NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF CONNECTED PERSON CD PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 93/2018
[2019] NZSC 134

BETWEEN	LEMUEL MISA Appellant
AND	THE QUEEN Respondent

Hearing:	11 July 2019
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Arnold JJ
Counsel:	W C Pyke for Appellant B J Horsley and M L Wong for Respondent
Judgment:	2 December 2019

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by Ellen France J)

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Introduction

[1] Lemuel Misa was convicted after a jury trial of 20 charges of acts of physical and sexual abuse against two complainants whom we shall call AB and BC. He was sentenced to a term of imprisonment of 13 years and six months.[1] He appealed unsuccessfully to the Court of Appeal against conviction[2] and now appeals with leave to this Court. The approved question is "whether there was a miscarriage of justice at [Mr Misa's] trial".[3] The following issues arise from that question:

(a) the proper approach to a "miscarriage of justice" under s 232(2)(c) and (4)(a) of the Criminal Procedure Act 2011 which sets out when an appeal against conviction must be allowed; and

(b) whether a miscarriage of justice has arisen in this case.

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1 *R v Misa* [2016] NZDC 15027 (Judge Bouchier).
2 *Misa v R* [2018] NZCA 293 (Cooper, Whata and Thomas JJ) [*Misa* (CA)].
3 *Misa v R* [2019] NZSC 42.

[2] The first of these issues provides an opportunity for the Court to address aspects of the interpretation of s 232.[4] The second issue will turn, primarily, on the effect of the additional evidence adduced in support of the appeal to the Court of Appeal and also on various aspects of the summing up. We deal with the interpretation of s 232 first and then turn to the application of our approach to this case. We begin by setting out the relevant background.

Background circumstances and evidence

[3] The relevant background material is set out in the judgment of the Court of Appeal and we largely adopt that description.[5]

Background

[4] AB and Mr Misa were in a relationship from 2004 to 2006. BC and Mr Misa began a relationship in early 2006 and this continued until 2009. There are "common features" in their accounts including their descriptions of ongoing abuse.[6] Both complainants were young when they met Mr Misa, AB was 19 and BC was 16 years old. Both were "infatuated with him, changed their lives to be with him and became pregnant to him".[7] Each described relationships in which Mr Misa was "possessive and controlling" and that they became isolated from their families and friends.[8] Both complainants described frequent violence, bullying and abuse. The violence described by both complainants included sexual abuse and rape. Both complainants said they wished they had left Mr Misa earlier in their relationships but did not feel they could do so.

[5] One consistent feature of the accounts of the two women warrants separate mention. That feature is that both women gave evidence of having jumped out of the window on the third storey of the apartment building in which they were living with Mr Misa to avoid further assaults.

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4 This case relates to a jury trial so does not engage s 232(2)(b), which was dealt with in *Sena v New Zealand Police* [2019] NZSC 55.
5 *Misa* (CA), above n 2, at [3]–[18].
6 At [3].
7 At [3].
8 At [3].

[6] AB complained to the police about Mr Misa's conduct in 2014. She gave police BC's name and BC subsequently made a complaint. Mr Misa was interviewed by police in January 2015.

[7] Mr Misa faced 10 charges relating to AB. The first two charges alleged assault. The first of these was a single incident in the course of which AB said she was picked up by Mr Misa and then he threatened to drop her on a television set. The second charge was a representative count of assault reflecting punching on a regular basis, for example, where Mr Misa was unhappy with her cooking. The next four charges encompassed assaults (punching and kicking), sexual violation by rape and assault with a weapon (AB said Mr Misa held a knife to her throat).

[8] These incidents were followed by similar offending but at a different address. AB said these assaults were less frequent as the address was closer to her family but again she said she was hit and raped.

[9] The last two charges relating to AB were said to have taken place at an apartment in Glen Innes. There was one representative charge of assault (AB described "heaps" of incidents of physical abuse). In addition there was a charge of sexual violation by unlawful sexual connection which involved an allegation of digital penetration which was said to have occurred while he was driving. Mr Misa was acquitted of that charge.

[10] There were initially 15 charges relating to BC but Mr Misa was discharged in relation to one charge prior to the taking of the verdicts. The first two of the remaining charges were of assault. BC described Mr Misa punching her in the face early on in their relationship. In the second incident, BC said Mr Misa was angry to find she had been smoking, he threw her down and whipped her with the cord of an electrical appliance.

[11] The next two charges were of sexual violation by unlawful sexual connection (digital penetration).[9] One of these charges was a representative charge. BC then

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[9] BC's evidence was that Mr Misa became convinced she was being unfaithful and she said he would digitally penetrate her to see whether "someone has been here".

described a rape she said occurred at a "Mt Wellington" location. The last of the "Mt Wellington" charges was of an assault. BC said she thought Mr Misa was going to kill her so she ran for the window and, although pregnant, jumped out of the window landing on the ground. This charge takes on importance in the appeal.

[12] The next eight charges comprised two charges of sexual violation by rape, two charges of sexual violation by unlawful sexual connection and four charges of assault (two of these charges were representative charges). Mr Misa was acquitted of two of the charges of sexual violation by rape and of one of the charges of sexual violation by unlawful sexual connection.

The trial

[13] The trial proceeded on the basis of an agreed statement of facts. That statement recorded that Mr Misa had pleaded guilty to two charges of assault and was convicted in relation to these two charges. The first of these convictions related to an assault on AB in January 2006 which led to her jumping from the Glen Innes apartment building.[10] The second conviction concerned an assault on BC in May 2008. The statement relevantly provided:

> (a) Mr Misa pleaded guilty to the following summary of facts:
>
> > *… on Tuesday the 3rd of January, 2006, the Defendant MISA was at an address …*
> >
> > *Also present was* [AB]*, the Victim in this matter.*
> >
> > *The Defendant and Victim have been in a relationship for two years and live together*[.] *At the time of the incident she was eleven weeks pregnant with his child.*
> >
> > *The Defendant became verbally abusive and aggressive towards the Victim in the bedroom of the address, accusing her of having an affair*.
> >
> > *He has then punched the Victim twice in the left side of her face with full force.*
> >
> > *She has feared for her life and struggled to break free from him.*

[10] We use the description of the apartment building as being in Glen Innes although we understand St John's is the more accurate description.

The door bell of the Defendant's address has rung, and the Defendant has then left the bedroom to answer the door. At this time the Victim was able to escape.

The Victim has jumped from a three storey window onto the neighbouring building, fearing for her life.

She has suffered bite marks to her face and thighs, severe bruising to her face, and small lacerations. Due to suspected facial fractures the Victim was required to stay in hospital.

(b) Mr Misa has a previous conviction for male assaults female:

…

2. The defendant has a previous conviction for Male Assaults Female in relation to the complainant [BC] after a guilty plea. The summary of facts to which he pleaded is no longer available.

3. The assault charge relates to an incident on 15 May 2008 that occurred outside the defendant's parents address …

[14] Both AB and BC had provided evidential video interviews. These interviews were not played at trial, rather, both women gave their evidence orally. Both AB and BC were cross-examined about not making complaints to family or friends, the delay in complaint to the police, and about collusion. On the latter aspect, the two women accepted that they knew each other. Both had children fathered by Mr Misa and they had both worked in media associated organisations. AB said they each knew Mr Misa had hit the other, but that they did not discuss the details of the abuse. AB denied "making a plan to gang up on" Mr Misa with BC. BC similarly said the two did not talk about their relationship with Mr Misa "in detail". She confirmed that AB told her that the police would be in contact with her.

[15] The other evidence for the prosecution came from a cousin of BC's, who described being shown bruises on BC's arm in the early part of 2007, and from the officer in charge. In the course of the latter's evidence, a video of the police interview with Mr Misa was played.

[16] Mr Misa gave evidence. He denied the offending apart from the two assaults to which he had earlier pleaded guilty. He accepted there were verbal arguments, that he had a problem with alcohol over the relevant periods and that he had been

unfaithful. He told the jury he believed the complaints had been "made up by both of them" and that the two women had "plotted the whole thing up". Mr Misa saw both women as women scorned.

[17] The question of where the two women and Mr Misa had lived, as will become apparent later, was canvassed at some length over the course of the trial. In the course of the trial the jury asked whether the Mt Wellington apartment referred to by BC in fact existed. The Judge told the jury that the exact location was not an essential element of the charges and the relevant charges were amended by adding quotation marks around "Mt Wellington". In closing, the prosecutor suggested that this offending may have occurred at the Glen Innes apartment. The prosecutor said this:

> … [BC's] description of the apartment complex that she lived with the defendant namely it had been a three storey complex, but being two storeys inside the individual apartment with a ladder that led to the bedroom upstairs is entirely consistent in my submission with the description given by [AB] and the defendant of the apartment complex at [Glen Innes]. She said she was pregnant when she was living with the defendant in the apartment and we know that she was pregnant in the second half of 2006. And I submit this fits with the evidence that after a separation with [AB] which was around January 2006, there was a period of time when [AB] later was living at [Glen Innes] in a separate apartment to the one that the defendant was living in, and again when [AB] was living in the separate apartment that fits in with the 2006 timing.

[18] As the Court of Appeal noted, in closing Mr Le'au'anae, trial counsel for Mr Misa, highlighted a number of points including the following: neither AB nor BC were "vulnerable, stupid women"; they were both "infatuated by Mr Misa because he was a well-known musician"; and they were both "obsessive" about him, and Mr Le'au'anae gave illustrations of that.[11] Counsel then described seven reasons why the jury should reject the complainants' accounts which were recorded by the Court of Appeal as follows:[12]

> (a) The complainants colluded, referring to, among other things, the remarkable similarity of some of the claims, especially the claim by BC that she leapt from a third-storey apartment in "Mt Wellington". … .
>
> (b) The eight-year delay in making a complaint (in 2014) was not adequately explained and further supports a finding of collusion.

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11 *Misa* (CA), above n 2, at [16].
12 At [17].

(c) The allegations from AB lacked detail, in particular, counts 4 and 8. He emphasises there is no information about what happened beforehand, or what AB was wearing; just her allegation that Mr Misa: "Put [his] penis in my vagina, he raped me".

(d) There was no corroborating or independent information supporting the allegations. For example, there is no evidence from her parents or from Mr Misa's parents, or from AB's brother who lived upstairs at one stage, that the rapes were mentioned previously. Similarly, the only evidence of this kind in respect of BC's allegations came from a cousin who mentioned seeing bruising, emotional and physical abuse, but no mention of sexual abuse.

(e) The complainants had clear opportunities to tell authorities about what was happening and they never did, noting for example that the Police had got involved in relation to assaults against AB in 2006. Yet there was no mention of the sexual offending at that time.

(f) The claims lacked credibility and defied commonsense. He noted the example of indecent touching while driving.

(g) BC got a Samoan "malu" — an excruciating ordeal, after their relationship ended, even though she is Maori not Samoan. This was said to show she still had a deep connection to Mr Misa which was not consistent with the abusive relationship now claimed.

[19] These matters were all reiterated by the Judge in the summary of the defence case in the summing up.

The Court of Appeal judgment

[20] On appeal to the Court of Appeal, two issues were raised. First, Mr Misa argued that inadequate preparation prior to trial meant he had not had an effective defence and, second, that there was new evidence which if admitted at trial would have affected the outcome.

[21] On the first issue, the Court of Appeal heard evidence from both Mr Misa and from trial counsel, Mr Le'au'anae. The Court noted there was no dispute trial counsel had been "sparsely briefed".[13] Trial counsel acknowledged his instructions were not

[13] At [42]. Just over an hour had been spent in pre-trial briefings by Mr Le'au'anae and his juniors.

sufficient. But, as the Court of Appeal said, this "was not for want of trying".[14] The Court continued:[15]

> The record shows multiple attempts by Mr Le'au'anae to meet with Mr Misa about his case, including travel by him to Mr Misa's parents' home. The lack of contact is partially explained by the fact Mr Misa was also living an itinerant lifestyle through this period due to financial constraints and was under considerable personal strain, his father having passed away [later in 2015].[16]

[22] Because of the inadequacy of the pre-trial preparation the Court considered an adjournment should have been sought. Nonetheless, the Court did not consider the insufficiency of pre-trial preparation had a "material effect" on the outcome.[17] The first reason for that was that trial counsel was sufficiently prepared. The Court said the "best illustration" of that was Mr Le'au'anae's conduct of the trial:[18]

> He competently tested the complainants' reliability and credibility in cross-examination by reference to a range of matters, identified several weaknesses in the complainants' evidence and closed to the jury by identifying all key defence grounds, including implausibility, fabrication and collusion.

[23] Second, after hearing evidence from the two new witnesses, the Court took the view that additional pre-trial briefings would not have added in any material way to the defence case on the matters raised for the purposes of the appeal. The Court addressed each of the alleged inconsistencies raised and determined these had either been addressed, were not material, or would not have been advanced by additional preparation.[19] The Court said the strongest point is that the "Mt Wellington" offending was fabricated. But this issue was signalled in the pre-trial briefing notes and was dealt with robustly at trial; so much so the Crown had to amend the charges.

[24] Third, the Court saw the suggested weaknesses in terms of trial performance as reflecting "post-trial remorse" not inadequate pre-trial preparation.[20] That was

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14 At [42].
15 At [42].
16 Mr Misa's trial began in June 2016.
17 *Misa* (CA), above n 2, at [46].
18 At [46].
19 At [47].
20 At [48].

primarily because the potential for more evidence "only assumed any significance during the trial when the Crown linked BC's allegations to the Glen Innes address".[21]

[25] Finally, the Court rejected a challenge based on trial counsel's advice about jury selection. This aspect was not pursued in this Court.

[26] Next, the Court dealt with the new evidence. This aspect became the central feature on the appeal to this Court in terms of whether a miscarriage of justice arose in the case. We accordingly address the detail of the Court of Appeal's reasons for the conclusion that the new evidence would not have had a material effect on the outcome of the trial in the discussion of that part of the appeal which follows.[22]

[27] The Court also considered whether the combination of the lack of pre-trial preparation and the new evidence gave rise to a miscarriage of justice. The Court said this:[23]

> Putting the case as highly as we can, given the inadequacy of preparation, Mr Misa was arguably disenabled from properly addressing the Crown's case on the "Mt Wellington" offending, whether in terms of cross-examining BC, presenting evidence-in-chief or responding to cross-examination on the "Mt Wellington" issue.

[28] However, the Court took the view this argument belied what actually happened at trial where:[24]

> … Mr Misa was confronted by two complainants with similar evidence about physical and sexual abuse spanning several years, both as to context and the nature and type of offending. His defence was simply it did not happen; that they were lying and colluding because they were out for revenge. Assuming for present purposes that there were weaknesses in BC's evidence about the Mt Wellington location and a potential for collusion, Mr Misa was aware of the overlapping complainant narratives about leaping from apartments well before trial.

[29] The latter comment reflected a statement made by Mr Misa in his video interview with the police where he identified the copycat nature of BC's complaint

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21 At [48].
22 Discussed below at [59]–[61].
23 At [50].
24 At [51].

and asked the interviewer why BC had not specified the address. He said in this interview that:

> If she can clearly state what actually happened or where … I don't know whether why she can't state the address or the location of this address that we so-called stayed at.

[30] BC had made it clear in her evidential video interview that she thought it was the same apartment AB had shared with Mr Misa. Trial counsel had that interview transcript before trial and his file note recorded he was briefed about the "Mt Wellington" location issue.

[31] On the basis of these matters, the Court said:

> [53] We are therefore satisfied that nothing in the pre-trial preparation, the conduct of trial counsel and the new evidence (individually or in combination) raises real scope for concern about the safety of the verdicts.

The interpretation of "miscarriage of justice" in s 232(4)(a) of the Criminal Procedure Act 2011

[32] Section 232 of the Criminal Procedure Act deals with how a first appeal court must deal with conviction appeals. Section 232 provides:

> (1) A first appeal court must determine a first appeal under this subpart in accordance with this section.
>
> (2) The first appeal court must allow a first appeal under this subpart if satisfied that,—
>
> (a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or
>
> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.
>
> (3) The first appeal court must dismiss a first appeal under this subpart in any other case.
>
> (4) In subsection (2), ***miscarriage of justice*** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

(5) In subsection (4), ***trial*** includes a proceeding in which the appellant pleaded guilty.

[33] Section 232 relevantly differs from its predecessor, s 385(1) of the Crimes Act 1961, by introducing a definition of a miscarriage of justice and by removing express reference to the proviso.[25] Section 385(1) provided that a conviction appeal was to be allowed if there was an unreasonable verdict or one that could not be supported on the evidence; an error of law; "on any ground … a miscarriage of justice"; or the trial was a nullity. The section went on to state:

> … provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[34] The other changes the Court of Appeal in *Wiley v R* identified are as follows:[26]

(a) The clarification of the unreasonable verdict ground to remove the alternative of a verdict that "cannot be supported having regard to the evidence".

(b) The addition of a discrete appeal ground for Judge-alone trials … .

(c) The removal of errors of law as a separate appeal ground.

(d) The introduction of subs (5) which provides that a "trial" for the purposes of the miscarriage of justice ground includes a proceeding in which the appellant pleaded guilty.

[35] The precursor to s 232 in the Bill as introduced provided that the appeal must be allowed if a substantial miscarriage of justice has occurred as a result of an error or irregularity.[27] The select committee report on the Bill recommended changing that provision to insert a new clause which defined the term "substantial miscarriage of justice" as "any error or irregularity that creates a real risk that the outcome of the trial was affected, or results in an unfair trial or a trial that is a nullity".[28] The word

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25 See the discussion of the legislative history of s 232(2)(b) in *Sena*, above n 4, at [23]–[25].

26 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [9] (footnotes omitted). See also Christopher Corns and Douglas Ewen *Criminal Appeals and Reviews in New Zealand* (Thomson Reuters, Wellington, 2019) at [7.5.5].

27 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1), cl 236(3)(c).

28 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 10; and see cl 236(5).

"substantial" was removed by way of a supplementary order paper following the second reading of the Bill.[29]

[36] The question of how the Court should approach the omission of express reference to the proviso is not a matter that needs to be resolved in the present case. That is because the respondent does not base its case on the proposition that conviction was inevitable. Rather, the respondent submits that the new evidence is inconsequential. The focus in the present case is accordingly on the first part of the definition of a miscarriage of justice; that is, what is meant by "a real risk that the outcome of the trial was affected". We add that it is not argued that what has occurred here has resulted in either an unfair trial or a trial that was a nullity.

Submissions

[37] It is not necessary to set out the submissions on the approach to s 232 in any detail. That is because, ultimately, there was no suggestion this Court should depart in substance from the approach taken by the Court of Appeal in *Wiley*.[30] The Court of Appeal there said that s 232 did not require "any materially different approach to conviction appeals from that prevailing in practice under s 385".[31] It described the test as being "a real risk arises if there is a reasonable possibility that a not guilty (or a more favourable verdict) might have been delivered if nothing had gone wrong".[32] The issue for us is whether that is the correct approach. In addition, we need to address a further submission made by the appellant, namely, that in expressing

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29 Supplementary Order Paper 2011 (281) Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) at 5–6. In *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 (addressing s 382 of the Crimes Act) Elias CJ for the Court described the notion that the proviso might be applied where there was otherwise a miscarriage of justice as "jarring": at [58]. This change followed the recommendation made by the then Chief Justice in a letter to the Select Committee: Letter from Sian Elias (Chief Justice) to Justice and Law Reform Select Committee regarding the Criminal Procedure (Reform and Modernisation) Bill (25 February 2011).

30 Mr Pyke is critical of the reference in [29] of *Wiley*, above n 26, to whether there is a reasonable possibility a different verdict "would" (rather than "could") have been delivered.

31 *Wiley*, above n 26, at [56].

32 At [27] (footnotes omitted), citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110]. It noted that a more favourable verdict includes a conviction on a lesser charge: at [27], n 28.

the test by reference to the absence of "concern about the safety of the verdicts" the Court in this case has not followed the *Wiley* approach.[33]

The correct approach

[38] The starting point of the approach must be the statutory language. That language provides a framework for the assessment to be undertaken and it is not helpful to seek to put any gloss on the language. The following points can be made about the text.

[39] First, s 232(4) applies where there has been an "error, irregularity, or occurrence in or in relation to or affecting the trial". That term is broad. It covers a range of different matters and is sufficiently expansive to cover those matters previously treated as providing a ground for appeal against conviction.[34] That would include errors of law to which, as has been noted, there is now no express reference. As the Court of Appeal noted in *Wiley*, with reference to *Sungsuwan*:[35]

> … the courts will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice however caused.[36] A broad approach is supported by s 25(h) of the [New Zealand Bill of Rights Act 1990] and the need to ensure the right of appeal is effective.

[40] Second, the use of the language "created a real risk" requires a focus on the potential risk of an alternative outcome and, as we shall shortly discuss, the use of the word "real" is an important description of the nature of the possibilities contemplated by the section.[37] The focus on the potential risk of an alternative outcome reflects developments in the case law under s 385 of the Crimes Act and it is plain from the legislative history that the legislature drew on these developments in enacting s 232.

[41] The explanatory note to the Criminal Procedure (Reform and Modernisation) Bill 2010 records that the Bill consolidated and updated the then appeal provisions in

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33 *Misa* (CA), above n 2, at [53], set out above at [31]. All of the Judges in *Sungsuwan*, above n 32, made reference to "safety" of verdicts: see at [7] per Elias CJ, [70] per Gault, Keith and Blanchard JJ and [110] per Tipping J. Similar language, while referred to, is not, however, adopted in either *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 or in *Wiley*, above n 26. The test under s 2(1)(a) of the Criminal Appeals Act 1968 (UK) is whether the conviction is "unsafe".

34 As was noted in *Wiley*, above n 26, at [26].

35 At [26].

36 *Sungsuwan*, above n 32, at [67].

37 As the Court noted in *Wiley*, above n 26, at [29].

the Crimes Act and in the Summary Proceedings Act 1957 "to provide one set of coherent provisions that applies to each appeal category".[38] The explanatory note also recorded that the Crimes Act model was generally preferred where the two Acts dealt differently with the same matter.[39] In particular, in terms of the appeal provision with which this case is concerned, the explanatory note recorded that the grounds had been "rationalised, by following the Crimes Act 1961 model but rewriting section 385(1) of that Act to integrate the existing grounds of appeal with the proviso to that subsection".[40]

[42] The developments in the case law under s 385 are apparent in the approach taken in *Sungsuwan* to those cases where the conduct of trial counsel is said to have given rise to a miscarriage of justice. In that case, Gault, Keith and Blanchard JJ described what was encompassed by a miscarriage in this way:

> [70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[43] Tipping J in a separate concurring opinion stated that, in the usual case, two things must be shown to establish a miscarriage:[41]

> First, something must have gone wrong with the trial or in some other relevant way. Secondly, what has gone wrong must have led to a real risk of an unsafe verdict. That real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong.

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38 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 12. The general purpose of the Bill was described as to "simplify criminal procedure and provide an enduring legislative framework" with a number of objectives including to ensure the fair conduct of criminal prosecutions in New Zealand courts reflecting s 25 of the New Zealand Bill of Rights Act 1990: at 1.

39 At 12. The Court in *Sena*, above n 4, at [26] concluded that "the underlying legislative purpose in respect of what became s 232(2)(b) was that appeals invoking that ground were to be dealt with in the same manner as appeals under s 119 of the Summary Proceedings Act [1957]".

40 At 12.

41 *Sungsuwan*, above n 32, at [110].

[44] In *R v Matenga* this Court dealt with s 385(1)(c) which stated that the appellate court must allow an appeal when: "on any ground there was a miscarriage of justice".[42] The Court said this could "potentially apply to anything falling outside the other paragraphs which has gone wrong with the substance or process of the case and has not been cured or become irrelevant to the verdict".[43] Second, the Court said an appellate court should "put to one side" and not take into account irregularities that "plainly" could not have affected the result and so cannot be termed miscarriages.[44] Finally, before considering the role of the proviso, the Court said it was necessary to consider whether what had occurred was something that "in reality" may actually affect the result.[45]

[45] In terms of the focus on a potential risk of a different outcome a contrast can be made with the unreasonable verdict ground under s 232(2)(a). That contrast indicates, as the Court of Appeal said in *Wiley*, that the concern in s 232(2)(c) is on "whether something material has gone wrong with the trial beyond the sufficiency of evidence".[46]

[46] The third textual point is one we have foreshadowed, namely, the use of the word "real". We agree with the Court in *Wiley* that the focus is on "realistic rather than theoretical possibilities".[47] Possibilities may range from the remote to the very strong. The requirement the risk is "real" must be accordingly significant in identifying the nature of the risk contemplated by the section. This is the point made by Tipping J in *Sungsuwan* in describing the question as whether there is a "reasonable possibility" a different verdict could have been delivered if there had been no error, irregularity, or occurrence.[48] We add that we do not agree with Mr Pyke that the reference in [29] of *Wiley* to whether there is a reasonable possibility a different verdict "would" have been delivered should be "could".[49] Differing formulations were used

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42 *Matenga*, above n 33.
43 At [11].
44 At [30].
45 At [31].
46 *Wiley*, above n 26, at [25] (footnote omitted).
47 At [28].
48 *Sungsuwan*, above n 32, at [110] and [115].
49 *Wiley*, above n 26.

to address the point in *Matenga*[50] and also to an extent in *Sungsuwan*[51] but, in any event, the effect of the use of the word "could" creates an unnecessarily complex test, involving double conditionality, and one which risks losing focus on the statutory threshold of "real" risk. We say that because another way of expressing such a test would be to ask whether there is a *reasonable possibility of a possibility* of a different outcome. In contrast, the standard of whether there is a reasonable possibility that a different verdict *would* have been delivered is simpler (and more workable) but more importantly, it better captures the statutory definition of miscarriage of justice, that there is a real risk that the outcome of the trial was affected.

[47] From these textual indications it is apparent, as the Court of Appeal said in *Wiley*, that s 232(4)(a) then requires "an assessment of the potential risk of a different outcome" arising from the error, irregularity, or occurrence that has been identified.[52]

[48] It follows from the discussion above that the question is whether the error, irregularity, or occurrence in or in relation to or affecting this trial has created a real risk the outcome was affected. That, in turn, requires consideration of whether there is a reasonable possibility another verdict would have been reached. It is clear that although the Court of Appeal in this case expressed the test by reference to the safety of the verdicts, the test applied by the Court in a substantive sense was in accordance with the statute. The reference to the safety of the verdicts was, in context, simply used as in a shorthand way for a consideration of the outcome. That said, it is best to keep to the statutory language.

Was there a miscarriage of justice in this case?

[49] To determine whether a miscarriage of justice has arisen in this case we need first to consider the impact of the additional evidence adduced in the Court of Appeal in support of Mr Misa's appeal.

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50 Compare *Matenga*, above n 33, at [31] and n 39.
51 See *Sungsuwan*, above n 32, at [65], [70] and [82] per Gault, Keith and Blanchard JJ.
52 *Wiley*, above n 26, at [29].

The new evidence

[50] The new evidence now in issue comes first from John Albert, who was the manager of the apartments in Glen Innes in 2005 and 2006. His evidence relates to the question of whether BC lived at the apartments in Glen Innes and as to the plausibility of BC's account of jumping from the third floor of the apartment she said she shared with Mr Misa. The second witness providing new evidence is Peter Kruger of the Ministry of Social Development (MSD). Mr Kruger's evidence relates to Mr Misa's addresses in 2005 and 2006 as listed in the Ministry's records.[53] This evidence is directed to Mr Misa's residence and so to the question of whether he lived at the apartments in Glen Innes with BC.

[51] Mr Albert in his evidence confirmed that Mr Misa and AB were tenants in the apartments in Glen Innes over the period from 2005 to 2006 both together and separately.[54] Mr Albert said he remembered Mr Misa because he was a good tenant and because of his singing background. He recalled AB because she was a tenant but also because she caused "a number of problems" as she kept going to Mr Misa's room and he could hear them "arguing all the time".

[52] Mr Albert had a very clear recollection of the day AB jumped from the third floor window and expressed surprise she managed to jump across to the other building. He was less sure about whether or not Mr Misa had moved out the day after this incident and as to whether he had returned at some point.

[53] Mr Albert also said no one else (apart from AB) had lived with Mr Misa in the apartment. He said he could be sure of that because he and "the other management" were "keeping an eye on things" after the problems with AB and because of the location of his office which meant people had to walk past the office when walking into the apartment complex.

[54] In addition, Mr Albert gave evidence about the layout of the apartment building noting that the building was in fact two storeys, but there was a third level.

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53 The Court of Appeal also had evidence relating to CD, Mr Misa's former wife, which the defence argued supported collusion. This aspect was not pursued in this Court.

54 He was not clear on the order of when they lived there together and separately.

He also expressed the view that anyone jumping out of the window in Mr Misa's apartment "would have been dead" or seriously injured given the height of the building and the surface on which that person would have landed. Mr Albert noted in this respect that there was "lots of old steel pipe and stuff" and "old concrete with twisted steel inside it" on the ground.

[55] Mr Kruger presented MSD records relating, principally, to the payment of an accommodation allowance to Mr Misa. He explained that an accommodation supplement relates directly to a client's residential address. The MSD records showed Mr Misa's address as the Glen Innes apartments in July 2005. In early January 2006, MSD was told by Mr Albert there had been a change in Mr Misa's circumstances. The file records Mr Albert on 5 January 2006 having been spoken to by MSD and advising it that Mr Misa was no longer living at the Glen Innes address. At that point, the supplement was suspended although MSD records show Mr Misa listed at the Glen Innes address until 26 July 2006. Payment of the accommodation supplement was in fact resumed on 3 February 2006 and backdated to 4 January 2006.

[56] Mr Kruger accepted it was not possible to tell where the supplement was actually going but the records showed payment of a supplement to the Glen Innes address until July 2006. There were no records of payment of a supplement to any other address over this period.

The approach taken in the Court of Appeal

[57] The Court of Appeal concluded that the new evidence was not fresh but admitted it for the purpose of addressing whether the effect of the new evidence was such as to leave the jury in doubt about a key issue.[55]

[58] The Court accepted Mr Albert was a credible witness. In terms of the way the matter was argued in the Court of Appeal, the Court saw this evidence as potentially bearing on whether BC could have been at the apartments in Glen Innes in the alleged periods of the "Mt Wellington" offending. Further, the evidence was potentially

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[55] The usual approach would be to admit this evidence only if it does have that effect: see *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

relevant to the plausibility of her account that she jumped from the building without any injury resulting. However, the Court concluded the potential impact of this evidence was small for a number of reasons.

[59] First, the Court considered the evidence was directly relevant to a contextual issue only, that is, whether the offending occurred at this apartment and whether BC leapt from the building.

[60] Second, the Court said that BC's evidence was cogent in that it was based on her general understanding of the geographical area. Further there was a consistency between her description of the apartment and that given by Mr Misa in his evidence. Under cross-examination BC confirmed that the "Mt Wellington" offending preceded an August 2006 visit to the doctor which fitted in with the MSD records that Mr Misa was receiving an accommodation supplement for the Glen Innes address up to the end of July 2006.

[61] Third, the Court did not see Mr Albert's evidence as of "such strength or cogency as to raise a real doubt" about the jury finding that the "Mt Wellington" offending occurred at the apartments in Glen Innes.[56] In this respect, the Court referred to the fact that Mr Albert could not be categorical about whether Mr Misa returned to the apartments after January 2006 and also that his evidence in relation to BC relied on observations made after a lapse of 10 years and in the absence of any documentary records. Further, the Court said that issues about the plausibility of BC's account of leaping from the apartments were obvious to the jury because all of the material facts were before the jury. Finally, both the issues of plausibility and potential collusion were thoroughly explored before the jury. The Court noted that Mr Misa himself said he did not think that BC would have survived such a fall.

Submissions

[62] The appellant's case is that the Court of Appeal was wrong to conclude that, as a result of the additional evidence, there was no scope for the jury to have been left in doubt about a key issue at trial. The essential argument for the appellant is that the

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56 *Misa* (CA), above n 2, at [36].

impact of Mr Albert's evidence as that of an independent witness would have strengthened the defence. In particular, it would have supported the defence theory of a lack of credibility and of collusion and eroded BC's reliability. It is also submitted that the lack of pre-trial preparation meant that Mr Albert's evidence was not investigated.

[63] The respondent submits the new evidence is, at best, neutral and would not have had any material impact. Nor would more extensive pre-trial preparation have altered the position.

[64] We address the submissions for the parties further as necessary in the discussion which follows.

Assessment

[65] It is agreed that Mr Albert's evidence is the most important of the new evidence. We analyse now whether there is a real risk that the new evidence would have affected the outcome of the trial. We address this under the headings of the two topics dealt with by Mr Albert, namely:

(a) whether BC ever lived at the apartments in Glen Innes with Mr Misa; and

(b) the likely impact of jumping from the building.

[66] For present purposes the relevant parts of the narrative are as follows. BC said that she moved into the "Mt Wellington" apartments with Mr Misa "pretty fast" after she left school and "In the early stages" of her pregnancy and that they were together there for "About three months". She described sexual offending having occurred "a lot" in Mt Wellington. By contrast, Mr Misa was firm that he never lived at a Mt Wellington address with BC and that the only person with whom he had shared an apartment at the Glen Innes address was AB. He accepted that he and BC lived together but that was at the home of BC's grandparents or at his sister's home. He also said that when he and BC first met in January 2006 he was living at his parents' house. At various points in cross-examination at trial he accepted that he continued to

live at the Glen Innes address for as long as "more than four months" from January 2006 after AB moved out.[57] That latter point is important in considering the potential impact of Mr Albert's evidence. It means that Mr Misa could well have been living in the Glen Innes apartment over the period of the incidents described by BC. Viewed against that evidence, Mr Albert's evidence on this aspect adds little.

[67] Mr Albert's evidence is, in any event, correctly characterised by the respondent as, at best, evidence of opportunity. That characterisation is apt because Mr Albert could not be definitive on the question of whether BC lived at the apartments in Glen Innes with Mr Misa. This is not surprising given that these events took place some 10 years ago and Mr Albert did not have the benefit of any documentary records. As Mr Albert agreed in cross-examination in the Court of Appeal, nor was he present in the building "24/7". Further, as he said in his evidence, these events took place in a complex which accommodated more than 150 people. This means there were practical limits on his ability to keep an eye on all that was going on. Mr Albert accepted accordingly that it was possible BC might have been at the complex for some time, although he doubted this would be for more than a period of days rather than months.

[68] The latter concession is also consistent with BC's account that Mr Misa did not want her to live there and said that when they were there they were not to make too much noise. In addition, the evidence at trial was that BC moved in with Mr Misa in mid-2006. The MSD records suggest that he left by, at the latest, 26 July 2006. On this approach, BC may have been at the apartment perhaps only a period of weeks which may assist in explaining confusion over the location of the apartment. We interpolate here that the evidence as to timelines at trial from both BC and Mr Misa was at times vague and not always consistent. That is not inconsistent with the evidence of a relationship which was short-lived and, it appeared, somewhat chaotic. It is plain that BC and Mr Misa moved around and spent some time living together at the addresses of various family members over the relevant period.

[69] Mr Albert also suggested AB had not come back to live in the complex after the incident in which she jumped out of the window there but said he could not be

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[57] In his evidence in the Court of Appeal, Mr Misa said he did not return to the Glen Innes apartment after 4 January 2006.

"100% sure" of this. Mr Misa's evidence on this at trial was that AB was in the complex after the incident although he, too, was not sure of the timing. Again, Mr Albert's evidence on this aspect does not add materially to the evidence at trial.

[70] Finally, Mr Albert could not say with any certainty whether Mr Misa left the Glen Innes apartment in January 2006 or whether Mr Misa came back to live there. The MSD records did not provide material assistance on this aspect. To the extent the records assist, they are not helpful to Mr Misa in that they are consistent with Mr Misa's acceptance in cross-examination at trial that he stayed on in the apartments for some months from January 2006. The possibility Mr Misa was still living there in July 2006 is also consistent with BC's evidence in cross-examination that she left the apartment shortly before visiting the doctor in August 2006.

[71] On the second issue, the likelihood of injury on the basis of BC's description of jumping from the building, BC said she had not received any injuries as a result of the fall. Mr Misa addressed this topic in this way when BC's account of the fall was put to him:

> Well if that was the case she wouldn't be alive. The room she's describing it's my ex's room, um, [AB's] room. How high it is are three storeys it is humungous. She wouldn't be here alive today. That never happened at all. For starters she doesn't even know, um, whereabouts we actually lived, um, because it never existed. We never ever lived apart from [BC's grandparents place] and my sister's. We never lived anywhere else. That never happened at all. It's fabricated and untrue and unfair.

[72] Further, when Mr Misa was asked about the fact AB had survived her leap, Mr Misa made the point that she had landed onto another building which was in between the two and she had said she landed in the rubbish bins.

[73] Mr Albert's evidence would not have assisted any further on this topic. His evidence confirmed BC's account that the fall would have taken place from three floors up. BC had also said she remembered it being "a hard jump" but she said she "wasn't too focussed on the landing", she said she remembered "just thinking escape and run". Mr Albert's evidence also confirmed BC would have landed on a hard surface. But Mr Albert is not an expert and so his independence adds nothing on this

topic particularly given the circumstances BC described.[58] The jury was just as capable of assessing the plausibility of this account. In this respect, as the Court of Appeal said, Mr Albert was not saying anything more than Mr Misa himself said. As matters transpired, the Judge made no comment on the fact there had been no cross-examination on the point so Mr Misa's observations which we have set out above were matters the jury could consider.

[74] Mr Le'au'anae's approach to this topic at trial was to say that this part of BC's account demonstrated she was simply copying AB's account and in this way it supported the defence theory of both a lack of credibility and of collusion. That theory, if accepted by the jury, would have undermined the evidence of both complainants and would have been a basis for an acquittal on all of the charges. In other words, the new evidence has little impact where the approach adopted was not just to seek to undermine BC's account of this particular charge. Rather, the strategy at trial was to highlight the copycat nature of the complainant's account and, in this way, to undermine both complainants. That was a legitimate tactical approach, particularly given the "plausible, mutually supportive narratives of domestic abuse spanning five years, including proven acts of assault on each of the complainants" which occurred during the relevant period.[59]

[75] The way Mr Le'au'anae dealt with this aspect also meant the defence maintained the best evidence of collusion, that is the copycat nature of BC's account. By not cross-examining BC on this particular aspect, the defence could remove any opportunity for BC to change her account or to back down in some way. In any event, the proposition that Mr Le'au'anae should have cross-examined on the plausibility of BC's account by focusing on the likely impact of jumping from the third storey of the building was not put to him in the Court of Appeal.

[76] The potential effect of Mr Albert's evidence and that of Mr Kruger also has to be considered in light of the fact that the proposition BC had fabricated her account was well-ventilated before the jury. The first point in this respect is that it was plain

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58 There was no expert evidence at trial. Subsequent to the hearing in this Court, Mr Pyke sought directions as to whether such evidence would be of assistance but the Court did not consider this was necessary.

59 *Misa* (CA), above n 2, at [38].

on the evidence that BC could not describe the suburb in which she said she was living. As has been noted, in response to a jury question at trial, the Crown accepted BC had incorrectly described it as Mt Wellington. In addition, the similarity with AB's account was obvious. The defence focused strongly on collusion and there was evidence that the complainants knew each other and had the opportunity to talk to each other. Mr Misa himself was clear that he had never lived at the Glen Innes apartments with BC. Finally, it was not necessary for the jury to accept BC's account she jumped from the building because it was not an element of the offence. It was open to the jury to accept BC's evidence that an assault occurred but reject her evidence as to jumping from the building to escape.

[77] In these circumstances, we agree with the Court of Appeal that the new evidence would not have made any material difference. There was no error, irregularity, or occurrence in or in relation to or affecting the trial that created a real risk that the outcome was affected. This conclusion also disposes of the argument based on trial counsel competency because, as matters have developed, the only relevance of that aspect relates to the failure to investigate the possibility of evidence being called from Mr Albert.[60]

The directions about delay in complaint

[78] The next issue concerns the trial Judge's directions on delay in complaint.[61] The issue arises in this way. The Judge first told the jury that it would have been "plain" to it that both complainants had:

> … been questioned about why they did not tell a number of people and did not take a number of opportunities to tell either their families, police, friends, a doctor about what they say the defendant did to them and only went to the police a number of years later.

The directions continued:

> Now they have both made their explanations to you as to why and the law recognises that, the Evidence Act says that there should be no adverse inference taken from delay, it is common and so the fact that they do delay or any person delays in making a complaint, they have given their reasons and

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60 The written submissions for Mr Misa also raised a question about the competency of appellate counsel but this was, properly, not a point developed in oral argument.

61 This aspect was not raised in the Court of Appeal.

> you shouldn't speculate otherwise and again, it's not what you or somebody else might do, it's what they said, they did and their reasons.

[79] The appellant submits that this direction was wrong because it was permissible for the jury to draw an adverse inference from the delay in complaint.[62] Mr Pyke relies on s 127 of the Evidence Act 2006 which provides that if, in a sexual case tried before a jury, there is evidence or a comment made "that tends to suggest" the complainant delayed making or failed to make a complaint, the judge "may tell the jury that there can be good reasons" for delay in or failure to make a complaint. Mr Pyke develops the submission by noting that delay was an important facet of the defence case. He submits that the direction ran the risk this aspect of the defence was put to one side.

[80] We accept the respondent's submissions that, in context, there is no risk the direction had any adverse effect on the defence. Both complainants were questioned at length about why they delayed making their complaints and both gave explanations for delay. They referred, for example, to wanting to keep the relationship with Mr Misa going, to attempts to leave and coming back. The alternative narrative advanced by the defence was that the two had colluded because they were both women scorned. Those two essential accounts were maintained throughout the trial and the jury cannot have been in any doubt about those competing narratives. In summing up the defence case, the Judge made specific reference to the numerous factors relied on by the defence to support collusion which included delay.[63] Against that background, the direction did not give rise to the risk of a miscarriage of justice.

Need for a direction under s 122(2)(e) of the Evidence Act 2006?

[81] Some of the offending charged in relation to AB was said to have occurred more than 10 years prior to trial.[64] In the written submissions for the appellant, it was argued the Judge should accordingly have given consideration to a reliability warning in terms of s 122(2)(e) of the Evidence Act.[65] That section states that in a criminal

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62 *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 at [51]; and see Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV127.03].

63 See the description above at [18]–[19].

64 The evidence on this is not entirely clear but it suggests that the earliest conduct referred to by AB took place in 2004.

65 This issue was not raised in the Court of Appeal.

jury trial the judge must consider whether to give a reliability warning whenever evidence is given "about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously".

[82] This was not a point pressed by Mr Pyke. In particular, in the course of the hearing, Mr Pyke accepted there was some merit in the submissions for the respondent that such a direction had the potential to undermine the defence case. That was because of the defence reliance on the lack of detail as proof the complainants' accounts were fabricated. Nonetheless, Mr Pyke said a reliability direction, particularly in relation to BC's testimony that she jumped from the third storey of the apartment, was necessary.

[83] It follows from our discussion on the impact of the new evidence that we see no need for a reliability direction. As we have said, the defence approach was to use the question as to the plausibility of this account to undermine the evidence of both of the complainants. The issues going to both the credibility and reliability of this evidence were well-ventilated before the jury.

[84] Finally, for completeness, we note that the appellant did not pursue a challenge based on the need for a direction as to reasonable belief in consent.

Result

[85] The appeal is dismissed.

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