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**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CRI-2014-044-001376
[2015] NZHC 1125**

THE QUEEN

v

YUN QING LIU

Hearing: 20, 21 May 2015
Counsel: B Dickey and F Culliney for Crown
M Kan and F Pereira for defendant
Judgment: 25 May 2015

JUDGMENT OF KATZ J

*This judgment was delivered by me on 25 May 2015 at 3:00 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Solicitors: Meredith Connell, Crown Solicitor, Auckland
Michael Kan Law, Auckland

Introduction

[1] The defendant, Yun Qing (“Jack”) Liu, is currently on trial on a charge of murdering his partner, Bin (“Cissy”) Chen. Ms Chen disappeared on Monday, 5 November 2012. Her body was not found until 16 months later.

[2] On the morning of her disappearance, Cissy Chen had a telephone conversation with a close friend, Yen (“Cindy”) Chin. Ms Chen told Cindy of her plans to make a will, leaving her assets to her brother and nephews. During the course of the conversation Ms Chen allegedly said to Cindy: “Cindy if one day I am dying [if I die] you please quickly call the police and Jack he’s the one who kill me”.

[3] The Crown believes that Mr Liu murdered Ms Chen within hours of that conversation, on the evening of Monday 5 November 2012. Mr Liu’s motive for killing Ms Chen is allegedly that he became aware on 5 November 2012 (or shortly before that) that she was intending to make a will, excluding him. The Crown case is that this precipitated an argument that turned violent, resulting in Ms Chen’s death.

[4] The Crown applied for a number of pre-trial orders regarding the admissibility of certain evidence. Moore J determined those admissibility issues prior to trial, with one exception. He determined that the admissibility of the “If I die” statement should be resolved by the trial Judge. In particular, Moore J concluded that a proper assessment of the reliability, probative value and prejudicial effect of the statement required hearing oral evidence from Cindy, at a voir dire, to assess the tone, mood and context of the relevant exchange.¹

[5] That voir dire has now been held, during the third week of Mr Liu’s trial. I accordingly analyse the admissibility of the “If I die” statement below, in light of the evidence that has now been given by Cindy regarding the circumstances in which the “If I die” statement was made.

¹ *R v Liu* [2015] NZHC 732 at [103f]; *R v Liu* [2015] NZHC 746 at [119]-[122].

Overview of relevant legal principles

[6] All relevant evidence is admissible, unless excluded by the Evidence Act 2006 (“Act”)² or another statute.² Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.³ Evidence that is not relevant is not admissible.⁴

[7] One of the categories of evidence excluded by the Act is hearsay evidence, unless it falls within one of the exceptions in the Act, or is admissible by virtue of some other statute. A hearsay statement is a statement that was made by a person other than a witness, which is offered in evidence to prove the truth of its contents.⁵

[8] The “If I die” statement is not hearsay, however, because the Crown does not seek to offer it in evidence as truth of its contents, namely as direct evidence that Mr Liu is Ms Chen’s killer. Rather, the Crown seeks to offer the statement as evidence from which the state of the couple’s relationship as at 5 November 2012 can be inferred. Where a statement is admitted not for the truth of its contents, but because it is evidence from which the maker’s state of mind (or some other relevant fact) may be inferred, it is not hearsay.⁶ As the challenged evidence is not hearsay evidence, the reliability threshold in s 18(1)(a) does not apply. Reliability issues may still, however, impact on the relevance or probative value of the statement.

[9] Given that the evidence is not hearsay evidence its admissibility falls to be determined in accordance with ss 7 and 8 of the Act. In particular, I must determine:

- a) whether the statement is relevant (has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding);⁷ and

² Evidence Act 2006, s 7(1).

³ Evidence Act, s 7(3).

⁴ Section 7(2).

⁵ Section 4.

⁶ See for example *R v Baker* [1989] 1 NZLR 738 (CA) at 5 - 6; *Ratten v R* [1972] AC 378 (PC) at 388; *R v Blastland* [1986] AC 41 (HL) at 54; *R v Kearley* [1992] 2 AC 228 (CA) at 241 - 242; *Walton v R* (1989) 166 CLR 283 at 62 - 63; *R v Rajamani* [2009] NZCA 225 at [22]; *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [21]; *R v Hsu* HC Auckland CRI-2006-004-26378, 17 July 2009 at [49].

⁷ Evidence Act, s 7.

- b) whether the prejudicial effect of the statement outweighs its probative value.⁸

[10] I will consider each issue in turn, after first outlining the relevant contextual evidence.

Cindy's conversation with Ms Chen – the factual context

[11] The Crown case has not yet concluded, although it appears that most of the relationship evidence has now been adduced. Much of that evidence is disputed, and was the subject of extensive cross-examination. It will ultimately be for the jury to determine which evidence they accept and which they reject. For the purposes of determining the present admissibility application, however, I will summarise the key Crown evidence that provides context for the telephone conversation between Ms Chen and Cindy on 5 November 2012:

- a) There appears to have been some ongoing tension between Mr Liu and Ms Chen regarding financial issues. Mr Liu's view was that they should focus on saving for retirement and invest in property to secure their future (the couple owned an investment property in addition to their own home). Ms Chen, however, felt that that as they did not have children together, they should focus more on enjoying the present, rather than just saving for the future.
- b) In February 2012 Ms Chen's brothers, Philip Chen and Peter Chen, together with their father, visited from China. During that visit Philip suggested to Ms Chen that she should make a will, given that she had no children. She was resistant to the suggestion, in part for cultural reasons (Philip's evidence was that it would be unusual for a young healthy Chinese woman to make a will). The will issue appears to have caused some tension between Ms Chen and her brothers during their visit.

⁸ Evidence Act, s 8.

- c) Several neighbours of the couple, and a tenant who rented a room in their home, gave evidence of hearing arguments between the couple in the weeks or months prior to Ms Chen's disappearance. Ms Chen appeared to be the more dominant partner and generally appeared to be the aggressor in the arguments. There is no evidence of any history of domestic violence, by either partner.
- d) On Sunday, 4 November 2012, Mr Liu's son from an earlier marriage, Jai-Li Liu, came for lunch with his fiancée. Jack gave Jai-Li \$1,000 to spend on a forthcoming visit to China. Ms Chen was absent from the room when the gift was made. Jai-Li felt awkward taking the money, because he knew Mr Liu and Ms Chen had just bought a house and that money was tight. Jai-Li Liu said that after that, towards the end of their visit, Ms Chen was "more quiet". Jai-Li left with his fiancée at about 4:00pm. He said that there was no argument while he was at the house.
- e) About an hour and a half after Jai-Li's departure Ms Chen phoned her brother Peter in China. Peter's evidence was that:

On the phone Cissy was angry and spoke in a heavy way. She said she had a fierce argument with Jack and his son.⁹ She decided to make a will. I didn't ask the reason why she asked me to do that [send through his passport details and those of his nephews] but I feel from the phone that she wants us to do that immediately in urgent. I advise on the phone to her that to keep calm and for sure and not let Jack know about this. I also said that if she let Jack know about that she would be danger. She would put herself in a dangerous situation. She said that she doesn't care and she said Jack has already known that she wants to do that. Finally I said, "Okay, take care..."

- f) On Monday 5 November 2012 Ms Chen seemed "off" at work. She phoned Cindy at 10:00 am (discussed in further detail below). She also phoned her brother Peter and asked him how the passports were

⁹ The Crown's case will be that this argument started following the gift by Mr Liu of the \$1,000 to his son and that either Ms Chen had connected the argument directly with Mr Liu's son, hence she had said the argument was with "Jack and his son" or alternatively, there may have been a misunderstanding by Peter as to whether the deceased said it was an argument *with* Jack and his son or simply an argument with Jack *about* his son.

coming along, as she wanted them sent to her urgently. Peter relayed this to their eldest brother Philip, who emailed Cissy copies of his sons' passports that afternoon.

- g) At 4:46 pm, which was probably soon after Ms Chen got home from work, she placed a call to Ross Holmes Law, a law firm that had previously acted for her on conveyancing matters. The call was not answered.
- h) Mr Liu told the police (and a number of other people) that Ms Chen went out for a walk on her own at about 5:00 pm or 5:15 pm and did not return.
- i) At 7:15 pm a phone call was made from the land line at the couple's home to Philip Chen, in China. He was in a meeting and did not answer the call. Mr Liu subsequently told the police and Philip Chen that he was not the person who had made that call, but that Ms Chen may have returned and made it when he was out the back in the garden, or in the shower.
- j) At 8:19 pm a friend phoned and asked to speak to Ms Chen. This prompted Mr Liu to notice that Ms Chen had not returned from her walk. As a result, he went out to look for her in his car. He did not find her.
- k) Mr Liu made a 111 call to the police at 9:34 pm.

[12] Against this general background, I now outline the key aspects of Cindy's evidence, as given at the voir dire.

[13] Cindy first met Ms Chen in 1995, when they worked together. They have remained close friends ever since. They saw each other once every 4 to 6 weeks and spoke on the phone about one to three times a month.

[14] Ms Chen telephoned Cindy at about 10.00 am on 5 November 2012. She asked Cindy if she knew a lawyer, because she wanted make a will in favour of her younger brother. She seemed to want to do it as soon as possible. Cindy's evidence at the voir dire as to what was said next was as follows:

Q. What did you say to her when she told you about wanting a lawyer and a will?

A. I told her, "From my point of view it's a good idea to do a will".

Q. Did you say anything else about that?

A. Yes, and then I also tell her, "It's a good idea to do a will because one day if you die and then you can pass all the money to your younger brother". And also I give another example as well, "For example one day if Jack cook for you or put something or poison into the food or whatever and then if you doing a will that will be good". And then she have a very big emotion and starting talking louder and louder and say, "Cindy if one day I am dying [if I die] you please quickly call the police and Jack he's the one who kill me". After that I feel very surprised why she saying that. And then I ask her, "What happened to you Cissy? Are you and Jack, both of you argue before or yesterday?" And then she didn't say anything yes or no to me.

Q. You said she had big emotion and she raised her voice, can you explain or give us more detail of what you mean by big emotion?

A. Because she speak very loud, she speak louder and big emotion, after I saying that example, I just only say for example, but – where am I up to?

Q. You said you only gave as example.

A. Yes, yes just we give an example and then she feel everything sounds changes and big emotion and getting louder, to me.

Q. So did she say anything to you when you asked if she and Jack had argued?

A. No she didn't.

Q. What happened after that?

A. After that, she told me, "Because I'm working at the moment, so I have to go and find a lawyer, I couldn't speak to you too much and then I will catch up with you later".

Q. Did she say which lawyer she'd talk to or did you give her names of lawyers?

A. No.

Q. Is that when the phone call finished then?

A. Yes because she says she need to go and get a lawyer.

[15] Cindy later elaborated on what she meant by “big emotion” as being “it’s like she [Ms Chen] got stimulated all of a sudden by something”. Cindy understood from the words used that Ms Chen was fearful of Mr Liu. She accepted in cross-examination that in her contemporaneous statement to the police (made on 8 November 2012) she had not said that she thought Ms Chen was fearful of Mr Liu, rather she had said that Ms Chen was angry. Her voir dire evidence, however, was that Ms Chen’s demeanour changed dramatically after Cindy mentioned the poisoning “example”.

[16] I asked Cindy why she had given the “example” of Mr Liu putting poison in Ms Chen’s food as a good reason for making a will. She explained that the reason was that for “us” (by which I understood her to be referring to people from China) making a will is very unusual. Cindy said she was therefore trying to give an example of why a will might be a good idea for someone with no children. The poisoning example she provided was simply a random example and was not intended to suggest anything negative about Mr Liu or the couple’s relationship. It was clear from Cindy’s evidence that, from her perspective, she could equally have said “a will is a good idea in case you get run over by a bus”. Nothing adverse can accordingly be inferred from her use of the poisoning example. It is simply a coincidence that such a statement was made on the day Ms Chen disappeared.

[17] According to Cindy, this was the first time the friends had discussed a will, although Cindy knew from another source that the question of Ms Chen making a will had been discussed within the family.

[18] During the telephone conversation Ms Chen also mentioned that she wanted to sell the rental property the couple owned jointly in Mt Roskill and “try to get a small unit or small house for her in the future”.

Is the statement relevant?

[19] The first issue I must determine is if the statement is relevant, in terms of s 7 of the Act.

[20] Intuitively, it seems natural to assume that a statement made by a homicide victim, shortly before their death, that “If I die, [X] did it,” must be relevant in some way to establishing that X is indeed the killer. This intuitive response, however, belies the difficulty in assessing in a given case precisely *why* such a statement is relevant, and what exactly it is relevant to. What is the particular fact that “is of consequence to the determination of the proceeding” that such a statement tends to prove or disprove?

[21] After a crime has been committed, a witness (other than a homicide victim) may be able to give direct factual evidence as to who the perpetrator was, based on what they have seen, heard and experienced. Before a crime has been committed, however, it is not possible to give direct factual evidence as to identity of the perpetrator. Rather, if a person expresses a view or belief that someone may commit a crime in the future, it is necessary to consider what facts may have underpinned that belief. Might any or all of those facts constitute a link in a chain of circumstantial reasoning that could lead a trier of fact to conclude that the defendant committed the crime alleged?

[22] The Crown submitted that the “If I die” statement is relevant, not to establish the truth of its contents, but essentially as “state of mind” evidence, to show the state of Mr Liu and Ms Chen’s relationship in the crucial time period just hours before her disappearance. Ms Chen’s statement to Cindy is said to be the “sharpest, best and most contemporaneous” evidence of the state of the relationship at that time. The Crown says that the “If I die” statement shows that the relationship was unstable and becoming dangerous. Other evidence before the Court suggests that Ms Chen was a fairly private person, who seldom discussed her personal affairs with others. In this context, the making of such a strongly negative statement about her partner, on the day she disappeared, was said to be particularly significant.

[23] The defence submitted, on the other hand, that the couple’s relationship was not troubled. They had their ups and downs like most couples, but nothing out of the ordinary. Ms Chen’s disappearance is not linked in any way to relationship difficulties. Mr Liu, on a number of occasions following Ms Chen’s disappearance, told people that his relationship with her had been fine. He further said that the

evening of her disappearance had been unremarkable and they had not argued in any way.

[24] The state of the couple's relationship is therefore clearly in dispute. But what, precisely, is that dispute relevant to? If the Crown can prove that the couples' relationship was unhappy and unstable as at the date of Ms Chen's disappearance, how will that help the jury decide if Mr Liu killed her?

[25] First, and at a fairly general level, it would be open to the jury to conclude that homicide would be more likely to occur in the context of a deteriorating relationship, with increasing levels of hostility, distrust and tension, than in a loving and harmonious relationship. Further, relationship evidence may also be relevant to establishing motive. When the prosecution case is circumstantial, evidence of motive assumes even greater importance in establishing the defendant's identity as the perpetrator of alleged offence.

[26] The Supreme Court of Canada, in *R v Griffin*, considered in some depth whether, in a homicide case, the deceased's state of mind could be relevant to the issue of the defendant's motive.¹⁰ In that case the two defendants, Griffin and Harris, were charged with murdering the victim, Poirier. The Crown's theory was that Griffin had shot Poirier as retribution for Poirier's failure to repay a drug debt. The identity of the killer was the sole issue at trial. The case against Griffin was largely circumstantial. The Crown led evidence that Poirier was driven into hiding and was fearful for his safety in the weeks preceding his death, and that Griffin was on a relentless search for him.

[27] Poirier's girlfriend testified that shortly before his death, Poirier said to her: "If anything happens to me it's your cousin's family". She understood that Poirier was referring to her relative Griffin, and that he was afraid. The trial judge ruled that the statement was admissible to show the state of mind of Poirier and to rebut the defence proposition that others would have had a motive to kill Poirier at the time of his death. The Supreme Court, by a 5-2 majority, upheld the trial judge's

¹⁰ *R v Griffin* 2009 SCC 28, [2009] 2 SCR 42.

decision that the statement was admissible. Delivering the decision of the majority, Charron J stated:

[60] As stated earlier, the sole issue at trial was the identity of Poirier's killer. Although Poirier's state of mind may have no direct bearing on the resolution of the identity of his murderer, it is well established that a deceased's mental state may be relevant to the question of an accused's motive. As Doherty J. explained in the oft-approved judgment in *P. (R.)*:

. . . the deceased's mental state may bear no direct relevance to the ultimate issue of identification but it will none the less be relevant to that issue if it is relevant to another fact (*e.g.*, motive) which is directly relevant to the ultimate issue of identification.

In turn, that evidence of motive is relevant and admissible particularly where, on the issues of identity and intention, the evidence is purely circumstantial, is equally well established at law: *Lewis v. The Queen*.

[61] The state of the relationship between a deceased and an accused in the time period leading up to the former's murder has been recognized as probative of the issue of motive. For example, in *R. v. Assoun*, identity was the crucial issue at trial. The trial judge admitted statements made by the deceased expressing fear of the accused on the basis that such statements were probative of the issues of "malice, motive, [and] state of mind" which in turn were relevant to identity. The Nova Scotia Court of Appeal agreed:

[The deceased's] state of mind and [the accused's] state of mind are probative of the relationship between them at the time of [the deceased's] murder. Therefore, they are probative of motive, which is relevant to identity.

[62] The conclusion in *Assoun* echoes that of the Ontario Court of Appeal in *R. v. Foreman*, where the court considered the relationship between a deceased's state of mind and the issue of motive. Upholding the trial judge's admission of statements made by the deceased shortly before her death in which she expressed fear of the accused, the court stated as follows:

Motive refers to an accused's state of mind. . . . [T]he deceased's state of mind was one link in a chain of reasoning which could lead to a finding that the [accused] had a motive to kill [the deceased]. In that way, evidence of [the deceased's] state of mind had an indirect connection to the appellant's state of mind.

[63] ...That the relationship between a deceased and an accused was acrimonious or that the two had engaged in a dispute in the period leading up to a murder are highly relevant to the issue of motive because such information may afford evidence of the accused's animus or intention to act against the victim: *R. v. Pasqualino*. See also *R. v. Lemky*. This is not to say that a deceased's state of mind alone is capable of proving motive. Insofar as it affords evidence of the nature of the relationship between a deceased and an accused, however, a deceased's state of mind is one piece of evidence that may be relevant to the issue of motive.

[64] In the instant appeal, Poirier's fearful state of mind is probative of the nature of the relationship between he and Griffin in the time period immediately preceding the murder... All of these facts [including that Poirier told his girlfriend that he believed that Griffin intended him harm] make it more likely that Griffin had the motive ascribed to him by the Crown than would otherwise be the case.

...

[66] Thus, the trial judge correctly appreciated that the deceased's mental state was highly probative of the issue of motive and that it took on additional probative value in that it tended to rebut the specific defence proposition that someone other than Griffin may have had a motive to kill Poirier in January 2003... I see no reason to disturb the trial judge's ruling on admissibility.

[Footnotes omitted]

[28] The evidence of Ms Chen's state of mind as at 5 November 2012 is relevant in this case for similar reasons to those outlined in *Griffin*. The Crown case is that Mr Liu found out about Ms Chen's plans to make a will leaving her assets to her family and, consistent with the deterioration in the relationship, they argued. On this occasion the argument became violent, resulting in Ms Chen's death.

[29] The jury could well take the view that nothing speaks more eloquently of the potentially dangerous deterioration in the relationship between Mr Liu and Ms Chen than the fact that Ms Chen should tell a close friend, on the very morning of her disappearance, that if she died, Mr Liu would be the one who had killed her. It is also of significance that the statement was made in the context of a conversation during which Ms Chen also discussed with Cindy her wish to make a will in favour of her younger brother and nephews.

[30] The Crown submitted that if the "If I die" statement is not admitted, an erroneous impression might be left in the minds of the jury that the steps being taken by Ms Chen were simply illustrative of a diligent and careful person putting their family affairs in order. It is only when the evidence (from several witnesses) regarding Ms Chen's plans to make a will is viewed in the context of her "If I die" comment, that the jury will be able to appreciate that Ms Chen's decision to make a will was inextricably linked with the serious deterioration in the relationship between her and Mr Liu in the period preceding Ms Chen's disappearance.

[31] It is not in dispute that the “If I die” statement cannot be relied upon for the truth of its content. The statement is not, in itself, direct evidence that Mr Liu killed Ms Chen. Rather, it is relevant because certain other circumstantial facts may be able to be inferred from the fact that the statement was made. Those facts, if accepted, may constitute a link in a chain of circumstantial reasoning that could lead the jury to conclude that Mr Liu was Ms Chen’s killer.

[32] The statement is accordingly relevant, but only for the limited purposes of establishing the state of the couple’s relationship as at 5 November 2012 (viewed from Ms Chen’s perspective) and providing contextual evidence for her apparent decision to make a will at that time, having previously been resistant to the idea. Viewed in that way, the statement is arguably relevant to motive. Establishing a motive may, in turn, help the jury determine the identification of Ms Chen’s killer and whether the Crown has proved beyond reasonable doubt that that person is Mr Liu.

Does the probative value of the statement outweigh its prejudicial effect?

[33] The court must exclude relevant evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding.¹¹ In determining the outcome of that balancing exercise, the court must take into account the right of an accused to offer “an effective defence”.¹²

What is the probative value of the statement?

[34] I have summarised the relevance of the statement at [32] above. Relationship evidence in this case, while certainly relevant, is arguably not as directly relevant as similar evidence that was admitted in both *R v Baker*¹³ and *R v Rajamani*.¹⁴

[35] In *R v Baker* the defendant was charged with raping and murdering his estranged wife. He claimed that his wife had been shot accidentally, after she had invited him around to her home with a firearm to shoot stray cats. The Crown

¹¹ Evidence Act, s 8(1).

¹² Evidence Act, s 8(2).

¹³ *R v Baker* [1989] 1 NZLR 738 (CA).

¹⁴ *R v Rajamani* [2009] NZCA 225.

sought to adduce evidence of statements made by the deceased four weeks before her death, demonstrating her fear of her estranged husband and her hostile attitude towards him. The evidence was found to be relevant because it tended to rebut the suggestion that the deceased would have voluntarily invited her husband to come to her home, with a firearm, on the day of her death.¹⁵

[36] In *R v Rajamani* the deceased's statements to three witnesses were offered as proof of her deep fear of her husband and his threats of violence. The comments were found to be relevant to rebut the defence of provocation. In particular, if accepted, they brought into question the defendant's claim that his wife had told him she was leaving him for a Pakistani man (which was said to have provoked him to kill her).¹⁶

[37] The relationship evidence in the present case is relevant in a more general way. It does not tend to prove or disprove a specific defence, as in *Baker* or *Rajamani*. That is in part because everything is at issue in this case, including identity. Nevertheless, if the Crown cannot establish that, as at 5 November 2012, the couple's relationship was unhappy and unstable, then this will make it significantly more difficult for the Crown to establish motive. Motive, in turn, is likely to assist in establishing the identity of Ms Chen's killer.

[38] The evidence accordingly has a fairly high probative value, particularly given that the statement was made very shortly before Ms Chen's disappearance. Its importance to the Crown case is increased by the fact that the other evidence the Crown has adduced of relationship problems between the couple is significantly weaker than the deceased's own "If I die" statement. This may possibly reflect the evidence of a number of witnesses that Ms Chen rarely discussed personal matters.

[39] Putting the "If I die" statement to one side, the evidence of relationship conflict that has been adduced by the Crown could possibly be interpreted as being consistent with a relatively normal marital relationship. There is no evidence of any history of domestic violence, and nothing to suggest that Ms Chen was in any way

¹⁵ At [3].

¹⁶ At [22].

fearful of Mr Liu. Rather, the evidence tends to suggest that she may have been the more dominant partner, and the “aggressor” in any arguments between the couple. The Crown says that the “if I die” comment supplies the crucial progression from a relationship in which arguments (albeit sometimes tense and generally dominated by Ms Chen) were commonplace, to a point where, it says, the relationship was so bad that homicide was a real possibility.

[40] Further, without the “If I die” comment, Ms Chen’s other comments to Cindy on 5 November 2012 could be interpreted as being only weakly indicative of relationship problems. The only other evidence in the conversation that is possibly suggestive of relationship problems is Ms Chen’s comment that she wanted to sell the rental property the couple owned jointly in Mt Roskill and “try to get a small unit or small house for her in the future”. That statement is a much weaker indicator of relationship problems, however, than the “If I die” statement.

[41] Accordingly, for the reasons I have outlined, it is my view that the probative value of the “If I die” statement is fairly high.

Is the probative value of the statement undermined by reliability issues?

[42] Mr Kan submitted that the statement is unreliable, and that this reduces its probative value. His submissions primarily focussed, however, on issues relating to the veracity or accuracy of Cindy, rather than Ms Chen. They included, for example, the suggestion that Cindy’s recall of the conversation may be inaccurate, that her translation of the conversation (from Cantonese into English) may be incorrect, that she may have colluded with members of Ms Chen’s family prior to making a police statement, and that she bears some animosity towards Mr Liu. Such allegations (which Cindy denied, to the extent they were put to her) would be able to be fully explored in cross-examination at trial and would ultimately be matters for the jury to determine. Similarly, any inconsistencies between Cindy’s evidence at trial and her prior police statements will be able to be thoroughly canvassed in cross-examination.

[43] Of more significance, Mr Kan also submitted that the statement is unreliable because it was prompted by Cindy putting to Ms Chen the “poisoning example”. It was therefore not entirely voluntary.

[44] In my view, however, this context does not undermine the inherent reliability of the statement, which was made by Ms Chen to a close friend of some 19 years standing. The issue of making a will was first raised by Ms Chen. Cindy then provided two “examples” as to why she thought a will might be a good idea. The reason for this appears to be that making a will was seen as a somewhat unusual step for a childless Chinese woman in her 40s. It appears that Cindy was endeavouring, in effect, to give Ms Chen some comfort that she was making a good decision.

[45] The spontaneous outburst Ms Chen made in response, in a state of “big emotion” was not the result of leading or unfair questioning. Further, the evidence indicates that Ms Chen was not an impressionable or suggestible person. Rather, she has been described as “dominant” and “strong-minded”. The “If I die” statement was a spontaneous and unsolicited statement by Ms Chen, apparently expressing genuine concern on her part. It was not elicited in circumstances that would tend to undermine its reliability. There is no indication that the statement was light hearted or was not intended to be taken seriously. Nor is there any suggestion from the voir dire evidence that it was hyperbole, driven by anger.

[46] I am satisfied that the probative value of the statement is not undermined due to any reliability concerns.

What is the prejudicial effect of the statement?

[47] Mr Kan submitted that there is a significant risk that the statement, if admitted, would have an unfairly prejudicial effect on the proceedings. That is because the jury “may use such evidence to engage in an improper and illogical reasoning process that because the deceased has allegedly expressed a view that the defendant would be the one to kill her, that he is *inevitably* the one who *did* kill her”.

[48] Mr Kan submitted that with such an inflammatory statement before them there is an “immense” risk that the jury would abdicate their responsibility to review the particular context of the statement itself, as well as all of the facts of this circumstantial case in detail. Ms Chen’s apparent premonition that if she died it would be at the hands of Mr Liu would be wrongly used by the jury as evidence of the fact that Mr Liu was, indeed, her killer. Mr Kan submitted that no judicial

warning, no matter how strong, would be capable of curing this illegitimate prejudice.

[49] Mr Dickey, on the other hand, submitted that any illegitimate prejudice is capable of being cured by a judicial direction. On a daily basis jurors are given directions as to the proper use of this type of evidence and our system of justice relies upon confidence that such directions are heeded.¹⁷

Is the probative value of the evidence outweighed by its unfairly prejudicial effect?

[50] Pursuant to s 8 of the Act I am required to exclude the statement if its probative value is outweighed by the risk that its admission will have an unfairly prejudicial effect on the proceedings.

[51] In *SR v R* the Court of Appeal observed that¹⁸:

[U]nfairness is generally found when, and to the extent, the evidence carries with it a risk that the jury will use it for an improper purpose or in support of an impermissible chain of reasoning.

[52] In a similar vein, Professor Richard Mahoney has observed that:¹⁹

Prejudice, in the evidentiary context, means the drawing of an inference...along an impermissible chain of reasoning – not one of logic, commonsense and experience, but one of hunch, gut reaction and lack of logic. It is the reaching of a conclusion for the wrong reason and whether that conclusion is right or wrong is quite immaterial.

[53] As the Crown accepted, the statement cannot be relied upon for the truth of its contents. The fact that Ms Chen told Cindy that if she died, Mr Liu would be her killer, is not evidence that Mr Liu is indeed her killer. Such reasoning is entirely impermissible. Rather, the statement is relevant because of what the jury may be able to infer from the fact that Ms Chen made such a statement. In particular, such a statement supports an inference that the couple's relationship was unhappy and unstable as at 5 November 2012. That fact is relevant, when considered together with other evidence in the case, to the issue of motive. Relationship evidence is

¹⁷ *Weatherston v R* [2011] NZCA 276 at [24].

¹⁸ *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638 at [128].

¹⁹ Richard Mahoney "Evidence" [1993] NZ Recent Law Review 57 at 59, quoting "Editorial" (1992) 34 Crim LQ 385 at [385].

therefore one link in a chain of circumstantial reasoning that could ultimately lead the jury to conclude that Mr Liu murdered Ms Chen.

[54] If Ms Chen had said to Cindy directly that the relationship was unhappy or unstable, or that she had been fighting with Mr Liu, I would have no hesitation in admitting the evidence. There would be no risk of such evidence being used to support an impermissible chain of reasoning. There is a very clear danger, however, in asking a jury to consider the “If I die” statement as evidence of a bad relationship, while directing them not to put the statement to its most obvious and prejudicial use, namely for the truth of its contents.

[55] I accept Mr Kan’s submission that there is a high risk of the jury engaging in impermissible reasoning, if the statement is admitted. There would inevitably be a huge temptation to rely on the statement for truth of its contents, perhaps even subconsciously. The fact that the statement was made on the very day that Ms Chen disappeared significantly increases that risk. The statement could almost be seen as a premonition by Ms Chen of her own death, and an accusation from beyond the grave as to who is responsible. I am concerned that no “limited use” direction from this Court, regardless of how strongly expressed, could mitigate against the risk of the jury engaging in impermissible reasoning in such circumstances.

[56] Justice Cardozo’s comments in *Shepard v United States* seem particularly apt in this context:²⁰

[The Government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. [The Government] used the declarations as proof of an act committed by [the victim’s husband]... This... the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon [the victim’s state of mind] and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed... When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

²⁰ *Shepard v United States* 290 US 96 (1933) at 104.

[57] With some reluctance, given the clear probative value of the evidence, I have concluded that the “reverberating clang” of the deceased’s accusatory words, made in such close proximity to her disappearance, would “drown out all weaker sounds” in this case. No matter how strong a jury direction is given, Ms Chen’s statement to Cindy begs to be used by the jury for an impermissible purpose, namely as evidence that Mr Liu did in fact kill Ms Chen. If the statement is admitted, there is a strong risk of the jury concluding that, whatever happened, Mr Liu must have done it. The “If I die” statement is therefore likely to assume a much greater significance than is warranted, and be used to support an impermissible chain of reasoning.

[58] Although there are a number of authorities to the effect that juries should be trusted to use evidence as directed, there will always be cases at the margins where the risk of unfair prejudice is so great that a court cannot be confident that the risk of misuse will be appropriately mitigated by a strong jury direction. In my view this is such a case.

Result

[59] The “If I die” comment made by Ms Chen to Cindy on 5 November 2012 is inadmissible at trial on the basis that its unfairly prejudicial effect outweighs its probative value.