

IN THE COURT OF APPEAL OF NEW ZEALAND

THE QUEEN

v.

Set 2

WILLIAM JAMES PIRI C.A.126/86

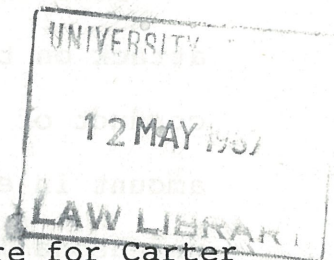
ERNEST GEORGE CARTER C.A.127/86

Coram: Cooke P.
McMullin J.
Somers J.

Hearing: 7 November 1986

Counsel: M.I. Koya for Piri
C.B. Cato and J.N. Bierre for Carter
R.R. Ladd for Crown

Judgment: 13 March 1987



JUDGMENT OF COOKE P.

William James Piri, a Maori aged 44, and Ernest George Carter, a Pakeha aged 22, were charged that on or about 7 September 1985 at Auckland they murdered Maxine Julia Walters, a Maori woman aged 26. They were tried before Smellie J. and a jury in Auckland from 12 to 30 May 1986. Neither accused gave evidence, nor was any other evidence called for the defence. Nevertheless, as will be apparent, the trial was a long one. But, after a retirement which including breaks for tea and an evening meal was little over four hours, the jury found both men guilty and they were duly sentenced to life imprisonment. They now appeal or seek leave to appeal against their convictions. A range of

grounds was argued on their behalf by counsel who did not appear at the trial. Mr P.A. Williams and Mr M. Gibson represented Piri at the trial, while Mr R.L. McLaren, with him Mr J. Bierre, appeared for Carter. Only the last-named counsel appeared in this Court. Mr R.R. Ladd conducted the Crown case in both Courts.

Some of the arguments raised in this Court involve an attack on the Judge's summing up, some an attack on the conduct of counsel who prosecuted for the Crown, and some amount in effect to saying that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence. Before dealing specifically with them, an outline of the evidence is essential, not only to enable all the arguments to be considered, but also in my opinion because it shows that, once the essence of the evidence is understood, none of the arguments have any substance and the verdict of the jury was one well open to them. To obtain an adequate grasp of the evidence it has been necessary to read all the recorded notes of it fully, and tracts of it several times. The notes occupy 334 typed pages (excluding evidence read to the jury by consent). The following account is necessarily brief and selective by comparison: the omission of other matters does not mean that they have been overlooked.

The Evidence

The deceased was or had been a drug addict; she used homebake heroin or morphine. She supplied others with

drugs. She and both the accused and a number of the witnesses were involved in or on the fringes of a criminal underworld in Auckland. The evidence is studded with references to drug dealing and consumption; thefts of cars, jewellery and money. During the weekend before her death Maxine Walters had been in custody, apparently on charges of car conversion or theft. At that stage some jewellery or money disappeared from her flat and there is a suggestion that she suspected Denise King of taking it. The latter girl and her baby son and her de facto husband, the accused Piri, had stayed in the flat with Maxine Walters for a week or so some time previously. Maxine and Piri had known each other for some years and were associated in certain undefined activities. They often went out together. Another close associate of hers was her cousin by marriage, Mark Ratana; they too apparently operated together in some way. Through Piri she had come to know, fairly recently, an older man (53) named John Ryan, whose business included boat-building and toy-making. Ryan had known Piri for about five years. Piri worked for Ryan from time to time and sometimes stayed at his house in Hector Street, Herne Bay. Maxine apparently formed some form of association with Ryan also.

Ryan had known the accused Carter for about a year. It is clear that Piri and Carter knew each other. Carter claimed in statements to the police that he did not know Maxine Walters. Ryan had a son named Jake Ryan who was

known to his father's associates. Together with Piri and Carter he was a subject of police investigations in connection with the death of Maxine Walters but he was not charged. The Judge made a permanent order for 'suppression of the name, age, sex of Jake Ryan or anything that might lead to his identification'. Counsel for Piri at the trial elicited in cross-examination of Chief Inspector Matthews, who was in charge of the homicide inquiry, that the police had suspected John Ryan of being involved but not directly, and that they still suspected Jake Ryan.

On or about the night of Tuesday 3 September 1985 a sum of money, referred to by several witnesses as \$8000, was stolen from a tin under the driver's seat in John Ryan's van, possibly while Ryan and Piri were at a tavern for the evening. The van was parked outside the Hector Street property. Maxine Walters and Mark Ratana had been in that vicinity during the evening, looking for Ryan. Ryan and Piri (at any rate ostensibly) suspected that she had stolen the money and shared it with Ratana; in the immediately succeeding days they spoke to the two suspects, in effect making the accusation but meeting with denials. Two young women gave evidence that Piri threatened Maxine, saying that if she did not come up with the money by the weekend he would cut off her hands and feet; or words to that effect. One witness said that Maxine had admitted to her, but not in Piri's presence, that she had taken the money. There are suggestions in the evidence that it was drug money, but John

Ryan, who was called for the Crown, dismissed the idea as absurd. He also maintained that it was only \$800.

On the night of Friday 6 September Maxine, who was expecting to be sentenced to imprisonment on the following Monday, decided to have a night out in town with some other young women. She drank about ten Drambuie's at a tavern, then went on to a nightclub, the Staircase, in Fort Street. She was under the influence of alcohol and was described as drunk but not stupid. One of her companions was Deborah Wren, with whom Mark Ratana lived. While Deborah and Maxine were at the nightclub Piri came in. He talked to and drank with Maxine and persuaded her to leave with him. She left her jacket and wallet behind, saying that she would be back in about ten minutes. It was about 11.45 p.m. In fact she never returned and Deborah ultimately left alone. Carter was at or about the entrance to the nightclub at the time. He was known to one of the doormen and may have been instrumental in Piri's being allowed into the club. The doorman gave evidence, unshaken in cross-examination, that on leaving the club Maxine was driven off in a car, appearing to be a Holden, and that Carter was the driver. There was another man in the front; Maxine and Piri got into the back.

Later that night, at about 12.30 or 12.45 a.m., Maxine was at the Manhattan Lounge in Dominion Road, Mt Roskill, asking for Mark. Because of her standard of dress the

doorman refused her admission. It should be mentioned that she was wearing tracksuit trousers, a tee-shirt and a swandri jumper. The doorman thought that two men, a Maori and a European, were with her, but could not be sure. A young woman who was known to Maxine happened to be standing outside the premises at the time, and Maxine spoke to her. She did not see any men with Maxine. She noticed two bruises on Maxine's cheek and arm. She said that Maxine looked sober but scared. The last she saw of Maxine was her running towards a shopping centre. No other witness deposed to seeing her alive after that. At about midnight a police constable inspected a brown Vauxhall car which had been left unlocked at a shopping centre at Glen Eden. He remained with the car for about ten minutes, taking the registration number. This car was Piri's. Its presence there at that time is hard to reconcile with Piri's alibi and the evidence of John Ryan to be mentioned shortly.

When Maxine did not return during the weekend, Mark Ratana and other friends of hers became concerned. They made fruitless inquiries, approaching among others Piri and John Ryan - although Piri appeared to avoid a face to face discussion with them when he saw them outside Ryan's workshop - and eventually they reported her disappearance to the police. Within a few days of her disappearance her flat was broken into and ransacked; some money was taken.

Police investigation of the disappearance began and Piri and Carter were among those questioned. They both gave what the jury must have found, and with abundant justification, to have been false alibis. Piri said that he had gone with Maxine from the nightclub to the White Lady piecart, but that after a conversation he had left her there and gone with Denise King, who (with her child) had been waiting and watching in the Vauxhall car, to John Ryan's Hector Street address, where they spent the night. Ryan in his evidence at the trial was to support this alibi to the extent that he said that he was roused by knocking by Piri about 1 a.m. and unlocked a door and thought that Piri and Denise had come in. Denise at first (on 14 September) supported this alibi in what she said to the police. Later she retracted her support and made statements inculcating Piri and Carter, but in evidence she retracted these statements, reverting to the alibi version. There was evidence establishing that, having arrived back by train that morning from a visit to Wellington, she had booked into the Bridge Motor Lodge at Herne Bay on the night of 6 to 7 September, but the proprietor was unable to say definitely that she and her child slept there; at the trial she claimed not to have slept there but just to have returned at 7 a.m. to have a bath and book out.

Carter's alibi was that he and Dallas (or Kelly) McFarland were living in a de facto relationship at Kaukapakapa, north of Auckland. A young brother of hers from

Tokoroa and one of his school friends were staying with them in the school holidays. Carter claimed to the police that on the Friday night he had driven Dallas, her daughter and the two boys round central Auckland, so as to show the boys 'sauna parlours, prostitutes and faggots'. While near the Staircase nightclub he happened to see Piri and, knowing the doorman, was able to get Piri into the club. He then returned home. He did not know or see Maxine Walters. In a later police interview, on 22 October, he said that he had made up the part about the boys being present as he did not want the police to find out that he had been driving a stolen Holden car. But it emerged at the trial that in the course of trying to persuade the boys to support his false alibi he had given them information which was eventually to provide some of the evidence against him.

It should be interpolated that the Judge correctly directed the jury to the effect that the fact that the accused may have told lies about their movements on the night of 6 to 7 September did not constitute evidence that they had abducted the deceased or were implicated in her death. No complaint has been made about the summing up in that respect.

On the night of Saturday 7 September Piri and Denise King and the child stayed at a hotel at Helensville, north of Auckland. After that they stayed for a period with Carter and Dallas McFarland at Kaukapakapa. On 21 September

Denise went voluntarily to the Henderson police station and spoke to a woman police constable, saying that she had previously told lies to the police because Piri had told her to, and that in fact she had not been with him on the night of 6 September. On Sunday 22 September she went to the Auckland police station, saying the same to another woman constable and asking to speak to the detective who had interviewed her on 14 September. It was not possible to arrange for her to do so that day but she was told that the file was at Henderson. On 23 September she made a long statement at the Henderson station to Constable Colson. He took it down and she signed it D. Evans, a name by which she was also known. It inculpated Piri and Carter in Maxine's death, but she claimed at the trial that it was all lies, 'I was just being vindictive to Bill and Ernie'. She gave no reason for her alleged vindictiveness. Later on the same day she returned to the station to add a detail to the statement, which was likewise taken down and signed. On 25 September she made a further statement, at the request of the police, to clarify the dates at which she had stayed at motels. Then on 3 October she made and signed a fourth formal statement, of a similar incriminating character, this time to Detective Sergeant Perkins at the Henderson station. This statement she retracted in evidence; she claimed that she had made it after being locked up for nine hours and beaten up by the police and having her son taken away from her, and that she had not been able to read it through. Also she said 'It was just a good tale to get my son back'.

On 26 September the police executed a search warrant at 7 Hector Street. Denise was found there. She had her arm in a plaster cast. She claimed at the trial that she had broken it on the beach; she denied telling a detective that someone had broken it after she had gone back on her original support for the alibi. A witness named Tony Smith gave evidence that in a conversation during which Maxine was mentioned he heard Piri say about Denise's broken arm that she was a fucking bitch and deserved it. A witness named Darren Ogilvie (known as Muncey) gave evidence that at Kaukapakapa Denise got a smack on the head from Carter. It is relevant to add that on 24 September the police had revealed to Piri that they believed that Piri and others had taken Maxine away and tied her to a tree.

In cross-examination of Denise King by counsel for Piri she said in effect that she was an unstable person with a history of drug overdosing and that the police had extracted false statements from her by force and by taking the child away. In cross-examination by counsel for Carter she said that he had struck her because she was upset over the fact that he had got rid of her little dog. In re-examination by counsel for the Crown it was brought out that when the child was placed in Social Welfare care on 3 October, after Denise had been taken into custody on a charge of assaulting a woman police constable, she had already made the three written statements of 23 and 25 September. It will be necessary to refer later to the directions given by the Judge to the jury regarding her evidence.

Piri and Carter were maintaining their denials of involvement in the disappearance of Maxine. In late September and early October they were both in custody, having been arrested on charges unrelated to this matter. During this period Piri in particular, but on one occasion Carter also, had frequent conversations with another prison inmate, named Brendon Kemp. Unknown to them he was or planned to be a police informer. He had a considerable criminal record and his credibility was strongly attacked in cross-examination by defence counsel. However, much of his evidence was indirectly corroborated by the ultimate discovery of the body by the police and evidence from other witnesses of similar admissions by the accused. The jury were entitled to accept his evidence.

Among other things he said in evidence that Piri asked him about dead bodies and how many days they would have to be buried before there would be any smell. Carter was released on bail on 10 October and Kemp on 12 October; according to Kemp, Piri expressed concern to him that Carter might rush off to where the body was, although the police would be watching him; but Piri also asked Kemp, if Piri himself did not get out on bail, to ask Carter to arrange for a dead opossum or a pig's head to be thrown on the grave so the dogs could not smell it. Kemp had a radio and Piri did not, so Piri would ask Kemp about the latest news concerning the Maxine Walters case. The radio and the press were reporting that the police believed that she had been

buried in the Waitakere ranges and the reports included some mention of the area between Mill Bay to the east and Whatipu near the north-western tip of the Manukau Harbour. Kemp, however, said that on the occasion when Carter was present the discussion indicated that she was buried at Whatipu; Kemp made a note of this on an envelope. On another occasion, when only Kemp and Piri were present, Kemp said to Piri that he had just heard on the radio that they believed that she had been tied to a tree and tortured; whereupon Piri said that they had just given her a good kicking and left her, and that next morning they went back and she was dead. They bundled her into a car and took her further up the road and buried her. Another man also took part in the kicking.

Piri was released on bail on 17 October. Kemp and Carter picked him up from the prison. They went to Hector Street, where Kemp met John Ryan. During the conversation Piri said something to the effect that they had found the gag. (Some pieces of cloth appearing to be bandages had been found on 3 October near the Little Huia-Whatipu road. Publicity had been given to the finding.) Piri indicated on another occasion that a piece of jewellery which he and Maxine had taken was still round her neck. On yet another occasion Kemp overheard Piri in a telephone conversation mentioning Mountain Road and giving certain directions. Kemp believed that this was a reference to the grave and passed the information on to the police.

After earlier fruitless attempts to locate the grave in the extensive and rugged bush country between Mill Bay and Whatipu, the police ultimately on 21 October concentrated their inquiries, as a result of information received from several sources, on an area off the Mt Donald McLean Summit Road, which intersects with the Huia-Whatipu coast road. They found the grave in the bush. The girl's body was buried face downwards with the legs bent up backwards. She wore tracksuit trousers, panties and socks but was naked to the waist; her jumper and tee-shirt, tangled together, had been placed on top of the body. One trackshoe was under the body. She was wearing two pendants round her neck and an assortment of rings and bracelets.

The evidence of the pathologist, Dr Smeeton, was that the body was so decomposed that it was impossible to ascertain the cause of death. No bones were broken, there had been no wounds from sharp weapons and there was no trace of morphine. Various areas of her skin bore marks consistent with bruising but he could put it no higher than that. There was no evidence of any natural disease that could have resulted in death. Hypothermia was a possibility and the risk of it would have been increased if she had been tied to a tree in an exposed, upright position or if she had been partly naked or by the consumption of alcohol. Airway obstruction by gagging could also have contributed. But the post mortem was necessarily inconclusive as to any of these things.

A meteorological officer testified that on the night of 6 to 7 September, according to records at Auckland International Airport six to seven miles way on the opposite side of the harbour from the Mill Bay-Mt Donald McLean area, there were south-westerly winds of up to 16 knots (a moderate to fresh breeze) and temperatures of 10 to 12 degrees Celsius; there were some showers but none were recorded between 1 and 5 a.m. He thought that a person in these conditions would need a jacket and warm clothing and would feel cold and miserable, though it would depend on the degree of exposure.

Carter was formally charged with murder on 25 October and Piri on 31 October. At the trial, in addition to the evidence already summarised, significant points of evidence against them included the following. Lance John Murphy was one of several witnesses concerning whose identity the Judge made permanent suppression orders as in the case of Jake Ryan. Murphy had criminal convictions and the defence naturally attacked his credibility, but this was for the jury to decide. He said that he was present at Kaukapakapa with a group including Carter, Kelly McFarland, Denise King and the two boys; in Carter's presence Kelly said that Max Walters had stolen some money and that they tied her to a tree until she would tell them where it was. Two or three days later Kelly and Carter himself told him that Max had died; Kelly said she had not known that at the time of the earlier conversation. The witness asked Carter why they did

not drop her off at a phone box or something. Carter replied that she had rope burns round her hands, so they had to bury her. He said it was about 30 miles from where she died. Carter also said that they had to break her legs to get her into the boot. (Although her legs were not broken, the pathologist's evidence was that a person bending them back when they were stiff could have gained that impression.)

Later, Murphy said, his de facto wife swapped her Mini car with Piri for the latter's Vauxhall and some money. Piri assured the witness that they did not have Maxine in the back of the Vauxhall, and on that basis the exchange was acceptable. Piri mentioned a Holden Premier as having been used to carry Maxine away. Carter told him later that the grave would not have sunk yet as it was on a hill. Later again he had another discussion with Carter when he asked Carter whether the gag was what had been reported as found in the newspaper; Carter replied No, they used tape. In cross-examination suggestions were put to him and denied that he had made a deal with the police to give evidence in return for not being charged in connection with stolen cars and homebake.

The two schoolboys, aged 15, both gave evidence. Michael Storer, who was Richard McFarland's friend, said that Carter went out on the night of 6 September and was again away from Kaukapakapa in his Holden Premier for a

period on 7 September. On the following day Carter and Dallas McFarland told the boys to tell a story (the false alibi) about the Friday night if the police came round. Carter told them that Maxine Walters had died; she had stolen some money, they went and got her and tied her to a tree; the next morning she died and they buried her. The boy agreed that Carter did not say who buried the body. Richard McFarland gave similar evidence. He said that it was either Piri or Carter who told them to tell the sightseeing story. Later Carter spoke to him about a girl. The notes of evidence here read:

What did Ernie tell you about this girl ... Something about stealing \$8000.

What else ... About that they were going to get the money that this girl had took off her.

Carry on ... About taking this girl out somewhere.

Were you told where from ... Yes.

Where was that ... A nightclub or something.

What else did Ernie tell you ... About them just leaving her behind.

Leaving her where ... Behind at this place where they were going to take her.

Where was that ... Out in the bush somewhere.

What else did Ernie say ... About them going back the next morning.

To ask her where this money was. Yes ... And when they got there she wasnt moving.

What else did Ernie say ... Said that she had passed away over night.

Do you remember the words Ernie used ... No.

What else did Ernie say ... That the other two had to bury her.

When he said the other two did he say who he was referring to ... Yes.

What was that ... Bill and another man.

Was the name of the other man given ... No I dont think so.

Did Ernie say why the woman was buried ... Yes.

Why was that ... Because she had marks on her hands.

Did Ernie say what sort of marks she had on her hands ... Yes.

What were they ... Rope marks.

In cross-examination the boy was led to agree that it seemed as if Carter might have heard about the tying up from other people. The jury were obviously not bound to accept that suggestion. Even more importantly, the cross-examination of the two schoolboys made no inroad at all upon their evidence that they had been told of the tying up and the death when being asked to support the false alibi for Carter.

The Conduct of Counsel for the Prosecution

It is convenient to deal first with the grounds of the applications for leave to appeal attacking the way in which counsel conducted the Crown case. These centre on two aspects.

1. Complaint is made of his emotive and prejudicial language in that in his opening speech he said some such words as that the Crown case was that Maxine Walters died tied like a dog to a tree, naked to the waist, with a gag in her mouth to stop her calling out. In his closing speech he

said that you would not treat a dog like the accused treated Maxine Walters; he also referred to her mouth being taped. Defence counsel in addressing the jury said a good deal in criticism of the emotional presentation of the Crown's case. The Judge, who throughout the trial and in summing up was studiously fair to the defence, told the jury that to some extent some of the criticism seemed to him justified. He warned them of the need for a calm, careful, dispassionate decision and his summing up was a model in that respect.

As in the recent case of R. v. Mirams (C.A.315/85; judgment 23 December 1986), I think that the language complained of, particularly the references to a dog, although strong was a vivid way of putting a justifiable view of the evidence. It emphasised that the actions of the accused were callous in the extreme, a matter which was very relevant to the head of murder on which the verdict turned, as will be seen.

From the fact that the girl's upper clothing was found placed on top of her buried body the inference was open that she had been left tied naked to the waist. No evidence to rebut that inference was given by either accused. The Crown was entitled to invite the jury to draw that inference. So too as to gagging or taping. It would have been unsafe to conclude that the cloth which was found had been used, but as has been seen there was evidence of what was tantamount to an admission by Piri that there had been a gag and of a statement by Carter that they used tape. The Crown was

entitled to rely on that evidence. The jury were effectively warned against emotionalism. I would reject all these grounds of attack.

2. Complaint is made of the nature of Crown counsel's questioning of the witnesses Denise King and Darren Ogilvie and of how he addressed the jury about Denise King. She was cross-examined by him for more than a day after the Judge had acceded to an application to declare her hostile. Ogilvie was not declared hostile, despite repeated applications by Crown counsel; he claimed not to remember a considerable number of matters of which he had given details in a signed police statement. The Judge ruled, with some hesitation, that he had not gone as far as to show actual hostility to the Crown's case. It is complained that counsel nevertheless persisted in trying virtually to cross-examine him on the statement and to get its contents before the jury.

In one of his rulings the Judge said 'I do not propose at this juncture to stop Mr Ladd. But I do wish him to clearly understand that I am concerned that the course that he is following is prejudicial to the accused and I do not think I will be prepared to allow it very much longer'. He warned the jury against speculating on what was in Ogilvie's statement and said that they could 'just about forget about Mr Ogilvie's evidence so far as advancing the Crown's case also'. I am satisfied that the Judge dealt effectively with

any possibility that the jury might be influenced by the supposed contents of that statement. Moreover in the context of the volume of evidence against the accused the manner in which Ogilvie was questioned can have had no importance in the trial.

The points concerning Denise King's evidence require rather more consideration. It is settled law that an out-of-court statement retracted by a witness when giving evidence on oath is not evidence of the truth of its contents; its only legitimate use at the trial is to discredit the contradictory version proffered by the witness in the box. The jury must be directed that except to the extent that the statement has been unequivocally accepted as true by the witness in giving evidence they cannot use it for any other purpose. The leading New Zealand case is R. v. Carrington [1969] N.Z.L.R. 790, a judgment of this Court delivered by North P. Sections 10 and 11 of the Evidence Act 1908 recognise that the out-of-court statement may properly be used to contradict the oral evidence. The line can be quite a fine one, however, and not easy for a jury to draw.

In this case, but for the firm manner in which the Judge dealt with the subject, there would have been every possibility of a wrong use by the jury of the out-of-court statements. The extensive cross-examination by counsel for the prosecution, with repeated reference to details of the

statements, must have tended to make the jury think that the statements could well be true, although repudiated by Denise King as lies. Some of the details she denied having even supplied, despite her signatures, but in the main she adhered to the explanation that she had deliberately misstated facts out of vindictiveness. The tendency just mentioned would have been aggravated by counsel's persistence in his final address, despite prior warning by the Judge, in putting to the jury that after at first supporting Piri's alibi Denise had voluntarily gone back to the police, and more than once, with incriminating statements. He was trying to persuade the jury that her motive must have been to tell the truth.

Whether a witness has unequivocally accepted all or part of an out-of-court statement is normally a question for the jury. An admission, express or tacit, by the witness that he or she had been motivated at the time by a wish to tell the truth could obviously help to show such acceptance. Apart from that, I would reserve for future consideration should the need ever arise the question whether, exceptionally, the total pattern of conduct of a witness, although including repudiation in the witness box, could point unequivocally to the truth of the statement. We have heard no argument on that possibility. The only safe approach is to assume that there is no such exception to the rule as stated in Carrington.

Because of the involved history of Denise King's dealings with the police and the highly detailed nature of the statements which she now claimed to have been lies, a long cross-examination was justified. Counsel was entitled to make a sustained attempt to obtain admissions from her to seek to destroy the false alibi which she gave Piri. In the latter respect at least he was successful, for it appears from the summing up that counsel for Piri virtually abandoned any reliance on her alibi evidence and preferred the approach that her evidence as a whole should simply be ignored. But what saves the case from the point of view of the prosecution, so far as the grounds now under discussion are concerned, is that the Judge positively and emphatically directed the jury to disregard the out-of-court statements altogether as evidence against the accused. He first highlighted this as soon as she left the witness box, saying:

You are probably aware that at the end of the case it will be my job to sum up to you. Normally any directions that I have to give you would wait until then but I have decided that in respect of Miss King's evidence I should take the somewhat unusual course of saying something very briefly to you about her evidence at this stage. You will have very clearly in mind I imagine that throughout the latter part of Thursday and most of Friday and again this morning there has been considerable discussion with her about three written statements and two oral statements that related to her having suffered a broken arm and to some extent having

been struck on one occasion. She has denied that the statements that she wrote are true and she has denied that what she said to the police is true. Indeed I have had to emphasise to you more than once during the course of the trial that the Accused are entitled to be judged on the evidence that is called here in Court. Now the evidence that has come from Miss King is that what in is those statements is not true. That means that the statements themselves are not evidence and so I will be directing you when I come to sum up that you must disregard what is in the statements. They are not evidence against the Accused but I have elected to make that point to you now because it looks as though the trial may well go on into next week and it seemed to be unsatisfactory, indeed unfair, to the Accused if possibly throughout all that time you were thinking the statements were to be treated as evidence whereas in fact they are not. So far as those statements are concerned I direct you now that they are to be disregarded as evidence against the Accused and I will remind you of that again in the summing up.

Early in the summing up he repeated the direction, stressing its importance, and going on to say that it was unfortunate that counsel for the prosecution had put it to them that the reason she went back to the police was that she wanted to tell the truth. He ended this passage in the summing up by saying:

Now, once and for all, the statements are not evidence, you will not see them, they will not go with you as will other statements when you go into the jury room, ignore them and indeed I suggest to you that the course that Mr Williams suggested is probably the safest - forget about Miss King's evidence completely.

He made a final brief allusion to the statements not being evidence at the end of the summing up, mentioning that they would not be among the exhibits that the jury would have in the jury room.

The Judge could not have done more to remove any possibility of prejudice to the accused from the retracted statements. What he said was enough in my view to cancel out the effect of any excess of zeal by counsel for the prosecution. I accept that there still remained some risk that the jury could not entirely succeed in excluding from their minds what they knew of the statements. That risk can seldom if ever be totally eliminated when a prosecution witness claims that his or her own signed statement was lies, especially when the explanation offered for the alleged lies is lame and the statement is evidently detailed and corroborated in many respects by other evidence. It is a consequence that has to be accepted of the rule, in itself generous to the accused, that repudiated police statements by a witness for the prosecution cannot be used at all as evidence against the accused. The mere existence of this inevitable risk cannot be allowed to abort a trial.

In terms of s.385(1) of the Crimes Act 1961 the attack on the conduct of the prosecution would be a ground for allowing the appeals only if there were a miscarriage of justice within the scope of paragraph (d) of that subsection. For the foregoing reasons, that is not made

out. I add that this conclusion is reinforced when it is borne in mind that, apart altogether from any impression created by Denise King, there was a strong and unanswered body of evidence against each accused, particularly of admissions by each. Some of the witnesses, considered individually, were of suspect credibility, but not all of them. If necessary I would apply the proviso, but I do not think that point is reached.

The Reasonableness of the Verdict

Arguments were submitted that the jury's verdict was against the weight of the evidence. A ground so expressed - which can be seen as an invitation to the Court of Appeal to retry the case - is not available under s.385(1) of the Crimes Act. The arguments can only be entertained as attempts to invoke para.(a), 'That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence'. Mr Cato contended that a verdict of manslaughter should be substituted by this Court.

For the reasons to be given when discussing the attack on the summing up, it is apparent that the jury's verdict was based on s.167(d) of the Crimes Act as explained to them. They must have found that the accused tied their victim to a tree and left her alone in a lonely place in the bush not precisely identified, for a period of hours over a

rather cold, windy and rainy September night, in order to reduce her to such a state of terror or submission that she would disclose the whereabouts of the missing money as a price of her release in the morning. They may have found, and would have been entitled on the evidence to do so, that she was so left half-naked and with her mouth covered.

In the light of the summing up, they must have found that the accused each knew that there was a real or substantial risk or that it could well happen - interchangeable terms for the same idea - that she would die in these circumstances. In my opinion that was a finding well open to the jury. No doubt the accused did not want her to die and did not expect the worst to happen. But, especially in the absence of any evidence from either of them, it seems obvious that the serious risk must have occurred to them and that they deliberately took it. After all their very object must have been to frighten the girl by an ordeal so severe that it would induce in her the fear of death. Accordingly it is plain that the jury's verdict was reasonable and should be supported having regard to the evidence, unless to put a victim's life at risk in that way cannot constitute murder in law if the victim does have the misfortune to die. This question requires consideration in the context of the attack on the summing up. Subject only to that point of law, the jury's verdict should stand.

The Law of Murder

The Judge caused copies of the relevant provisions of the Crimes Act to be provided to the jury, including s.167:

- 167. Murder defined** - Culpable homicide is murder in each of the following cases:
- (a) If the offender means to cause the death of the person killed:
 - (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
 - (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed:
 - (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

The further definition of murder in s.168 is not in issue in the present case.

The only change in the current s.167 from the older New Zealand legislation is that in (d) the words 'or ought to have known' have been dropped after 'knows'. It is generally understood that this was because the decision of the House of Lords in Director of Public Prosecutions v. Smith [1961] A.C. 290 was considered to be 'unhappy' (Lord

Scarman's description of it in R. v. Hancock [1986] 1 All E.R. 641, 650) and it was desired, contrary to what was seen as the effect of that decision, to make plain that the intent for murder is always subjective. No point about that arises in this case. In summing up the Judge made it very clear that the jury must be satisfied 'that the accused appreciated and knew - it is not should have known - but they actually appreciated and knew that leaving her there in those conditions was likely to cause death. The Crown does not have to prove that the accused foresaw precisely how death would occur. But it does have to prove beyond reasonable doubt to your satisfaction that the accused had an actual or conscious appreciation of the likelihood of death'. That was impeccable.

The Crown case against the accused invoked in the alternative paragraphs (a) and (b), as well as (d), but I think that any possibility that the verdict was based on (a) or (b) can safely be ruled out. As to (a), intentional killing, it is true that there was evidence of serious threats by Piri to Maxine and even a theory, unsubstantiated by any evidence, that Piri himself may have taken Ryan's money; but the evidence as a whole pointed so strongly to the desire of the accused to extract information from the girl that the Judge strongly discouraged the jury from a verdict under (a), saying among other things that they needed to bear very carefully in mind what seemed to have been the overall objective that these men were aiming at,

and to ask themselves very seriously whether they could be satisfied beyond reasonable doubt that killing Maxine, as opposed to frightening her or knocking her about a bit, fitted in with that scheme. That amounted to endorsement of the defence under (a) and there is no reason to suppose that the jury did not see the force of that defence.

As to (b), the difference between that paragraph and (d) has been much less since the objective element was removed from (d), as this Court has pointed out in previous cases, among them R. v. McKeown [1984] 1 N.Z.L.R. 630, 635. The two paragraphs overlap. Here a verdict under (b) could have been found on the evidence, but possibly through a misunderstanding the Judge summed up on the footing that the Crown case under (b) depended on the girl having been kicked. On that view, as he indicated, it would have to be proved that death was caused by the kicking and that the offenders knew at the time that this outcome was likely. Not surprisingly the Judge also discouraged the jury from finding those things. It is to be noted that apart from the obvious factual difficulties with this theory, there does not appear to have been any evidence of kicking admissible against Carter; the kicking evidence was of an admission by Piri. At the end of the summing up Mr Ladd said that the Crown had not put the case under (b) just on the basis of kicking and asked for a direction in relation to the bodily injury which could result from the tying and leaving. The Judge declined to give any such direction. He told the jury

that the approach referred to by Mr Ladd was not an approach open to them. At the same time he repeated inter alia that it would have to be proved that kicking caused the death. This was so unsupported by evidence that in my opinion no rational jury would have so found.

It follows that the verdict must have been based on (d) and counsel for the appellants addressed most of their legal submissions to that paragraph. In the view I take, it is unnecessary to deal any further with (a) or (b) or the arguments in connection with those paragraphs.

Of the arguments under (d), one by Mr Koya adverted to passages in the summing up of which the following is typical:

So if you are satisfied that they first of all had that unlawful purpose of detaining her and that in the process of carrying out that detention they did an act, namely leaving her exposed throughout the night and that that caused her death and that they actually knew and had a conscious appreciation of the likelihood of death - that means the fact that it was something that might well happen even if they did not intend to hurt her - then if you find in respect of either of the accused that that was their intent at that stage then you would find them guilty of murder.

Counsel's point was that the tying up and the leaving her exposed through the night could not be treated as two separate acts. They were, he said, two necessary steps in the one act of detention. For these and allied verbal

reasons he submitted, in short, that the facts did not fit paragraph (d). He cited R. v. McKeown (supra) and the earlier case of R. v. Downey [1971] N.Z.L.R. 97, distinguished in McKeown.

It is true that the tying up and the leaving of the girl alone for hours were both parts of the accused's plan, but not true that it was necessary for them to leave her to detain her. The detention itself was unlawful and the act of leaving her unattended was likely to cause death because neither the accused nor anyone else would be able to observe her condition and free her if her suffering became acute. The Judge was justified in putting it to the jury as he did. An alternative way of putting it, equally open, is that for the unlawful object of extorting information by compulsion or torture of her mind, the accused committed acts of assault and false imprisonment which were known to be likely to cause death in the circumstances, though they may have desired that she should not be seriously hurt. The case is in the McKeown category rather than the Downey one. The argument is so close to a quibble that one cannot imagine it being seriously put to a jury, let alone accepted.

The remaining arguments, in presenting which Mr Cato took the lead, were less an attack on the summing up than on the relevant law of New Zealand, faithfully applied by the Judge. Put in various ways, the argument turned on the word 'likely' in (d). There are many reported cases in various

fields and jurisdictions where it has been remarked that the words 'likely' and 'probable' (used in s.66(2) of the Crimes Act with reference to liability as a party based on contemplated consequences of a criminal enterprise) are variable in meaning. Each can mean, in an appropriate context, more probable than not, but that is certainly not the only available meaning. This may be simply illustrated by noting that the Concise Oxford Dictionary includes in its definitions of likely 'Such as may well happen ... probable'.

In a line of cases this Court has held that in the context of the two sections in the Crimes Act the words do not require proof that the accused thought that the result which fact eventuated was more likely than not. A fine calculation that the odds were against it, although the risk was plainly there, is no defence: R. v. Gush [1980] 2 N.Z.L.R. 92; R. v. Hamilton [1985] 2 N.Z.L.R. 245, 250-2; R. v. Tomkins [1985] 2 N.Z.L.R. 253; R. v. Doyle and Te Awa (C.A. 234/85, 245/85; judgment 19 December 1986), a case decided after the hearing in the present case in which Mr Cato presented a similar argument. R. v. Wickliffe (C.A.104/86; judgment 23 December 1986) belongs to the same line. Compare, although it is not an authority for New Zealand, Chan Wing Siu v. R. [1985] A.C. 168.

Counsel's argument is in substance that this approach is wrong, though it is only doing him justice to say that he

appeared to shrink from explicitly contending that the trial Judge should tell the jury that they must be satisfied that the accused assessed the unfortunate consequence as more than a 50 per cent chance. The tenor of the argument was rather that the Judge should refrain from helping the jury with the meaning of the word. With some ordinary English words that is a feasible and accepted approach. And with the words 'likely' and 'probable' there are occasions when it is unnecessary for the Judge to expand on their meaning; the Judge can simply leave the case to the jury without elaboration in this respect. But where a critical issue as to the degree of likelihood or probability clearly arises, that may not do. The jury may then be entitled to more guidance, and so it was here.

The rationale of (d) is the need to classify as murder culpable killing by conduct whereby the accused deliberately risks life for his own unlawful ends. If the risk of the death of the victim was truly no more than negligible or remote in the offender's eyes, the stigma of murder should be withheld. To be distinguished from that, however, are cases where the risk is so appreciable that to indulge in the conduct is seen by society as the virtual equivalent of intentional killing. Every Judge who tries to formulate a test for the distinction in precise and simple terms, suitable for directing a jury, soon realises that no single formula is preferable or adequate. Expressions commonly used to indicate the degree of foresight of death required

to be proved against the accused are a real risk, a substantial risk, something that might well happen.

All those expressions were used by the Judge here, each of them more than once. For instance he said that the vital factor for the jury to grasp was that the likelihood of death had got to be something that the accused 'actually appreciated - saw as a real or substantial risk. It is not enough to say if any reasonable person had stopped to think about it they would have foreseen it. In this case, in respect of these two men you have got to say, are we satisfied beyond reasonable doubt that they did in fact foresee it and only then under (d) would it be open to you to convict them of murder'. The phrase 'something that might well happen' was among those used twice. He also emphasised that the state of mind of each accused had to be considered separately. Again I think that the summing up was impeccable on these matters. Occasionally for simplicity the Judge also used the words 'might' and 'a possibility', but there can be no doubt that the jury would have understood these in the sense of the fuller explanations just illustrated.

In a helpful explanation to the jury of paragraphs (a), (b) and (d) of s.167 the Judge referred to the Report of the English Royal Commission on Indictable Offences 1879, whose draft ss.174 and 175 are virtually reproduced in the current New Zealand ss.167 and 168, with the 1961 omission mentioned

earlier. He gave the same three examples of the different kinds of murder as are given in the body of that Report, the blowing up of a train example illustrating (d). As the Report is not readily available it may be useful to reproduce the material passage in full here. The references to the Draft Code are to the draft annexed to the Report, including the abovementioned ss.174 and 175. The references to the Bill are to the earlier Criminal Code Indictable Offences Bill 1878.

The Draft Code deals next with murder, manslaughter, and some other offences to which we will refer specifically. Many of the doctrines of the common law bearing upon this subject relate equally to murder and manslaughter. Both the Draft Code (Part XVI) and the Bill (Chapter XIX) accordingly deal with homicide generically, and ascertain the cases in which it is culpable, before dealing specifically with murder and manslaughter. There is some difference in language and arrangement between this Part of the Draft Code and the Bill. The Draft Code preserves a rule of the common law which was repealed by the Bill, viz.: the rule that to render the homicide culpable, death must take place within a year and a day of the injury. It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule. In other respects there is little difference between the Draft Code and the Bill, and none between the former and the existing law. Having defined culpable (or, as it is called in the Bill, unlawful) homicide, both the Draft Code and the Bill proceed to the problem of defining murder and manslaughter. The common law definition of murder is 'unlawfully killing with malice aforethought'.

Manslaughter may in effect be defined as 'unlawful killing without malice aforethought'. The objection to these definitions is that the expression 'malice aforethought' is misleading. This expression taken in a popular sense would be understood to mean that in order that homicide may be murder, the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name. This definition if so understood would be obviously too narrow as without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation, the expression is calculated to mislead anyone but a trained lawyer. The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case as in the case of other legal fictions it is difficult to say how far the doctrine extended. We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a Committee of the House of Commons sitting on a Bill for the definition of Homicide, introduced by the late Mr Russell Gurney in 1874. It was also considered by the Commission on Capital Punishments, which reported in 1866. Each of these bodies reported that the present condition of the law was unsatisfactory, though neither

arrived at a definition which was considered satisfactory.

The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows:- Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:-(a) An intent preceding the act to kill or to do serious bodily injury to the person killed or to any other person; (b) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not; (c) An intent to commit any felony; (d) An intent to resist an officer of justice in the execution of his duty. Whether (c) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p.258) 'A shooteth at the poultry of B, and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter'. It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought', although the principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not he ought in our opinion to be considered a murderer if death ensues.

For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another

a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not. This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder all cases in which the offender intended to cause, or knew that he probably would cause 'grievous bodily harm' to any person. The Draft Code would include all such cases, substituting the expression 'bodily injury known to the offender to be likely to cause death' for 'grievous bodily harm', which to some extent narrows the definition given in the Bill. On the other hand, the Draft Code (section 175) includes all cases in which death is caused by the infliction of 'grievous bodily injury' for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm, irrespectively of the purpose for which it is used. Lastly, section 175 in sub-sections (b) and (c) provides that killing by the administration of stupefying things, or by wilfully stopping the breath, for the purpose in either case of committing any of the specified offences, shall be murder, whether the offender knows or not that death is likely to ensue. According to the provisions of the Bill, these cases would amount to murder only if the offender knew their danger. The difference between the Draft Code and the Bill upon the whole comes to

this. A, in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus to prevent him from crying out; the death of B results. This is murder according to the Draft Code. According to the Bill it is murder if A knew that such an act would probably cause death; manslaughter if he did not. A few years ago a case occurred in the Western Circuit [Footnote: Reg. v. Gilbert, known as the Fordingbridge murder. See 'The Times', 19 July 1862.] which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl on her way to church had to pass over a stile into a narrow wooded lane and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries, and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder.

Again, A stabs B in the leg, not intending to kill him; B dies. According to the Bill this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if without such intent it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder, if the jury thought the act was meant to cause to B an injury known to A to be likely to cause

death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach other very closely.

The references in that passage to the doctrine of felony murder are not material to the present case; they bear rather on the New Zealand s.168. But particular interest attaches to the train example and to what is said about homicide not premeditated in the common use of language but involving public danger and moral guilt in the highest possible degree. Clearly the Commissioners (Lord Blackburn, Barry and Lush JJ., Sir James Fitzjames Stephen) regarded the deliberate taking of risk as in some cases as culpable as intentional killing but at the same time appreciated that concepts such as premeditation and intention were inadequate to explain this head of murder. It is also interesting that they thought that there was no difference between their Draft Code and the common law. If so, in England the common law may have evolved quite considerably since then.

In recent years, as is well known, the English Courts in general and the House of Lords in particular have experienced unexpected difficulties with the law of murder. I have already mentioned Smith in 1961. Latterly there has been the trilogy of cases R. v. Moloney [1985] A.C. 905; R. v. Hancock [1986] 1 All E.R. 641 (bearing a striking similarity to the Royal Commissioners' train example); R. v. Nedrick [1986] 3 All E.R. 1. These cases are not in point as regards the interpretation of the New Zealand s.167(d) and it would be dangerous to seek to apply passages from the

judgments in them to issues under that paragraph. Such relevance as they have here will be mainly to s.167(a). Any extensive discussion of the English cases is unnecessary. The latest (strictly from the Isle of Man) of which I have seen any report is Frankland v. R. (The Times 5 March 1987). The Privy Council re-emphasises the subjective approach. It would be presumptuous to do more than say that the possibility suggests itself that some of the difficulty in England may have arisen from a tendency to define or at least think of murder simply as causing death with the intention of killing or causing grievous bodily harm (R. v. Cunningham [1982] A.C. 566). Thus Lord Scarman said of Moloney in Hancock at 649:

... the House made it absolutely clear that foresight of consequences is no more than evidence of the existence of intent; it must be considered, and its weight assessed, together with all the evidence in the case. Foresight does not necessarily imply the existence of intention though it may be a fact from which when considered with all the other evidence a jury may think it right to infer the necessary intent.

That approach, the exercise of treating foresight as merely evidence of intent, goes far to account for such expressions as 'virtually certain' and 'moral certainty' - see Lord Lane C.J. in Nedrick at 3-4. It is not an approach or exercise required of a New Zealand jury under paragraph (d), because it has always been recognised in this country, following the view of the English Commissioners of 1879 preserved in the Crimes Act, that there are cases fully deserving to be categorised as murder where it would be artificial to say that liability depends on intent to injure.

I am indebted to my brother McMullin for a reference to Boughey v. R. (1986) 65 A.L.R. 609, where the majority of the High Court of Australia, Mason, Wilson and Deane JJ., held that in a section corresponding (except for 'ought to have known') to the New Zealand s.167(d) 'likely' is not used with the meaning 'more likely than not' but to convey the notion of a substantial or real chance. The significance of this correspondence between Australian and New Zealand law is all the greater because it appears to have been arrived at independently. There are no references to New Zealand cases in the majority's opinion, and although the New Zealand line of cases has been influenced by Johns v. R. (1980) 143 C.L.R. 108, the latter case is not mentioned in Boughey. Since Boughey, however, the High Court of Australia in Mills v. R. (2 December 1986; Gibbs C.J., Mason, Wilson and Dawson JJ.) have declined to give special leave to appeal to reconsider Johns. Delivering the judgment Gibbs C.J. mentions that Johns has been accepted as correct in other jurisdictions and that the High Court see no reason to review it.

For these reasons I would dismiss both the present appeals and applications for leave to appeal. The Court being unanimous, the case will be disposed of accordingly.

RB Collier P.

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THE QUEEN

V

WILLIAM JAMES PIRI
ERNEST GEORGE CARTER

Coram Cooke P
McMullin J
Somers J

Hearing 7 November 1986

Counsel M.I. Koya for Piri
C.B. Cato and J.N. Bierre for Carter
R.R. Ladd for Crown

Judgment 13 March 1987

JUDGMENT OF McMULLIN J

I have read the judgment of Cooke P. I am grateful to him for his masterly summary of the facts and his analysis of the issues and I am in agreement that these appeals and applications for leave to appeal should be dismissed. I add only a few comments of my own on the ground of the appeals which relates to the directions given to the jury as to the phrase "likely to cause death" in s.167(b) and (d) Crimes Act 1961.

Both Mr Cato and Mr Koya submitted that in directing the jury as to what was required to be established to bring the

acts of the appellants within this phrase the Judge had erred in using expressions such as "something that could well happen", "might well cause death" and "possibility" as synonymous with "likely". They submitted that a possibility was not a likelihood, and that the substitution of other terminology for "likely" might well lead a jury to convict persons of murder in cases where death was unlikely just because the actions of the accused were potentially hazardous to life.

The words "known to the offender to be likely to cause death, and is reckless whether death ensues or not" as used in s.167(b) appeared in the legislation of this country in s.163 Criminal Code Act 1893. The Criminal Code Commissioners in their Report, on which the Criminal Code Act 1893 was based, said:

It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression "malice aforethought" although the principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer if death ensues.

The words were repeated in the consolidating measure, the Crimes Act 1908, s.182. So they have been part of the relevant legislation of this country for nearly a century.

By reference to some English cases in the civil jurisdiction Mr Cato contended that "likely" meant something more than a possibility, a probability. "Likely" was treated as meaning "probable" in Re Bayer Products, Ltd's Application [1947] 2 All ER 188, 190 and 193. But "probable" itself is not a precise term. It is used with various shades of meaning. It may mean more probable than not; likely but not very likely; or a bare possibility. The Wagon Mound (No. 2) [1967] 1 AC 617, 634-635 per Lord Reid. Reference to these cases is enough to show that the weight to be given to a word may differ from statute to statute and circumstance to circumstance. The Shorter Oxford Dictionary gives the word meanings of "seeming as if it would happen" and "probable". That "likely" may mean something less than having an even chance is suggested by the fact that it is sometimes used with "very", "most" or "more".

As Cooke P points out, there is a line of authority in this country that the relevant words do not require the Crown to prove that the accused thought that what occurred was more likely than not. However, support for the appellants' contention is to be found in the judgments of Gibbs CJ and Brennan J, particularly the latter, in Boughey v. R (1986) 65 ALR 609 where a provision in the Criminal Code Act 1924 (Tas), similar to s.167(b), was considered. See Gibbs CJ 611 and 612 and Brennan J 631-635. But the judgment of the majority (Mason, Wilson, Deane JJ) was otherwise; it was that "likely" should be treated as

conveying the notion of a 'substantial - a "real but not remote" - chance regardless of whether it is less or more than 50%.


The majority judgment in Bouhey v. R accords with the judgment of this Court in R v. Gush [1980] 2 NZLR 92, 96. Admittedly the meaning to be given to "likely" was not argued in Gush nor was it necessary to decide the point. However, the Court addressed the point specifically and its reasoning is compelling. Richmond P said:

It is as well, in this context, that we should guard ourselves against being thought to agree with the direction given to the jury as to the meaning of the word "likely" in s.167(b). This point was not argued and is not one which it is necessary to decide for the purposes of the present case. But the test under s.167(b) is also purely subjective - "known to the offender to be likely to cause death". We think that "such as could well cause death" may, on proper consideration, be found to be the appropriate meaning to be adopted in order to attain the object of this particular definition of murder. It would seem unreal to make the liability of the offender depend upon whether or not he can be shown to have made an assessment of the probabilities and concluded that the injury which he intended to inflict would be more likely to prove fatal than otherwise. We leave the point for final determination in an appropriate case.

There is a further reason why "likely" should not be read as meaning "probable" in the sense of more probable than not. The words "probable consequence" in s.66(2) Crimes Act 1961 have been construed to mean an event which could well happen; not an event which is more probable than not. R v. Gush p.94. That is also the view taken by the

Privy Council in Chang Wing-Siu v. The Queen [1985] AC 168. If then "probable" in the phrase "probable consequence" in s.66(2) is to be construed as meaning no more than an event which could well happen, thereby making a person criminally liable for an offence which he may never have set out to commit and to which he may never have turned his mind, it would be illogical to construe "likely" in s.167(b) and (d) which deals with foreseen harm as indicating a greater degree of chance than that attributed to "probable" in s.66(2).

For these reasons, I think that the death which is "likely" in s.167(b) and (d) Crimes Act 1961 is a death of which there is a real or substantial risk. It need not be more probable than not but it should be more than a bare possibility. Such a construction accords with the approach long since taken by Judges in directions to juries in this country; it accords with the Privy Council decision in Chang Wing-Siu and of this Court in R v. Gush and the majority decision of the High Court of Australia in R v. Boughey. In good sense it recognises the reality that it is hardly ever possible to assess events which are the result of aberrant human behaviour as likelihoods or probabilities with any degree of mathematical precision.



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THE QUEEN

v.

WILLIAM JAMES PIRI
ERNEST GEORGE CARTER

Coram: Cooke P.
McMullin J.
Somers J.

Hearing: 7 November 1986

Counsel: M.I. Koya for Piri
C.B. Cato and J.N. Bierre for Carter
R.R. Ladd for Crown

Judgment: 13 March 1987

JUDGMENT OF SOMERS J.

I have had the advantage of reading in draft the judgment prepared by Cooke P. I agree with it and for the reasons which he gives I would dismiss the appeals and applications for leave to appeal.

Somers