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

**I TE KŌTI PĪRA O AOTEAROA**

**CA184/2017**
**[2018] NZCA 610**

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| BETWEEN | ALEXANDER MERRITT<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 12 November 2018 |
| Court: | Miller, Dobson and Mander JJ |
| Counsel: | T Ellis and S M Shone for Appellant<br>K S Grau for Respondent |
| Judgment: | 19 December 2018 at 10.00 am |

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**JUDGMENT OF THE COURT**

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**A The application for an extension of time to appeal is granted.**

**B The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Miller J)

[1] Mr Merritt appeals his conviction for the murder of Karin Ross at Dunedin on 2 December 2015.[1]

[1] *R v Merritt* [2017] NZHC 232 [sentencing notes].

[2] He has never accepted that he killed Ms Ross, but in the face of powerful forensic and circumstantial evidence he does not challenge the jury verdict on that ground. He says rather that his trial counsel failed to pursue a diagnosis of Autism Spectrum Disorder (ASD) made shortly before trial, and in the result he lost the opportunity to pursue a defence that he lacked mens rea. There was and is no evidence that his autism might have affected his capacity to form murderous intent, but he says it is sufficient that he lost the opportunity to explore the issue at trial.

[3] The challenge to the conduct of trial counsel extends to two other aspects of the trial. It is said that trial counsel ought to have resisted the admission of his police video interview, and that he did not give informed consent to being absent when the jury took a view of the scene.

[4] Mr Merritt also challenges aspects of the jury directions given by the trial Judge, Davidson J, contending that unanimity ought to have been required as to the kind of murderous intent proved and the jury ought to have been required to give reasons specifying which kind of intent they found proved.

[5] We record that there is no appeal against the sentence of life imprisonment with a minimum period of imprisonment of 12 years, but Dr Ellis signalled that one is likely. We observe that such an appeal is out of time and we express no view about its prospects, beyond saying that some of the arguments advanced in this appeal might be of relevance to sentence.

[6] The appeal was filed out of time, but the delay is explained and the Crown does not oppose an extension. Accordingly, we grant the necessary extension of time.

**The narrative facts**

[7] Mr Merritt, who was then aged 20, worked at Spotless Cleaning. Ms Ross was his supervisor. She had occasion to chastise him for repeatedly parking in a mobility carpark at his regular place of work, a polytechnic, and for his attitude and behaviour. She reduced his working hours. In conversation with workmates he made comments such as he would like to burn her family alive in front of her and he would be happy if she died.

[8] A formal disciplinary process was triggered by a letter of 25 November 2015 that gave Mr Merritt reason to think his employment might be at risk. There was to be a hearing on 1 December, but he took legal advice and it appears he was advised by letter of 1 December that the meeting had been delayed.

[9] Ms Ross worked on the night of 1 December, returning in her work van to the Spotless premises in the very early hours of the morning. She was attacked with a weapon outside the premises. Her many defensive wounds indicate that she fought her attacker and it appears she tried to escape in the van. The pathologist estimated that she had suffered at least 18–20 blunt force blows to her head, resulting in 14 separate full-thickness lacerations. These caused internal bleeding that was the immediate cause of death. Some of the wounds suggest she was struck with the weapon while she lay on the ground. She was found dead by another co-worker, who happened to be Mr Merritt's mother, at about 2 am.

[10] Forensic evidence linked Mr Merritt to the crime. Notably, a bloodstained tack hammer was found at his home and traces of blood were found in the house and in the car that he drove. Blood on his shoes appeared to be spatter stains. Samples matched the DNA of Ms Ross. There was said to be a strong probability that a small sample from her fingernails matched his DNA.

[11] Mr Merritt was interviewed by the Police on 4 December. It is common ground that he elected not to exercise his right to a lawyer. He maintained that he had gone home after finishing his own shift at 9.18 pm and remained there. He explained apparent injuries to his face by saying that he had scratched himself in his sleep. He could not account for cellphone polling data that indicated his phone was not at home that evening.

**The diagnosis of ASD**

[12] It has never been suggested that Mr Merritt was insane or unfit to stand trial. However, three psychological reports were prepared before trial. They assumed importance on appeal because of what they have to say about his capacity to form intent, the diagnosis of ASD, and the contribution made to the offending by his ASD.

[13] The first report was prepared by a clinical psychologist, Louisa Medlicott, on the instructions of trial counsel, Mrs Stevens. It was dated 24 January 2016. She recorded that she had been instructed to consider Mr Merritt's intellectual functioning and fitness to stand trial, and whether he had Asperger's Syndrome, which as she recorded is currently diagnosed as ASD with or without additional specifiers. She assessed him and surveyed his family, educational and medical history at some length. His intellectual functioning was average. However, he presented with significant behavioural problems throughout childhood, and this sometimes included lashing out or becoming verbally aggressive. He learned at school to avoid situations he did not like by becoming difficult and aggressive, following which his mother would come and take him home. She concluded that he has "strong features indicating ASD", though comprehensive review of the information provided and interactions during her assessment did not support that as a definitive diagnosis at that time. Rather:

> Alex appears to have had a lifetime of anxiety and avoidance of situations that have been threatening to his self-esteem. When he has felt such a threat, if he was unable to avoid it through low level behaviours, he would frequently escalate his behaviour to include verbal and physical aggression against both peers and those in authority. This behaviour was reinforced by removing or changing the threat. After each episode where this occurred, it appears that Alex adjusted quickly and did not hold on to grudges, although the difficult interactions at Kavanagh College may be an exception to this.
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> Alex appears to have developed a sense of "specialness" and entitlement, whereby if he cannot get his own way he will feel significantly aggrieved. He appears to categorise people as on his side or against him. His presentation and interaction style varies depending on the category he has placed such people in. He has the capacity for warmth, caring, respect, reciprocal relationships, and positive interactions. He also has the capacity to challenge authority, particularly if aggrieved, and to express his anger and frustration through physical and verbal aggression.

[14] The second report was prepared by a consultant forensic psychiatrist, Dr Justin Barry-Walsh, again on the instructions of trial counsel, who asked him to further delineate mental health issues of potential relevance to the offending. Mrs Stevens explains that she did so because of the possible ASD diagnosis. The report was dated 26 July 2016. While recording Mr Merritt's account of his history, Dr Barry-Walsh noted that Mr Merritt said he knew someone had diagnosed him with autism but that meant nothing to him. He could not be definitive as to whether Mr Merritt has ASD but considered it more likely than not, noting a number of

elements of Mr Merritt's history supported it. Whether or not Mr Merritt's condition qualified as ASD, he has major problems that caused him to struggle with behavioural problems, poor school performance, markedly impaired socialisation and an inability to live independently. Dr Barry-Walsh added that:

> I note Ms Medlicott's comments about the lack of limits on Mr Merritt's anger when he was younger leading to a sense of specialness and entitlement, [and feeling] aggrieved when challenged. This is both plausible and consistent with a co-existing autistic disorder.

[15] The final report prepared before trial was that of a forensic psychiatrist, Dr Bathgate.[2] It was dated 23 September 2016 and received a week before trial. This report was commissioned by the Otago Forensic Psychiatry Service, not the defence, but upon learning that it was under way, trial counsel contacted the Service to flag the possible ASD diagnosis. After summarising Mr Merritt's history, Dr Bathgate reviewed his mental state, finding that he did not present with a specific intellectual disability, although he had difficulties with reading and writing. The Autism Diagnostic Observation Schedule was used. It highlighted issues with language and communication, lack of spontaneity, difficulties in developing rapport and reciprocity, limited empathy and emotional gestures. School reports confirmed that Mr Merritt tended to be isolated and when overwhelmed he could become anxious and then physically aggressive. The conclusion was that Mr Merritt met the DSM-V criteria for ASD and "appears to fall more in the mild end of the autistic spectrum". Dr Ellis's attack on the conduct of trial counsel focused on this diagnosis and the alleged failure of trial counsel to seek an adjournment to explore it further.

[16] Dr Barry-Walsh completed a further report for purposes of sentencing. He concluded that given Dr Bathgate's report a diagnosis of ASD was clinically sustainable and robust. He stated that "[u]nfortunately for Mr Merritt this diagnosis has not been made until subsequent to the commission of the offending". He noted that to say the condition was mild in Mr Merritt's case was not to diminish its pervasive nature and its effect on psychosocial functioning. He expressed the opinion that it contributed to the offending:

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[2] It was co-authored by Dr Fernando.

> It is my opinion there is a significant relationship between Mr Merritt's mental health difficulties generally, his ASD specifically and the offending. I consider his actions in committing the homicide may be understood within this framework although this opinion is necessarily speculative to some extent as I have not re-interviewed Mr Merritt and he has denied the offending. I previously commented on Mr Merritt's tendency to use aggression and denial as non-adaptive responses in problematic situations and said this along with a dichotomous thinking could account for his denial of the offending. I advanced that rigidity of thought, problems with social interactions and dealing with challenges and criticisms would have contributed to his actions at the time of the offending. I considered, as these could be attributable to his ASD that they may represent significant mitigation. The robust diagnosis of ASD reinforces this opinion. It appears this tragic offending involved a grossly disproportionate response to escalating employment difficulties and antagonism with the victim. These factors, I would speculate, had their genesis in Mr Merritt['s] problems dealing flexibly with difficulties, with a pattern of becoming entrenched and rigid in his thinking coupled with obsessive preoccupation leading to escalation in the situation. Commonly in people with ASD, problems with managing anxiety worsen already maladaptive responses and can lead (as has been noted in the case of Mr Merritt) to aggression and anger. It is plausible Mr Merritt continued to ruminate, became increasingly anxious and then angry and fixated on his difficulties with the victim prior to the offending. This response, although extreme, is consistent with his pattern of previous behaviour in such circumstances (e.g. the comment in the report of Drs Bathgate and Fernando which I quoted and his response to a parking ticket and his Mother's resolution of that.) There is also a good chance that his limited ability to see things from other people's viewpoint which would curtail his capacity for empathy and for meaningful consideration of the consequences of his actions was also a factor in the offending. Finally, it may be the case that his statements including threats and expressions of potential thoughts of harm to others as were noted by several witnesses were elements in the commission of this offence. All of these issues can be related to his ASD and as I noted more generally his mental health problems.

[17] We record that Davidson J agreed with this assessment. He stated at sentencing that:[3]

> [56] Your world has over time shrunk around you. This job at Spotless clearly meant everything to you. You had no friends and limited interests, other than that with your father, in old cars or classic cars. You were isolated. You were also defiant and difficult. Faced with the possibility you might lose your employment, and because you had a problem with Ms Ross, you decided that night to take her life and you thought rid yourself of the problem. Your reaction was extreme, rational only to you, cold blooded and callous, and afterwards you thought you could simply go on with your life, having dealt with the problem you thought Ms Ross posed for you.
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> [57] I think Dr Barry-Walsh is right, that the missing diagnosis of ASD means that your abnormal understanding of yourself and other people, and your thinking, has never been addressed. No one could have foreseen the risk

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3 Sentencing notes, above n 1.

> that you posed, but it was real and it crystallised and you responded decisively and brutally when you were confronted with something which threatened the centre of your world — your job — your income — your status.

**The evidence on appeal**

[18] This appeal has followed an unusual course. When the conduct of trial counsel is challenged it is usual for the appellant to swear an affidavit deposing to their dealings with counsel. A waiver of privilege is given and the Crown obtains an affidavit from trial counsel. Where it is said that other evidence ought to have been called at trial it is usual to seek leave to adduce that evidence on appeal so the Court can evaluate it when deciding the ultimate question: whether a miscarriage may have resulted.

[19] Mr Merritt neither swore an affidavit nor sought to adduce fresh evidence. His complaints about trial counsel were made in grounds of appeal which, as Ms Grau observed for the Crown, were expressed in general terms and evolved as the appeal progressed. Mr Merritt provided a waiver of privilege and Mrs Stevens swore an affidavit responding to his complaints as she understood them. She swore a supplementary affidavit after Mr Merritt's submissions were filed. At the hearing Dr Ellis advanced detailed criticisms of her supplementary evidence, but she was not required for cross-examination.

[20] We make two points about this. First, Mrs Stevens' evidence is unchallenged and that is a complete answer to some of the complaints that Dr Ellis made about her. For example, he submitted that she lacks knowledge of ASD and experience in dealing with it. The premise of that submission was that had she been experienced and competent she would have recognised that the diagnosis offered a defence and sought an adjournment to explore it. We do not accept that premise.

[21] Her evidence is squarely to the contrary: she says that she has more than 30 years' experience, has represented many people with ASD, has a very good understanding of mental and intellectual difficulties and how they can best be used in criminal proceedings, and is sometimes briefed specifically because of her expertise in the field. He submits that she failed to advise Mr Merritt of the full range of

defences; she denies it and specifically says that she advised him about a mens rea defence. We accept her evidence.

[22] Second, we accept Ms Grau's submission that Mr Merritt's approach to the appeal resulted in Mrs Stevens being unable to engage in close detail with some arguments that were advanced before us but not clearly signalled when she swore her affidavits. We make allowances accordingly when dealing with some of the arguments.

**The defence case at trial**

[23] With that introduction, we turn to the substance and conduct of the defence case. Mrs Stevens explains that she commissioned Ms Medlicott's report because she decided on meeting Mr Merritt that an assessment was needed. She found him unusual in that he lacked emotional responsiveness. However, he did understand the court process, he paid attention and he answered questions appropriately. She found him quite a deep thinker, alert to potential challenges to the Crown case. He agreed to undergo psychiatric assessment so that a defence of insanity could be explored. She discussed the available defences with him. She explained the strength of the Crown case but he was adamant that he wanted to go to trial. She gives a specific example of that. He did not want to pursue a plea to manslaughter. His defence was that the evidence did not show he killed Ms Ross. He instructed trial counsel that he wanted to challenge the forensic evidence. She briefed forensic experts and conducted the trial accordingly. In her opinion significant inroads were made, though they were insufficient to create reasonable doubt.

[24] Trial counsel discussed a defence of lack of mens rea with Mr Merritt but he did not instruct her to pursue it. On the contrary, he accepted the evidence of Crown witnesses that he disliked Ms Ross, had wished her harm in the past, and did not mourn her death. In counsel's opinion a mens rea defence would have been hopeless in light of these instructions and, as she explains in her supplementary affidavit, the reports into Mr Merritt's ASD, which confirm that he is able to form murderous intent. Expert evidence would be needed to contest murderous intent given the manner of Ms Ross's death, and the experts would have conceded that Mr Merritt lacked limits

to his anger, experienced feelings of entitlement, and became aggrieved when challenged.

[25] Trial counsel discussed Mr Merritt's police interview with him. She formed the view that it could not be excluded in its entirety; Mr Merritt's rights had been explained and evidently understood and he chose to proceed without counsel. Further, there was no reason to do so. The statement was in part exculpatory (he firmly denied killing Ms Ross), and to the extent it was inculpatory (he appeared indifferent to her death and provided an implausible explanation for visible scratches on his body) — there would be independent evidence of these matters. However, she did challenge the latter part (the last 15 pages) of the interview. The Crown agreed to exclude these passages.

[26] So far as the view is concerned, Mrs Stevens explains that Mr Merritt was informed of his right to attend but a consensus was reached that there was little to be gained and some risk, in that Mr Merritt might convey his indifference to the jury.

**The trial**

[27] Because the appeal does not extend to who killed Ms Ross, we need not survey the evidence in detail. By way of brief overview, the Crown called: the usual fact and emergency services witnesses to the scene; Mr Merritt's family, who were in the unhappy position of having to depose to his movements and his appearance the following day; forensic witnesses who examined the scene, the car, and the Merritt home or analysed samples; fact witnesses about work routines at Spotless, Mr Merritt's unhappy relationship with Ms Ross and his angry and extreme comments when there was conflict between them, and his injured appearance and calm conduct at work the following day; an expert on cellphone polling; and the police officer who interviewed Mr Merritt. Some of this evidence was hard-fought. A number of witnesses were recalled, some over the opposition of defence counsel.

[28] As noted, the jury took a view of the scene of Ms Ross's death. Defence counsel attended, but Mr Merritt did not. Several questions were raised at the scene and recorded in a document. For the most part they were answered later, in court. It was not suggested on appeal that any of them are of moment.

[29] The defence case was that Mr Merritt was not the killer. The Crown case was challenged accordingly, with particular emphasis on alleged gaps in the evidence or alternative explanations for forensic evidence. Witnesses agreed that sometimes Ms Ross talked down to Mr Merritt and some of her requests of him were unreasonable or humiliating, explaining his anger; further, there had not been recent conflict at the time of her death. The defence called no witnesses. It is not suggested that trial counsel ought to have advised Mr Merritt to go into the witness box. In closing counsel focused on identity but also reminded the jury that they had to be sure of murderous intent, pointing out that while there were skin lacerations there were no fractures.

[30] In her closing address, Mrs Stevens sought to make something of Mr Merritt's calm demeanour and indifference. She emphasised that he spoke honestly, admitting that he did not like Ms Ross, and presented in his video interview as literal and straightforward. She suggested that had he been guilty he would have behaved differently.

[31] Davidson J gave a detailed direction about Mr Merritt's demeanour. After cautioning the jury against prejudice, he stated that:

> [44] In that regard, we have to guard against judging people too quickly simply by the way they look and behave. Sometimes in life we do not give people the credit we should because we do not particularly like the look of them, or we judge them in some way for what we perceive about them. Well, as jurors, that is something you must not do. You must look at the evidence, and the witnesses again dispassionately and objectively.
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> [45] You have seen Mr Merritt sitting before you throughout this trial. You look at one another across the room. How he looked to you, what you made of him is completely irrelevant to your role as jurors. That is not evidence.
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> [46] Further, it would be unfair and wrong for you to judge him by what you made of him looking across the room. No one facing trial for murder is in a normal setting and apart from that his appearance *is not evidence* at all. You know what the evidence is, it is that which was given from the witness box or admitted into evidence whether exhibits or the testimony of a witness.
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> (Emphasis in original.)

[32] He returned to this theme when discussing the demeanour of witnesses:

> [144] Do not jump to conclusions based on how a witness has reacted, or not reacted, to questions that are asked. Looks can be deceiving. Giving evidence is not a common experience for most people. People react, and appear differently one to another. We come from different backgrounds and cultures. We have different abilities, values and life experiences. There are too many variables to make the *manner* in which a witness testifies the only or most important factor in your decision. Mr Merritt's interview you may think shows him to be quite hesitant in his answers, quite slow and deliberate. You may think him unemotional and uncaring about Ms Ross's death. That must be treated with great care by you. He did not like her and said so. It does not prove that he killed her.
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> (Emphasis in original.)

[33] The Judge gave an orthodox direction about murderous intent, explaining that it sufficed if the Crown proved either actual intent or reckless infliction of an injury that Mr Merritt knew would likely kill. However, he added that the jury need not be unanimous as to which of those alternatives was proved. Rather, it sufficed if all 12 found that one of them was proved.

[34] The Judge also gave the jury the usual direction that they need only deliver a verdict; they would not be asked for reasons.

[35] We turn to the grounds of appeal, which as noted focus on trial counsel error.

**Failure to advise Mr Merritt about his ASD diagnosis and take instructions about a mens rea defence**

[36] Dr Ellis responsibly accepted that the defence case was well run so far as it went to the question whether Mr Merritt killed Ms Ross. His main point was that trial counsel failed to advise Mr Merritt of his diagnosis of autism, with the result that he was unable to give her instructions about a mens rea defence. He submitted that the diagnosis came very late, just a week before trial, and she ought in the circumstances to have sought an adjournment so it could be explored further. Dr Ellis sought to characterise this as an error so fundamental as to establish without further inquiry a miscarriage of justice, much like a failure to follow instructions about a plea or an election to give evidence.

[37] In short, we do not agree that there was an error in Mr Merritt's case, let alone one that might qualify as a miscarriage without inquiry into its plausible effect on the result. Trial counsel had discharged her duty to advise Mr Merritt about a mens rea defence, and on the evidence before us there is no reason to think that she ought to have advised him to seek an adjournment so Dr Bathgate's diagnosis could be explored further and her advice revisited. And in the absence of evidence, the argument that a mens rea defence might have emerged is supposition.

[38] We elaborate briefly on these conclusions. Dr Ellis argued by reference to academic literature that while ASD is often relevant to sentencing — affecting for example, culpability, the weight assigned to sentencing principles such as deterrence, and the form of the sentence — it may also go to a person's capacity to form mens rea.[4] In some cases ASD may impair the person's ability to foresee and appreciate the consequences of his or her actions; and if so, it may exclude the specific intent required for murder.[5] We accept these submissions so far as they go, but they do not go nearly far enough. They identify a potential defence but they say nothing about its availability in Mr Merritt's circumstances.

[39] Dr Ellis sought to deal with this issue by arguing that trial counsel completely missed the significance of the defence and so failed to explore it. He argued that Mrs Stevens did not understand ASD. He based that submission on his interpretation of her supplementary affidavit, in which she noted that ASD is a spectrum disorder, that Mr Merritt is at the mild end, and that autism does not exclude psychopathic traits.

[40] This argument is not supported by the evidence before us. We make several points about it. First, we have accepted Mrs Stevens' evidence that she does understand the condition and we reject the submission that what she had to say about

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4 By way of example: David Bathgate "ASD and offending: reflections of practice in from a New Zealand perspective" (2017) 8(2) Journal of Intellectual Disabilities and Offending Behaviour 90; and Colleen Berryessa "Judiciary views on criminal behaviour and intention of offenders with high-functioning autism" (2014) 5(2) Journal of Intellectual Disabilities and Offending Behaviour 97.

5 He instanced *R v Reynolds* [2004] EWCA Crim 1834, in which an appeal was allowed on this ground in a case bearing some apparent similarities to this one. We return to this case at [44] below.

ASD suggests otherwise. Her point was that nothing in the reports suggested that the diagnosis of ASD made available a mens rea defence in Mr Merritt's case. We agree.

[41] Second, the three reports prepared before trial all identify the characteristics of Mr Merritt that inform the eventual ASD diagnosis. The reports of Ms Medlicott and Dr Barry-Walsh were commissioned because trial counsel was aware of those characteristics and recognised that they pointed to ASD. She was exploring the very possibility that Dr Ellis says she overlooked.

[42] Third, the reports, including that of Dr Bathgate, are not silent on the question of Mr Merritt's capacity to form murderous intent. They suggest that he is well capable of doing so. Ms Medlicott explained that throughout his childhood Mr Merritt learned to use aggression: "when he has been thwarted or felt provoked, he has responded with aggression, sometimes significant aggression". Dr Barry-Walsh agreed with that assessment in his first report, and further stated that Mr Merritt was "immature" as well as "rigid and dichotomous in his thinking". Dr Bathgate echoed these sentiments as well, noting that "it is clear… [that] at times when overwhelmed, [Mr Merritt] would become anxious and then become physically aggressive". The evidence establishes that Mr Merritt has learning difficulties and struggles in social situations, but it also confirms that he has a learned behaviour in which he responds with aggression to threats to his sense of security.

[43] As we explained at the outset there was and still is no evidence that the reports were wrong. Dr Ellis gave us to understand that he sought such evidence, but none has been adduced. He also pointed to the second report of Dr Barry-Walsh, prepared for sentencing, and suggested that it ought to have been made available before trial. But while that report offers the opinion that ASD explains Mr Merritt's behaviour and mitigates his culpability, it does not suggest that he lacked murderous intent.

[44] That being so, there is no support in the record before us for the argument that further investigation would have identified a mens rea defence. We add that, as Mrs Stevens points out, expert evidence would have posed risks for Mr Merritt's defence. By establishing that he could form murderous intent and might with little provocation resort to violence, the evidence would tend to show that he was capable

of committing an otherwise inexplicable crime and so detract from his chosen defence. These considerations distinguish *R v Reynolds*, on which Dr Ellis relied; there the only defence was mens rea and the appellate court heard evidence about the appellant's ASD that was not available at the time of trial.[6] They also distinguish *Sultan v R*, on which Dr Ellis also relied; there the charge was sexual violation, the defence was belief in consent, and the appellate court heard fresh evidence about the appellant's condition.[7] We also note in passing that the United Kingdom has legislation that appears to provide for the downgrading of murder to manslaughter where the defendant has a mental abnormality short of insanity (it was relied on in *Reynolds*).[8] New Zealand does not have similar legislation.

[45] Finally, we observe at this point that the appeal proceeds on the premise that Mr Merritt did not and does not lack decisional competence, notwithstanding that the reports remark upon his rigidity of thinking. The decisions taken at trial are not challenged. That creates an added difficulty for this ground of appeal. The implicit premise of Dr Ellis's submission was that had ASD been explained to Mr Merritt he would have taken advice to follow a mens rea defence. But Mr Merritt has not sworn an affidavit to that effect and some of the documents in the record, including his notice of appeal, indicate that he still denies killing Ms Ross. Given that a mens rea defence would put that primary defence at some risk, it cannot be assumed that he would have instructed trial counsel to advance it.

*Counterintuitive evidence*

[46] We have more sympathy for Dr Ellis's argument that "counterintuitive" evidence ought to have been adduced to explain Mr Merritt's demeanour at trial and in his police interview. He cited *Sultan* for the proposition that evidence about ASD may be needed to persuade juries against drawing adverse inferences from seemingly odd and apparently callous behaviour.[9] As noted above, it is partly because she was

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6 At [12].

7 *Sultan v R* [2008] EWCA Crim 6 at [8] and [28]–[31].

8 Homicide Act 1957 (UK), ss 1 and 2(1A).

9 *Sultan*, above n 7, at [34]. See also *Thompson v R* [2014] EWCA Crim 836 at [5] and [31]–[33]; and Ian Freckelton "Autism Spectrum Disorders and the Criminal Law" in Mohammed-Reza Mohammadi *A Comprehensive Book on Autism Spectrum Disorders* (Intech, Rijeka, 2011) 249 at 254.

concerned that Mr Merritt would convey indifference that Mrs Stevens advised him against attending the view. As Dr Ellis pointed out, the Judge remarked at sentencing on Mr Merritt's cold manner.[10] It is a reasonable inference that he left the same impression on the jury. Dr Ellis emphasised that counterintuitive evidence may be adduced through an agreed statement.

[47] Mrs Stevens does not say that she considered and discarded such evidence. She says rather that she does not believe it would have been possible to adduce it without giving the Crown the opportunity to establish that Mr Merritt's ASD made it more likely that it was he who killed Ms Ross. There is force in this point. The Crown need not consent to an agreed statement that was limited to Mr Merritt's presentation in interview and at trial. It might insist on a witness being called, giving the Crown the opportunity to establish that his ASD could explain why Mr Merritt killed Ms Ross.

[48] In any event, the Judge decided, apparently of his own volition, to give the directions that we have quoted at [30] above. He did not mention ASD, but he did caution against drawing inferences based on Mr Merritt's presentation at trial and the apparently uncaring attitude in his police interview. Mrs Stevens also made what she could of it, suggesting that Mr Merrick had been frank in interview, willing to admit his dislike of Ms Ross while adamant that he did not kill her.

[49] For all of these reasons, we are not persuaded that the absence of counterintuitive evidence occasioned a miscarriage of justice in this case. We record that before reaching this conclusion we viewed that part of the recording of Mr Merritt's interview that was played to the jury.[11] We discuss the interview below.

**Failure to have Mr Merritt's statement excluded**

[50] As we explained earlier, Mrs Stevens did not object to Mr Merritt's interview being given in evidence but she did take issue with the latter part, comprising the last 15 pages of a 60-page transcript, and the Crown conceded. She took the view that

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10 Sentencing notes, above n 1, at [56] and [76].

11 Dr Ellis invited us to view the entire interview but we saw no reason to do so. We have considered the transcript of the entire interview.

there were no grounds on which to have the rest excluded and in any event the interview was generally exculpatory. So far as it was harmful to Mr Merritt, she reasoned that it did not add to evidence (such as his extreme statements about Ms Ross) and information (such as Mr Merritt's demeanour) that would be before the jury anyway.

[51] Dr Ellis's first ground of objection was that the interview contained cross-examination, bullying and questioning beyond the scope of the interview. He submitted that it did not comply with the Chief Justice's *Practice Note — Police Questioning*, which relevantly states that questions asked of a person of whom there is sufficient evidence to lay a charge must not amount to cross-examination.[12]

[52] When preparing his submissions on this point Dr Ellis was not aware that the jury did not see that part of the interview that was excluded by agreement. (He appreciated that not all of it was in the casebook, but because the evidence was excluded by consent the casebook did not explain clearly what had happened to the remainder.) All but one of the specific examples given in his submissions were drawn from the excluded section.

[53] Dr Ellis maintained his objection to the rest of the interview, but we do not consider that it amounts to cross-examination or bullying, nor does it exceed the original scope of the interview. The transcript records that Mr Merritt had agreed to attend the police station for interview about the death of Ms Ross and his movements on that night, and that is what he was asked about. In the one specific instance of impropriety that counsel cited, the questioner stated that he believed Mr Merritt had held some information back and he wanted to give an opportunity to tell the whole truth. The questioner then left a long silence. Mr Merritt then answered "no" when the questioner asked "you don't want to tell me the whole truth just at the moment". We agree that the questioner was placing pressure on Mr Merritt. The question was unfair. It invited a negative response if, as was apparent, Mr Merritt did not want to say more. Because of the way in which the question was framed, that answer was potentially misleading. But when the interview is viewed it is reasonably apparent

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12 *Practice Note — Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 at 298.

that he was simply declining to say more, and the question does not amount to cross-examination or bullying. There is nothing overbearing about the interviewer's speech or manner. Mr Merritt was questioned closely about the scratches and marks on his face and arms, but not in a confrontational way.

[54] Dr Ellis argued that the interview was nonetheless tainted by the later cross-examination. We do not see how that can be so. Counsel accepted that in light of *R v Antonievic* it would not be open to us to exclude the otherwise admissible portion of the statement in order to discipline the police, even if we were minded to do that.[13] There is no suggestion that the improper questioning affected Mr Merritt's trial by, for example, causing him to disclose new information that the police then exploited.

[55] Dr Ellis next submitted that the right to a lawyer was not adequately explained because Mr Merritt is dyslexic. It is not in dispute that his rights were explained orally and in simple language. He repeated the rights back to the questioner, who sought to confirm his understanding. The complaint is that while he was told there was a list of lawyers available to give free advice, the names were not read to him and he was not given the list to read for himself. Mrs Stevens' name was on the list and Dr Ellis's instructions are that Mr Merritt's father had told him to ask for Mrs Stevens if given a choice of lawyers.

[56] It seems to us that Mr Merritt's dyslexia is irrelevant in the circumstances. The question is whether he could effectively understand his rights without the list of lawyers being read to him. Counsel cited no authority for the proposition that he could not do so.[14] In our opinion Mr Merritt knew all he needed to know when he decided to proceed without legal advice. Until he elected to consult a free lawyer the question of choosing among the names on the list did not arise.

[57] Dr Ellis next submitted that because Mr Merritt has ASD he ought not to have been interviewed without a support person present. The police did not know he had

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13 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 at [55].

14 Compare *Scown v Police* [2015] NZHC 106 at [11]–[12]; and *R v Robinson* (1999) 5 HRNZ 170 (HC) at 174–176.

ASD, but counsel submitted that he appears somewhat odd, and this ought to have caused the police to insist on him having a support person. He cited the judgment of Frater J in *R v Samuelu* for the proposition that when dealing with an intellectually impaired person the police ought to insist on a support person or proactively arrange a lawyer.[15] He reminded us that this Court has held that the rights protected by the New Zealand Bill of Rights Act 1990 have a special value to those who are at a disadvantage because English is their second language, and argued that similar considerations apply to defendants with mental health issues.[16]

[58] To a layperson Mr Merritt's presentation in the interview does not clearly suggest mental impairment, though it is emotionless. He sometimes makes eye contact. His responses are sometimes hesitant but their content is generally appropriate to the question. The one apparent exception is that when asked about his work on the night of her death he responds very literally, going in close sequential detail through his cleaning routine. He concedes frankly that he did not like Ms Ross, but he explains why: she was habitually rude to him. When discussing the disciplinary letter he explains that he is dyslexic but he is able to recount the substance of the letter. He readily accepts another witness's statement that he said he would like to burn her family in front of her and it would be fine if she died; further, that after learning of her death he said he did not care.

[59] This account of the interview distinguishes *Samelu* on its facts. There the defendant had schizophrenia, polysubstance abuse and was intellectually impaired, and his mental health deficiencies were readily apparent to the officer interviewing him.[17] It is significant that it took some time, and multiple experts, for Mr Merritt to be diagnosed with ASD. It cannot be suggested the interviewing officer ought to have recognised it and insisted on counsel or a support person attending the interview.

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15 *R v Samuelu* (2005) 21 CRNZ 902 (HC) at [82]–[93]. See also *R v Mallinson* [1993] 1 NZLR 528 (CA) at 531; and *R v P* (1993) 1 HRNZ 297 (CA) at 302.

16 *R v Narayan* [1992] 3 NZLR 145 (CA) at 149.

17 *Samuelu*, above n 17, at [3], [77] and [79].

[60] It will be recalled that the appeal is brought on the basis of trial counsel error. In our opinion Mrs Stevens correctly concluded that the statement was admissible. That being so, she did not err by failing to protest its admission into evidence.

**Failure to have Mr Merritt attend the view**

[61] We can dismiss this point shortly. Counsel could point to no case in which the defendant's absence, on advice, from a view was held to establish trial counsel error, let alone a miscarriage of justice. Ms Shone, who argued this part of the case, could not point to anything about Mr Merritt's absence that affected the trial. She submitted that the jury might think he would attend if he were innocent. There is no reason to suppose, however, that the jury would expect the defendant to be present or that, if they did, they would speculate on the reasons for his absence. And it is not in dispute that Mrs Stevens was right to feel concern that he might appear to the jury to be indifferent.

**Jury directions as to unanimity and reasons**

[62] We have summarised the Judge's directions at [31] above. As noted, he said that they need not be unanimous as to which of the two alternative forms of murderous intent was proved, but they must all agree that one of them was. These directions were repeated on the jury question trail.

[63] Dr Ellis submitted that this direction rested on the judgment of this Court in *R v Mead*, which he argued was wrongly decided in the absence of a further requirement to give reasons.[18] He indicated that the argument was rejected by the Supreme Court in *Lavemai v R*.[19] This is why he acknowledged, as noted at the outset, that this ground of appeal is unlikely to succeed in this Court.

[64] We observe that *Lavemai* was a leave decision and the only reference to the issue is found in a footnote.[20] We do not think the decision forecloses the issue so far as this Court is concerned. However, we do consider that there is no room for an

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18 *R v Mead* [2002] 1 NZLR 594 (CA).
19 *Lavemai v R* [2016] NZSC 144.
20 At [12], n 19.

argument that a jury must give reasons. Juries have never been required to do so, and the standard for reasoning in judge-alone trials was set in light of that.[21] The authorities pre-date the Criminal Procedure Act 2011, which did not change the position. In our view the question raised by this ground of appeal is simply whether the jury must be unanimous as to the form of murderous intent. If the answer be affirmative, then the appeal must be allowed.

[65] Counsel cited no authority for the proposition that jurors must be unanimous on the form of murderous intent. *Mead* is not authority for it. The dissenting judgment of Elias CJ is now considered authoritative — it was cited by the Supreme Court in *Mason v R*.[22] It establishes that a jury must be unanimous as to the essential ingredients of the offence and that essentiality is not a technical question of law but rather one of practical judgment in which the answer depends on the facts and trial issues in the particular case.[23] A charge very often incorporates a number of acts, such as a series of blows. They usually form "one transaction", as the Privy Council put it in *Meli v R*, so that there is no need to distinguish among them for this purpose.[24] In such a case the general rule is that the jury need not be unanimous on all of the evidence.

[66] An alternative charge or unanimity direction may be required, however, when the jury are offered alternative bases for guilt on a single charge. It is especially important to direct the jury carefully if alternative narratives put different legal ingredients of the offence in issue or invite different defences. By way of illustration, a manslaughter case in which potentially fatal blows were separated in time and circumstance may raise questions of identity, intent, and self-defence, and sometimes a unanimity direction is required in such cases.[25]

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21 See for example *R v Connell* [1985] 2 NZLR 233 (CA) at 237; *Roest v R* [2013] NZCA 547, [2014] 2 NZLR 296 at [56]; and *Gotty v R* [2017] NZCA 528 at [14].

22 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [11]. The authorities are discussed in *King v R* [2011] NZCA 664.

23 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [174], citing *Mead*, above n 18, at [17] per Elias CJ.

24 *Meli v R* [1954] 1 WLR 228 (PC) at 230.

25 *R v Carr* [2000] 2 Cr App R 149 (CA) at 157. The line can be difficult to draw, as shown by the differing opinions in *R v King*, above n 22.

[67] We accept that when the charge is murder and there are different factual bases for verdict, the availability of different forms of murderous intent may contribute to the need for a unanimity direction.[26] That was so in *R v Chignell*, in which this Court held that unanimity was needed where the Crown offered in the one charge two alternatives separated by place, time, unlawful act and "it seems likely, different intents on the part of each accused".[27] In a single-transaction case, there is no need to distinguish between a willed and a reckless killing for purposes of verdict. The distinction often informs sentencing, but the judge acts there as the 13th fact-finder.[28]

[68] This case was a single transaction. The central question was not how,[29] or when,[30] Ms Ross died but whether it was Mr Merritt who wielded the weapon. The jury were not offered alternative narratives among which the killer's intent might plausibly have differed.

[69] Dr Ellis also argued that the Judge's directions on manslaughter were inadequate. Manslaughter was left to the jury, but counsel submitted that not enough was said about it, with the result that the jury may have been confused.

[70] There is nothing in this submission. To some extent it rests on the proposition that there was no counterintuitive evidence about Mr Merritt's ASD. We have already addressed that issue. Otherwise the Judge simply explained that if the Crown proved that Mr Merritt killed Ms Ross but failed to prove murderous intent then their verdict must be manslaughter since she was killed by an unlawful act. That was an adequate direction in circumstances where the trial issue was not intent but identity. It corresponded to the Judge's question trail.

**Result**

[71] The application for an extension of time to appeal is granted.

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26 *R v Chignell* [1991] 2 NZLR 257 (CA) at 265–266.
27 At 265.
28 Sentencing Act 2002, s 24.
29 For example, *King*, above n 23.
30 For example, *Chignell*, above n 26.

[72] The appeal is dismissed.

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