would mention is reference is made again to the relevant test in the difference between balance of probabilities and reasonable evidence, so I just draw the Court's attention to Justice Cooke, was in *Buckton* who drew a practical distinction between the two tests. He said that the balance of probabilities test was rigid, or more rigid and therefore it didn't allow for the flexibility that the reasonable evidence test so provided. Justice Somers agreed with him on that and then referred to the reference as being safe to admit which is also what Justice Cooke had mentioned. The majority decision didn't refer at all to the safeness issue and Justice Cooke felt that the balance of probabilities was less flexible and more rigid. I can't actually find the exact passage to hand at the moment but it's apparent when one reads it

Tipping J Is there not a more fundamental difference, namely that the real issue is whether this evidence should go to the jury not whether the Court thinks it measures up to a pre-ordained standard of proof? The latter being a sort of indirect way of saying it's sufficient to go to the jury, but the key point is will you admit it so that the jury can consider. Surely the focus should be on that rather than some abstract standard of proof.

Templeton Well as I tried to say in my opening I think there are two aspects to it. One is that in the context of this particular case when it's dependent upon one person a lot of caution needs to be exercised by the trial Judge

Tipping J That's application. I'm asking you whether you agree or disagree conceptually with that distinction.

Templeton Yes, with the distinction, yes. Those are my submissions.

Elias CJ Thank you Mr Templeton. Thank you counsel for your help. We'll reserve our decision.

1.00pm Court adjourned