**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA644/2015**
**[2017] NZCA 195**

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| BETWEEN | VILIAMI ONE FUNGAVAKA<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 9 March 2017 |
| Court: | Winkelmann, Woodhouse and Collins JJ |
| Counsel: | M I Koya for Appellant<br>M J Lillico for Respondent |
| Judgment: | 22 May 2017 at 10.30 am |

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**JUDGMENT OF THE COURT**

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**The appeal against conviction is dismissed.**

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**REASONS OF THE COURT**

(Given by Winkelmann J)

[1] Mr Fungavaka was convicted of one charge of murder following a jury trial before Faire J in the High Court at Whangarei. The victim, Ms Georgina Manuel, was struck by Mr Fungavaka's car two times in quick succession. Mr Fungavaka's appeal against conviction is based upon the following grounds:

(a) Late notice of detailed evidence given by the pathologist, Dr Glengarry, as to the cause of death prejudiced Mr Fungavaka. While it was not in dispute that injuries arising from the two impacts caused the victim's death, it was not until Dr Glengarry gave evidence

at trial that she clarified that injuries inflicted by either impact would have been fatal.

(b) The Crown laid a single, unparticularised murder charge against Mr Fungavaka. Mr Fungavaka complains that because his car struck the victim twice, there was a risk he was convicted without the jury ever being in agreement that he had the requisite intent at the time of the fatal impact.

(c) Deficient interpretation of evidence during the course of the hearing (Mr Fungavaka has poor English).

(d) The Judge instructed the jury incorrectly in relation to murderous intent.

[2] On each or any of these grounds it is argued for Mr Fungavaka that a miscarriage of justice has occurred.

**Background**

[3] The Crown case was that on 20 August 2013 Ms Manuel and Mr Fungavaka together drove off from a gathering looking for Ms Manuel's father. When they found him walking along a road, Ms Manuel got out of the car. An argument broke out between Ms Manuel and Mr Fungavaka when she then refused to get back into the car. While the engine was still running and with the headlights on, Ms Manuel walked in front of the car and gave Mr Fungavaka the fingers, yelling at him to fuck off and leave her alone. The engine of the car revved and the car moved forward into Ms Manuel, hitting her.

[4] Mr Fungavaka continued forward in the car, did a spin or u-turn with the tyres squealing, and came back down the road directly toward where Ms Manuel was lying. The car went over the top of her and Mr Fungavaka drove away.

**First ground of appeal: late disclosure of evidence of pathologist**

[5] In the formal written statement provided by Dr Glengarry, dated 11 September 2013, the cause of death is recorded as "multiple blunt force injuries due to a motor vehicle collision". On 1 September 2015 an amended statement for Dr Glengarry was served on the defence, linking particular injuries to each impact. Then on 4 September 2015, during the course of trial, Dr Glengarry gave evidence at a voir dire (a hearing in the absence of the jury)[1] in the course of which she linked particular injuries to each impact.

[6] Dr Glengarry's evidence was that injuries caused by the first impact (including a brain injury, subdural haemorrhage, subarachnoid haemorrhage and traumatic diffuse axonal injury) were sufficient in severity to be fatal in themselves independent of other injuries present. She also described injuries consistent with the second impact — a crushing force application, rib fractures, lung bruising and bleeding into the chest cavities, anterior mediastinal haemorrhage, liver laceration, spleen laceration, small bowel mesentery laceration and left kidney laceration. Again, she said these injuries were sufficiently severe to be fatal in themselves, independent of the other injuries present. She described other injuries which might have arisen from either impact, such as hip fracture; fractures of the humerus, clavicle and scapula; and the extensive bruising and grazing.

[7] Mr Koya for Mr Fungavaka says that it was only after the voir dire evidence that the defence understood fully that Dr Glengarry's evidence before the jury would be that either impact could have been the cause of death. As to whether this late notice caused prejudice to the defence, the only prejudice he could point to was that it meant the defence was not in a position to obtain a second opinion as to the cause of death.

*Analysis*

[8] We do not accept that in the context of this trial the supplementary brief or voir dire evidence contained material which would, through its late disclosure, have

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[1] The voir dire occurred on 4 September 2015 prior to her giving evidence before the jury. The purpose of the hearing was to assist with the determination of a defence application to remove some photographs from the photographic exhibit booklet.

surprised the defence or caused it difficulty. Although Dr Glengarry's formal written statement of 11 September 2013 may not have been detailed, the overall effect of it was that Ms Manuel had died from blunt force trauma inflicted by both impacts. That initial opinion was sufficient to ground the Crown case that either impact was a sufficient actus reus for the purpose of the murder charge.

[9] We also note that the defence has never sought to challenge Dr Glengarry's opinion on the cause of death or to isolate out one or other impact as the cause of death. Mr Fungavaka's defence at trial was that both impacts had been accidental. The defence closing was that Ms Manuel "came at him [Mr Fungavaka] from an oblique angle" in relation to the first impact and that he simply did not see her before his car struck her in relation to the second impact. In closing, defence counsel addressed Dr Glengarry's evidence by noting that it did not prejudice the defence because it did not prove that Mr Fungavaka saw Ms Manuel when she came at him from the "oblique angle" or that he saw her body before he ran it over. Trial counsel did not raise any concern regarding the late disclosure in the course of trial, did not seek an adjournment and did not indicate a desire to instruct a defence expert. Mr Koya is not able, even at this stage, to say how such an expert could have helped the defence. In reality, the cause of death was not at issue at trial. This ground of appeal therefore has no merit.

**Second ground of appeal: the charge list**

[10] Mr Koya argues that the charge was under-particularised and therefore did not fully and fairly inform Mr Fungavaka of the case against him. He also argues that the failure to charge each impact separately created a risk that the jury would not understand they needed to be agreed that the act which caused death coincided with the requisite murderous intent. In this regard, Mr Koya relies upon the following passage in *R v Mead*:[2]

> Where a number of specific incidents or transactions or courses of conduct are included in the same count, there is a risk that all jurors will be satisfied of the proof of one, but not necessarily the same one.

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2 *R v Mead* [2002] 1 NZLR 594 (CA) at [20].

*Analysis*

[11] Mr Koya did not press the argument that the charge was inadequately particularised. He was right not to. Although the charge as formulated was no more than "[Mr Fungavaka] on the 20th day of August 2013 at Kaitaia murdered Georgina Manuel", there can be no doubt Mr Fungavaka was fully informed of the particulars of the charge he faced. The summary of facts described two impacts and stated that Ms Manuel subsequently died of multiple blunt force trauma injuries. At a pre-trial hearing on 4 August 2014, a year before trial, Ellis J noted the two impacts when she outlined the Crown's evidence and said that the Crown case would be that "Mr Fungavaka deliberately drove at Ms Manuel that night and in doing so, intended to kill her or to cause her bodily injury that he knew was likely to cause death, being reckless as to whether death ensued".[3]

[12] As to the alternative argument, that the two impacts should have each been separately charged as murder, we agree with Mr Koya that there were two separate acts on the part of Mr Fungavaka. The first was driving the car in the direction of the victim and striking her. The second occurred after he turned the vehicle around and then proceeded to run Ms Manuel over.

[13] Section 17(1) of the Criminal Procedure Act 2011 provides that "a charge must relate to a single offence". In *Mason v R* the Supreme Court was concerned with the application of the predecessor to s 17 — s 329(6) of the Crimes Act 1961, which provided that every "count shall in general apply only to a single transaction". The Court said that distinctly identifiable acts of alleged offending should be the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if the acts are combined in a single count,[4] endorsing the comments of Anderson J writing for the Court in *R v Qiu*:[5]

> Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of conviction, they assist the sentencing Judge by indicating the extent of culpability.

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3 *R v Fungavaka* [2014] NZHC 1818 at [12] and [17].
4 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [9].
5 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

[14] We consider that this reasoning applies with equal force to s 17 of the Criminal Procedure Act so that where there are distinctly identifiable acts of offending, those acts should be charged separately.

[15] In this case it might have been preferable to formulate two charges, but we do not consider that any prejudice to Mr Fungavaka flowed from the Crown's failure to do so. Mr Koya claims there was a risk that the jurors reached a guilty verdict without being satisfied that Mr Fungavaka caused the victim's death at a time when he had murderous intent. But that risk does not even reach the level of the theoretical in this trial. It was not at issue that Mr Fungavaka was responsible for each impact, nor that each impact was a substantial and operative cause of death. The only issue was whether the Crown had proved beyond reasonable doubt that one or other of the impacts was non-accidental.

[16] The mismatch identified as a risk by the Chief Justice in *R v Mead* could not therefore arise. And even had there been such a risk, the question trail addressed it. The jury was directed to consider the elements of the offence separately for both the first and second impacts. The Judge therefore directed in such a way to ensure that, before a verdict of guilty could be reached, the jury had to be satisfied of each of the elements in respect of one or other or both of the impacts.

[17] This ground of appeal also fails.

**Third ground of appeal: deficient interpretation**

[18] For most of the trial Mr Fungavaka had a single interpreter. But because the trial ran over time that interpreter was replaced for a period by a Mr Briggs. Mr Briggs' first day was 21 September 2015, partway through Mr Fungavaka's evidence-in-chief. He interpreted all the evidence given on 21 and 22 September, including the remainder of Mr Fungavaka's evidence-in-chief, his cross-examination and re-examination. Mr Briggs also interpreted for Mr Fungavaka the evidence of Mr Rhodes, the private investigator called by the defence, and another witness for the defence, Detective Sergeant Beatson, who gave evidence on 30 September 2015. After that, the original interpreter returned.

[19] On 23 September 2015 Faire J heard from counsel about the quality of Mr Briggs' translation and, as a consequence, directed that the accuracy of the translation be reviewed. Ms Christine Helu was appointed to undertake that review. Ms Helu provided a brief report which stated that the English was correctly interpreted into Tongan and vice versa, and that a Tongan would understand it very well. However, she highlighted that the interpreter needed to take notes of the dates, times, places, locations and names so that they were clearly stated. Ms Helu then gave evidence in a voir dire to clarify aspects of her opinion. The Judge provided the following helpful summary of her evidence in his ruling:[6]

> [25] The notes of evidence of the voir dire form approximately 54 pages of questioning the witness. What is apparent from that exercise is the following:
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> (a) Ms Helu considered that the interpreter's skills and techniques were not adequate, as will be revealed in further matters that I shall refer to;
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> (b) He did not use the first person when he should have;
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> (c) He clearly made no notes when asked to translate dates, times or names. Very often the dates, times and names do not occur in the Tongan translation when a question is asked;
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> (d) She was concerned that there were instances where words were added and, in some cases omitted. This led her to question the interpreter's listening skills;
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> (e) She considered that the standard of interpretation required by the Supreme Court in the *Abdula*[7] case had not been fully met in this case;
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> (f) There were occasions when the interpreter "side talked". That meant he was having a discussion with the defendant which was quite separate from simply interpreting the question asked and the answer given;
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> (g) There were occasions when reference was made to specific chattels in an English question. The interpreter did not identify each chattel by type but simply referred to all the chattels mentioned as the Tongan equivalent of "things";
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> (h) There were occasions when the defendant was saying he did not understand the question and that was not properly relayed or recorded in the English translation;

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6 *R v Fungavaka* HC Whangarei CRI-2013-029-761 (Ruling 20 of Faire J) [Ruling 20].

7 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534.

(i) She was particularly concerned when longer questions were asked. In those instances she considered that the interpreter was not interpreting exactly what was said. Again, this seemed to arise because he had not been taking notes as the question was being asked in English;

(j) She was asked at about an important question which appears in the notes of evidence as to the defendant's knowledge of whether the lights in the car were on at the time. It has particular reference as to whether the defendant saw the deceased on the road and it appears at page 818, starting at approximately line 23. The question asked at page 818, line 26 in fact involved a question followed by a statement. It is an ambiguity which arises not from the strict interpretation of the words used, but rather from the way the English words were put in the first place;

(k) There was also an instance where the interpreter had added words not spoken by the defendant in Tongan but which he recorded in English "we didn't fight". That has some importance because it was given by the defendant in a passage describing his relationship with the deceased.

[20] Faire J declined a defence application for a mistrial on the ground of inadequacies in the interpretation of questions and answers. In his ruling, having carefully reviewed the principal areas highlighted in support of the application and their cumulative effect, the Judge concluded that although there were some deficiencies in the interpretation, the overall standard required had been met.[8]

*Relevant principles*

[21] The standard against which the interpretation in question is to be measured was explained in *Abdula v R*:[9]

> [43] That standard must reflect the accused person's entitlement to full contemporaneous knowledge of what is happening at the trial. Interpretation will not be compliant if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence. This approach maintains and demonstrates the fairness of the criminal justice process which is necessary if it is to be respected and trusted in our increasingly multicultural community. Trial judges should at all times be alert to the quality of interpretation; certain omissions and irregularities may thereby be sufficiently avoided or mitigated. Where compliance is challenged, the cumulative effect of deficiencies in the interpretation must be evaluated, in the overall context of the trial, to determine whether its standard was,

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8 Ruling 20, above n 6, at [74].

9 *Abdula v R*, above n 7.

> nevertheless, such that there was compliance with the accused's rights. That is a matter for judicial assessment in every case.

[22] On appeal, Mr Koya submits that it was clear that prejudice was caused to Mr Fungavaka because, as the notes of evidence reflect, and as was translated by Mr Briggs, Mr Fungavaka asked for another translator to replace Mr Briggs "so he can understand what you are saying, 'cos what I said in Tongan, not really fully understand".

*Analysis*

[23] We find no error in the Judge's approach to this issue. He directed himself to the appropriate tests in terms of *Abdula*. It is clear that he considered all of the deficiencies which had been highlighted by the defence. He found that on the material currently before the Court, the evidence did not require correction. While he did not review all of the points identified by Mr Fungavaka's trial counsel Mr Bradford, he directed himself to those which had relevance to the defence theory of the case at trial.[10] That approach was consistent with the issue he had to consider — whether the standard of interpretation risked impeding the conduct of the defence.

[24] We have reviewed the interpretation issues raised by Mr Bradford at trial. We find ourselves in agreement with the Judge that the standard of interpreting did not impede the proper conduct of the defence. Like the Judge, we address only issues which have some significance to issues at trial.

[25] It was put to Mr Fungavaka that his statement to the police that his lights were off was not true, because the CCTV footage showed them to be on. In evidence, Mr Fungavaka answered yes, that he saw the CCTV, and that revealed that the lights were on. It was then put to him that what he had told the Detective Sergeant was not true. Mr Fungavaka answered: "I didn't hide anything, what I told him that my light was off and I didn't see anything as I thought my light was off." The interpretation of this answer was the subject of criticism but the Judge found the jury would not have been under any misapprehension as to what the

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[10] Ruling 20, above n 6, at [66].

defendant was saying.[11] He was simply stating that he said his lights were off because he didn't see the deceased. We note also that Ms Helu's evidence was that the interpreter had accurately interpreted Mr Fungavaka's evidence. We note this as an aside, as we acknowledge it may be the case that an entirely accurate translation fails to adequately convey the meaning of evidence, reflecting the reality that interpreting is an art and not a science.

[26] The next focus of criticism was the portion of evidence which occurred when Mr Fungavaka was asked a question regarding his statement to the police that during the second impact he felt he ran over the victim's leg. The evidence records that Mr Fungavaka agreed that during the second impact he felt that "he did run over a body". Ms Helu said that counsel's question of Mr Fungavaka, whether he felt he ran over a body, was translated as whether he felt he hit a body. It was to that question which he answered yes. The Judge said:[12]

> Now the issue that arises in this piece of evidence is whether the defendant was saying he hit the deceased as opposed to running over the deceased. There is certainly a difference in the concepts being conveyed, but it was not suggested to me by Mr Bradford that the answer given specifically to the question which revealed the answer that I have referred to was a significant departure from what it should have been.

[27] Mr Koya was unable to say how Mr Fungavaka's answer resulted in any prejudice to his defence. In the context of this trial this was not a material difference. The evidence related to the second impact. It was not challenged that Mr Fungavaka felt he had run over something, as he conceded to police. The issue was whether the impact was accidental.

[28] The next issue raised was the answer given by Mr Fungavaka in response to the question "Or don't you remember that?" in relation to his tyres squealing and his engine revving during the u-turn. The interpreter said that Mr Fungavaka's answer was "That's it". Ms Helu criticised the translation. She said the answer should have been "Yes", as in "Yes, I cannot remember". In our view both answers have the same meaning and would have been understood as such by the jury. Moreover, Crown counsel went on to clarify the answer. She said: "You said, 'That's it', when

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11 At [67].
12 At [68].

I asked you, 'Don't you remember?' Do you not remember?" Mr Fungavaka replied: "I replied to that, what you have just described is not what happened as I remember it".

[29] To sum up to this point, the appellant has not shown that any particular question or answer of significance to the matters at issue in the trial was misinterpreted. Nor can we see that they gain significance if viewed cumulatively.

[30] We also do not accept Mr Koya's proposition that the complaint Mr Fungavaka made about the interpreter during trial is sufficient to show prejudice. Mr Fungavaka did not give evidence to describe how his evidence, his understanding of the proceeding or the conduct of his defence was affected by any interpretation issue.

[31] Against this background, the Judge was plainly correct to conclude that the individual criticisms, and the cumulative effect of those criticisms, did not establish that the interpretation had fallen below the standard set out in *Abdula* to justify a finding of miscarriage of justice. As to the range of other criticisms, the Judge said:[13]

> [71] I am mindful of the fact that Mr Bradford referred to a significant number of passages in the notes of evidence where street names, or names of persons or things were not specifically interpreted. Nowhere can I find where this occurs, however, that an answer given as the defendant's evidence could be said to be wrong or it has been suggested by the defence that it is wrong. That leads me to the conclusion on the evaluation that has been carried out, that in the overall context of this trial the standard required has in fact been met.

We see no error in that conclusion.

[32] Mr Koya has raised a new ground on appeal which arises from the interpretation completed by the principal interpreter during the course of the Crown case. Mr Fungavaka's ex-wife was giving evidence. In the course of her evidence the following exchange occurs:

> Q. And so when you answered the phone, what does he say?

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[13] Ruling 20, above n 6.

A. He said he was making his way down to Auckland to see his family, or to say his goodbyes and then turn himself in and then that's when he stated this is what he wanted to do. At the time then I was a bit, didn't really quite know whether he was quite –

**OBJECTION: MR BRADFORD** (14:50:34)

**EXAMINATION CONTINUES: MS O'CONNOR**

Q. In terms of the "this is something I wanted to do", can you remember now the words that he said?

A. Yep, he spoke it in Tongan though, like he was saying, **Lena, ko e me'a pe na'u loto keu fai** It's just how I put it in English, just before, "This is something that I wanted to do.["]

**THE COURT:**

Pause for a moment please. Can we have that translated to the defendant and then translated into English please.

**INTERPRETER:**

He said to me "**Lena, ko e me'a pe eni na'u loto keu fai**" This is what I have been wanting to do

**EXAMINATION CONTINUES**

[33] The interpolation from the interpreter occurred at the Judge's direction. This was to meet the concern that the witness had provided her own translation of a statement the defendant had made in Tongan. This ground of appeal was initially advanced on the basis that the Judge had directed the interpreter to provide an interpretation of the statement in Tongan the witness said had been made by Mr Fungavaka, but the interpretation was not captured in the transcript so it did not take place. But prior to the hearing of the appeal it emerged that an incorrect version of the transcript was included in the case on appeal. When the correct version was obtained, the interpretation was indeed captured as set out above. Mr Koya now submits that the words used by the interpreter were wrong. They should not have been "[t]his is what I have been wanting to do", they should have been "[t]his is something that I wanted to do". We see no material difference between those two phrases.

[34] Mr Koya also submitted that this version provided by the interpreter was misused by Crown counsel in the course of closing. Crown counsel's closing address is as follows:

> Lina told us in Tongan what the defendant said because he spoke it in Tongan. The words, "This is something that I wanted to do," were spoken in Tongan. It's at page 400 in the notes of evidence and at page 399 she explained in English all of what he'd said, "This is something that I wanted to do," because he was sick and tired of the way she was treating him and that he stated that she's got a boyfriend who was in jail, that she told him that once he gets out she's going to go back to him. I said he, in terms of him saying he was sick and tired of the way she was treating him, I said, "Well what had she been doing that he was sick and tired of?" "Like kicking them out of the house every now and again when she felt like it." I said, "How did his voice sound when you talked to him that morning and he was telling you this?" "It was just a straightforward talk, like no emotions. Just how we would have a conversation."

[35] We have read the relevant part of the evidence. We consider that is fairly represented by Crown counsel.

[36] This ground of appeal must therefore also fail.

**Fourth ground of appeal: misdirection on the elements of murder**

[37] Mr Fungavaka argues that the Judge wrongly directed the jury on reckless driving as part of his summing-up and that a direction on s 167(b) of the Crimes Act (intention to cause bodily injury and recklessness as to whether death ensues) was omitted.

[38] However, Mr Koya's submissions are based upon a misreading of the question trail. The Judge included a direction on reckless driving as part of the manslaughter direction. Manslaughter was clearly at issue in the trial and counsel for Mr Fungavaka closed on the basis that the incident was "an accident and, at worst, manslaughter". In this case, to prove manslaughter, the Crown had to prove that the victim was killed by Mr Fungavaka by an unlawful act In this case the unlawful act relied upon by the Crown to support a manslaughter charge was either assault (with the weapon being the car) or reckless driving causing death. The Judge directed on both offences at question B. Question B directs the jury that if they are satisfied that Mr Fungavaka assaulted the victim with the vehicle they should go on to consider question C, which addresses directly the issue of murderous intent. If they were not satisfied of the assault, they were directed to consider reckless driving. That part of the question trail can only lead to a conviction for manslaughter — not murder.

[39] That meant that the jury could only reach question C if satisfied that Mr Fungavaka assaulted the victim but not if they were satisfied instead that he had driven recklessly and, in so doing, caused her death. If the jury reached question C they were then directed to consider the issue of murderous intent as follows:

> Viliami Fungavaka had murderous intent if:
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> (i) at the time he assaulted Georgina Manuel using the motor vehicle as a weapon, he meant to cause Georgina Manuel's death; or
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> (ii) at the he assaulted Georgina Manuel using the motor vehicle as a weapon, he meant to cause her bodily injury that he knew was likely to cause death and was reckless as to whether death ensued or not.

[40] This direction is plainly taken from the terms of s 167(b) and was a conventional direction in relation to murderous intent.

[41] Accordingly we find no error in the Judge's direction in relation to the elements of murder.

**Result**

[42] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent