IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 102/2018
[2019] NZSC 98

BETWEEN	JESSE-JAMES WINTER Appellant
AND	THE QUEEN Respondent

Hearing:	16 May 2019
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Arnold JJ
Counsel:	A J Bailey and E Huda for Appellant C A Brook and Z A Fuhr for Respondent
Judgment:	13 September 2019

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by O'Regan and Ellen France JJ)

Table of Contents

Introduction

[1] The appellant, Mr Winter, (along with a co-defendant, Alvin Kumar) was convicted (as a party) on two charges of wounding with intent to cause grievous bodily harm and one charge of male assaults female after a District Court jury trial. Four people were involved in the incident but the other two, Nicholas Hanson and Stephanie McGrath, pleaded guilty shortly before the trial. Mr Winter was sentenced to a term of imprisonment of eight years.[1]

[2] Mr Winter appealed against conviction and sentence to the Court of Appeal. He raised two grounds of appeal against conviction. The first was that a text message sent by Mr Hanson to Mr Hanson's girlfriend was wrongly admitted into evidence at the trial under the co-conspirators' exception to the rule against the admission of hearsay evidence, now set out in s 22A of the Evidence Act 2006. The second was that the trial Judge had not provided the jury with an included lesser offence for its

[1] *R v Hanson* [2017] NZDC 27289 (Judge O'Driscoll). Mr Winter also appeared for sentencing on unrelated cannabis charges.

consideration. Both grounds were rejected by the Court of Appeal and the sentence appeal was also dismissed.[2]

[3] Mr Winter now appeals to this Court against his conviction (but not sentence), raising the same two grounds as were advanced in the Court of Appeal.[3]

Background

[4] The origin of the offending was a dispute between Ms McGrath and Daniel Hatcher, with whom she was in a relationship. Ms McGrath is Mr Winter's half-sister.

[5] The relationship between Ms McGrath and Mr Hatcher was volatile, and an argument broke out on 30 August 2015 after Ms McGrath formed the view that Mr Hatcher had arranged for a copy of the key to her back door to be made.

[6] After the argument between Ms McGrath and Mr Hatcher, Mr Hatcher left the address with a friend, Jason Nash. They went to visit Mr Nash's mother, Sandra Aldridge, who lived in a house bus with her partner, Lance Ambrose. Ms Aldridge and Mr Ambrose had visitors, Gerard Williams and Nicola Spencer. Ms McGrath knew that Mr Hatcher was going to the house bus.

[7] Ms McGrath instigated a plan to go to the house bus and seriously assault Mr Hatcher. She contacted Mr Hanson, who went to Ms McGrath's home. Mr Hanson and Ms McGrath then made various threats to Mr Hatcher by text messages and phone calls. Mr Hatcher said that during one of the phone calls, Ms McGrath and Mr Hanson threatened to slit his throat and to stab him.

[8] Ms McGrath sent text messages to others inviting them to "smash Dan". Mr Winter and Mr Kumar, who had been contacted by Mr Hanson, became involved later in the day. Mr Winter, Mr Kumar and Mr Hanson were all associated with the Bandidos gang and Mr Winter was Mr Hanson's flatmate. Mr Hanson and Mr Winter

---

2 *Winter v R* [2018] NZCA 469 (Miller, Mallon and Gendall JJ) [CA judgment].

3 *Winter v R* [2019] NZSC 8. The approved ground is whether the Court of Appeal was correct to dismiss Mr Winter's appeal to that Court.

lived at the same address as Mr Hanson's stepfather, who was president of the Bandidos.

[9] Ms McGrath first contacted Mr Winter by text message at 11.38 am, asking him to come and see her. Ms McGrath and Mr Winter spoke on the phone at 1.57 pm for about five minutes, but there was no evidence as to what was said. There was a further text message exchange between Mr Hanson and Mr Winter between 4 pm and 5.30 pm, and Ms McGrath sent a text message to Mr Winter at 7.27 pm saying "He's threatening Jacob and cyfs". The reference to "he" was apparently to Mr Hatcher and Jacob is Ms McGrath's son. There was a further phone call between Mr Winter and Ms McGrath at 7.52 pm, again lasting approximately five minutes, but no evidence as to what was said. There was evidence that Mr Winter was at Ms McGrath's address at 9.54 pm and that Mr Kumar had arrived there some two hours earlier.

[10] The four participants travelled in Ms McGrath's car from her address to the house bus. They were in the vicinity of the house bus at around 10.20 pm. As it turned out, Mr Hatcher and his associate, Mr Nash, had left the house bus between 8.30 pm and 9 pm. So the only people present at the house bus were Ms Aldridge and Mr Ambrose and their friends Mr Williams and Ms Spencer.

[11] When the four participants arrived at the house bus, Mr Hanson knocked on the door. Ms Aldridge and Mr Ambrose answered the door and told Mr Hanson that Mr Hatcher was not there. This prompted what the District Court Judge described as a "frenzied attack" by Mr Hanson on Mr Ambrose and Mr Williams and then Ms Spencer. Mr Ambrose was stabbed in the shoulder, neck, arm and hand as well as his face, and was also kicked. Mr Williams was stabbed in the forehead and also kicked and punched by Mr Kumar and Mr Winter. Ms Spencer was also assaulted. Mr Ambrose had to have emergency surgery and Mr Williams required medical attention and several stitches to two of the wounds he suffered.

[12] After the attack ended, the four participants left the house bus and returned to Ms McGrath's address. The police arrived at Ms McGrath's address around 10.55 pm, which was 23 minutes after a 111 call had been made reporting the violence at the house bus. The police found Ms McGrath and Mr Kumar in the driveway in a

car apparently about to leave the property. The police found three knives in the kitchen sink at the address and a knife block in plain view on the sofa in the living room, with three knives missing. They also found a knife in Ms McGrath's handbag. It was established by forensic testing that DNA from the three victims was on the knives found in the sink. Mr Ambrose's DNA was also found in blood on Mr Kumar's jeans.

[13] Mr Winter was not present at the address when the police arrived and was not apprehended until approximately six weeks later. However, there was evidence that he had tried to set up a false alibi for the evening. When interviewed, he denied knowing Mr Hanson, denied that he had sent the text messages on his cellphone and denied knowing a person to whom text messages had been sent who was, in fact, his girlfriend.

Crown case

[14] The Crown contended that Mr Winter and Mr Kumar had formed a common intention with Ms McGrath and Mr Hanson to carry out a serious assault on Mr Hatcher and to assist each other in doing so, and that the wounding with intent to cause grievous bodily harm of Mr Ambrose and Mr Williams was a probable consequence of carrying out that common intention. The Crown contended that this was sufficient to make Mr Winter and Mr Kumar parties to the wounding with intent charges under s 66(2) of the Crimes Act 1961. Similarly, the Crown case in relation to the assault of Ms Spencer was that this was also a probable consequence of the common intention to seriously assault Mr Hatcher.

[15] The Crown case was that evidence established that both Mr Kumar and Mr Winter were present at Ms McGrath's house before the party left to go to the house bus. The Crown argued that, as the knife block was in plain view in the lounge and the group travelled to the house bus in the same car, Mr Kumar and Mr Winter must have known that Mr Hanson was armed with a knife.

[16] Both Mr Kumar and Mr Winter argued that they did not agree with Ms McGrath and Mr Hanson to carry out an unlawful act or to help with that and that they did not know Mr Hanson was carrying a knife when they went to the house bus.[4]

First point of appeal – admissibility of text message

[17] This point of appeal centres on the text message sent by Mr Hanson to his girlfriend at 7.13 pm on the evening of the attack. The text message said "arming up to dn wht we do" (meaning "arming up to do what we do"). We will call this the arming up text. Mr Winter had sent a text message to his girlfriend at 9.01 pm saying he was going on a "mish" (mission), but there was nothing in the text messages originating from Mr Kumar or Mr Winter about knives or weapons and no evidence that either of them had taken a knife with them to the house bus or used a knife in the assaults.

Section 22A

[18] As mentioned earlier, the arming up text was found to be admissible under s 22A of the Evidence Act. Section 22A provides:

> **22A Admissibility of hearsay statement against defendant**
>
> In a criminal proceeding, a hearsay statement is admissible against a defendant if—
>
> (a) there is reasonable evidence of a conspiracy or joint enterprise; and
>
> (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
>
> (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

[19] A "hearsay statement" is defined in s 4 as a statement made by a person other than a witness that is offered in evidence to prove the truth of its contents.

---

[4] In the appellant's case, he also argued that the Crown had not proved that he had left the car when it arrived at the house bus and approached the house bus with the other offenders. He did not give evidence but argued the Crown evidence did not establish this beyond reasonable doubt. The jury must have been satisfied it did.

[20] Section 22A replaced the former s 12A of the Evidence Act (which was inserted into the Act in 2007). Section 12A simply provided that nothing in the Evidence Act affected the common law rules relating to the admissibility of statements made by co-conspirators or persons involved in joint criminal enterprises. Section 22A was intended to codify the common law. It adopted the articulation of the rule in *R v Messenger*,[5] which, in turn, adopted an earlier Court of Appeal decision, *R v Morris*.[6] As we note below, the intention of codifying the common law was only partially achieved in s 22A.[7]

[21] As mentioned earlier, Mr Winter was charged as a party to the offending under s 66(2) of the Crimes Act. There was no conspiracy charge but s 22A applied on the basis that the offending involved a joint enterprise.[8]

District Court

[22] It had been anticipated that all four participants in the house bus incident would be tried together. But Mr Hanson and Ms McGrath pleaded guilty shortly before the trial was to begin. The arming up text was obviously admissible against Mr Hanson, and therefore would have been evidence in the trial if Mr Hanson had not pleaded guilty. It was anticipated that the question as to whether it was admissible against Mr Kumar and Mr Winter would be resolved at the trial. Once Mr Hanson and Ms McGrath pleaded guilty, the issue as to its admissibility against Mr Kumar and Mr Winter needed to be resolved to determine whether the arming up text could be in evidence at all.

[23] The trial Judge ruled that the arming up text was admissible against Mr Winter under s 22A of the Evidence Act.[9] The Judge considered the requirement in s 22A(a) was met: there was reasonable evidence of a joint enterprise to cause violence to Mr Hatcher. Initially this joint enterprise comprised Ms McGrath and Mr Hanson. Mr Kumar and Mr Winter joined later. The Judge accepted that the arming up text was sent before Mr Winter became part of the joint enterprise. The evidence that the

---

5 *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779.
6 *R v Morris* [2001] 3 NZLR 759 (CA).
7 See below at [62]–[63].
8 See *Messenger*, above n 5 at [15], citing *Tripodi v R* (1961) 104 CLR 1 at 6.
9 *R v Kumar* [2017] NZDC 14861 (Judge O'Driscoll) [DC judgment].

joint enterprise existed included the evidence of the hostility between Ms McGrath and Mr Hatcher, Mr Hanson contacting Mr Kumar and Mr Winter, Mr Winter and Mr Kumar going to Ms McGrath's address, all four travelling together to the house bus where Mr Hatcher was believed to be, the presence of all four defendants at the house bus, the attempt to locate Mr Hatcher in the house bus, the use of violence against three people at the house bus and travelling from the scene together.[10]

[24] The Judge considered there was also reasonable evidence that Mr Kumar and Mr Winter were both members of the joint enterprise (s 22A(b)). In the case of Mr Winter, the evidence included Mr Winter's text messages and phone calls to Mr Hanson and to Ms McGrath, the text message from Mr Winter to his girlfriend that he was going on a "mish", and cellphone polling data, which showed Mr Winter's phone travelling from the vicinity of Ms McGrath's house to the vicinity of the house bus and travelling back to Ms McGrath's house, consistent with the timing of the offending and evidence that two males, in addition to Mr Hanson, had inflicted the violence.[11]

[25] The Judge considered that the arming up text was evidence that Mr Hanson was "arming up" and was an action done in furtherance of the joint enterprise to inflict violence on Mr Hatcher (s 22A(c)).[12] He found the arming up text was admissible against both Mr Kumar and Mr Winter but only for a limited purpose.[13] The fact that it had been sent before they became part of the joint enterprise did not matter.[14]

[26] In his summing up at the end of the trial, the Judge directed the jury that they could use the texts involving Mr Hanson and Ms McGrath, including the arming up text, to show there was a common intention to carry out a serious assault on Mr Hatcher. But he made it clear the arming up text could not be used to prove Mr Winter knew Mr Hanson was armed. We will come back to these directions later.[15]

---

10 At [67]–[68].
11 At [70].
12 At [85].
13 At [103].
14 At [100]–[101].
15 See below at [55].

[27] That was particularly important because the Judge directed the jury that they could convict Mr Winter on the charges of wounding with intent to cause grievous bodily harm only if they were sure that Mr Winter knew that the wounding with intent to cause grievous bodily harm by Mr Hanson (of persons other than the intended victim, Mr Hatcher) was a probable consequence of carrying out the common purpose of committing a serious assault on Mr Hatcher. He told the jury that they could conclude that Mr Winter had that knowledge only if they were satisfied that he knew at the point of engagement that Mr Hanson was armed.[16] If they were satisfied Mr Winter knew Mr Hanson was armed, that was something they could take into account in considering whether Mr Hanson's actions were a probable consequence of the implementation of the common intention to seriously assault Mr Hatcher.

Court of Appeal decision

[28] The Court of Appeal did not reach a concluded view on the admissibility of the arming up text. The Court noted that the arming up text was sent before Mr Winter agreed to assist Mr Hanson and Ms McGrath and was not made to enlist him or instruct him or advance their objectives.[17] The Court considered that, if the arming up text was admissible, it was only as evidence of the joint enterprise in operation at a time when Mr Winter was not part of the joint enterprise. So the arming up text would be admissible in order to prove the origin, character and object of the joint enterprise but not Mr Winter's participation in it.[18] The Court noted the risk of unfair prejudice (that the jury could use the arming up text as evidence that Mr Winter knew Mr Hanson had a knife) but considered the direction given by the trial Judge specifically dealt with that risk.[19]

[29] The Court of Appeal's conclusion was:

> [32] In our view it is debatable whether the text was "in furtherance of the joint enterprise". It could have been viewed as an incidental text to a third party rather than in furtherance of the conspiracy. Some judges might have ruled the text message as inadmissible against Mr Winter and Mr Kumar on

---

16 The trial Judge told the jury, in answer to a jury question, that the point of engagement was at the time Mr Hanson engaged with Mr Ambrose (at the house bus), made an inquiry about Mr Hatcher and was told Mr Hatcher was not there.

17 CA judgment, above n 2, at [30].

18 At [30], citing *Messenger*, above n 5.

19 At [31].

> this basis. Others might have taken the approach the Judge did here. In our view it was open to the Judge to take the view he did. We consider the Judge appropriately dealt with any unfair prejudice arising from the text through the direction he gave.

Issues

[30] Mr Winter challenges the admissibility of the arming up text on three bases. First, he argues that, as the arming up text was sent before he was part of the joint enterprise, it was inadmissible against him. Second, he argues that, even if that is incorrect, the arming up text was not a statement made in furtherance of the joint enterprise and did not therefore meet the test for admissibility under s 22A. And lastly, if neither of those points is accepted, he argues that the prejudicial effect of the arming up text outweighed its probative value and it should therefore have been excluded under s 8 of the Evidence Act. Mr Winter also argues that the admission of the arming up text caused a miscarriage of justice, as that term is defined in s 232(4) of the Criminal Procedure Act 2011. So, if we accept the arming up text was wrongly admitted, a fourth issue arises: was there a miscarriage of justice?

[31] During the course of the hearing the possibility that the arming up text was offered to prove only that Mr Hanson had said he was arming up was canvassed. That led to a further issue: was the arming up text a hearsay statement, that is, was it offered in evidence to prove the truth of its contents? Section 22A applies only to hearsay statements.[20]

[32] We will deal with these issues in the above order.

[33] Mr Winter did not dispute before us that there was reasonable evidence of a joint enterprise and reasonable evidence he was a member of it (s 22A(a) and (b)). So the focus of the argument before us was on s 22A(c): was the arming up text a statement made in furtherance of the joint enterprise?

---

[20] The argument before us was advanced on the basis that the arming up text was offered in evidence to prove the truth of its contents, namely that Mr Hanson was, in fact, arming up as part of his preparations to carry out the joint enterprise.

Text sent before Mr Winter was part of the joint enterprise

[34] As noted earlier, the District Court Judge was satisfied that the arming up text was sent before Mr Winter was part of the joint enterprise.[21] However, he concluded that this did not render the statement inadmissible, citing the judgment of the High Court in *R v Mahutoto* as authority for this proposition.[22] In *Mahutoto*, Chambers J noted that the rationale for the common law co-conspirator's rule relied on the concept of agency.[23] Chambers J then asked himself the question as to how a statement made by a co-conspirator could be admissible against a person who was not part of the joint enterprise at the time the statement was made, in other words, how that could fit within the implied agency rationale. He answered his own question as follows:[24]

> The answer lies in the concept of ratification. When a person decides to join a conspiracy after its inception, he or she is taken to have accepted the plan as it has developed and the steps that have already been taken towards arranging the intended unlawful acts. He or she is therefore taken as impliedly ratifying those steps already taken by the co-conspirators in furtherance of the common purpose.

[35] This rationale for the admissibility under the common law of a statement made by a co-conspirator against a defendant even if made before the defendant became a participant in the joint enterprise was confirmed by the Court of Appeal in *Messenger*.[25]

[36] As was made clear in *Messenger*, however, a statement made by a co-conspirator before the defendant against whom it is offered in evidence joined the joint enterprise may be admitted only for a limited purpose. It cannot be led to prove the defendant's participation in the joint enterprise. That must be proved

---

21 See above at [23]. The respondent argued in its written submissions that the Judge could have left it to the jury to decide whether Mr Winter had joined the enterprise before the arming up text was sent but this was (correctly in our view) pursued only briefly in oral argument.

22 DC judgment, above n 9, at [100]–[101], citing *R v Mahutoto* [2001] 2 NZLR 115 (HC) at [35].

23 At [9]. More recently, this has been confirmed by this Court in *R v Qiu*, which noted that implied agency was the most commonly cited reason for admitting a hearsay statement of a co-conspirator: *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [24]. Although the Law Commission has recently expressed some doubt about the agency rationale: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at 224–225.

24 *Mahutoto*, above n 22, at [35].

25 *Messenger*, above n 5, at [21].

independently of the co-conspirator's statement. The purpose for which the statement may be admitted is to prove the "origin, character and object of the conspiracy".[26]

[37] Mr Huda, who argued this part of the appeal on behalf of Mr Winter, submitted that a statement made by a co-conspirator should not be admissible against a defendant who was not part of the joint enterprise at the time the statement was made. He pointed to criticism of the implied agency rationale for the common law co-conspirator's rule and the ratification justification for the admission of statements made prior to the defendant becoming part of the joint enterprise. However, as Ms Brook for the respondent pointed out, these arguments are essentially arguments to the effect that the policy underpinning s 22A is wanting. Even if that were so, the Court would still be required to give effect to s 22A. Codification has rendered what was previously a common law rule a statutory rule and it is not open to the Court to decline to follow this statute whether it considers it has a good policy foundation or not.

[38] Mr Huda pointed out that there was nothing in s 22A referring to the admissibility of a statement made prior to a defendant joining a joint enterprise. We accept that is so, but observe that there is also nothing in s 22A that limits the application of the provision to statements made after a defendant joins a joint enterprise. Section 22A is closely based on the articulation of the law in *Messenger* and it is clear that the intention behind the wording of s 22A was to adopt the law as stated in *Messenger*. There is nothing in s 22A that suggests that Parliament sought to change the law as articulated in *Messenger* to provide that statements made before the defendant joined the conspiracy or joint enterprise are inadmissible against that defendant.

[39] We conclude that the fact that the arming up text was sent prior to Mr Winter being a part of the joint enterprise does not, of itself, render it inadmissible against Mr Winter. We turn now to consider whether the statement was in furtherance of the joint enterprise and whether it was admissible under s 8 of the Evidence Act.

---

[26] *Messenger*, above n 5, at [21], citing Hodge M Malek (ed) *Phipson on Evidence* (16th ed, Sweet & Maxwell, London, 2005) at [31-49]. The current edition of *Phipson* contains a statement to the same effect as that cited in *Messenger*: Hodge M Malek (ed) *Phipson on Evidence* (19th ed, Sweet & Maxwell, London, 2018) at [31-50]. See also Mark Lucraft (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2019 ed, Sweet & Maxwell, London, 2019) at [33-64].

[40] We think it is also important to emphasise that a cautious approach to the interpretation of s 22A is appropriate. The section not only allows hearsay evidence to be offered against a defendant but also allows the admission of a pre-trial statement by one defendant against a co-defendant which would otherwise be inadmissible against the co-defendant under s 27(1) of the Evidence Act.

Was the arming up text sent in furtherance of the joint enterprise?

[41] As already noted, the District Court Judge said the text traffic between Mr Hanson and his girlfriend, which culminated in the arming up text, was evidence of Mr Hanson arming up and was "an action done in furtherance of the joint enterprise to inflict violence on Mr Hatcher".[27]

[42] Mr Huda argued that in making this finding, the Judge had conflated the statement about arming up contained in the arming up text and the fact that Mr Hanson was arming up. While the latter was an action in furtherance of the joint enterprise, the statement of intention to arm up was not. We accept that the language used by the District Court Judge is ambiguous. But, whether the distinction drawn by Mr Huda is justified or not, the focus of our analysis has to be on the requirement of s 22A(c), which requires that the statement itself was made in furtherance of the joint enterprise.

[43] The argument of counsel focussed on two decisions, that of the Court of Appeal of New Zealand in *Kayrouz v R*[28] and that of the Court of Appeal of England and Wales in *R v Platten*.[29] In *Kayrouz*, the Court of Appeal observed:

> [35] The question of whether a conversation between joint conspirators was for the purpose of advancing or furthering the conspiracy needs to be approached in a realistic and commonsense way. In this respect, we consider there is merit in the approach adopted by the English Court of Appeal in *R v Platten*, where it was held that statements made during the conspiracy will be admissible when they are "part of the natural process of making the arrangements to carry out the conspiracy". We refer also to the Court's acceptance in *Platten* that evidence would be admissible when it could be said that it "showed the enterprise in operation". In contrast, merely incidental statements even if they refer to the conspiracy or aspects of it are not

---

27 DC judgment, above n 9, at [85].
28 *Kayrouz v R* [2014] NZCA 139.
29 *R v Platten* [2006] EWCA Crim 140, [2006] Crim LR 920.

> admissible if they are not intended to advance or further the common purpose of the conspiracy.
>
> (footnotes omitted)

[44] Both *Kayrouz* and *Platten* are, however, cases where the statement at issue was made by one member of the joint enterprise to another. It can be contrasted with the present case, where the arming up text was sent by Mr Hanson to his girlfriend, who was not a participant in the joint enterprise. Mr Huda emphasised this point, and referred us to the decision of the Court of Appeal of Victoria in *R v Ousley*, which also concerned a statement made by a member of the joint enterprise to a third party.[30] In that case, the Court observed:[31]

> The answer to the question raised [whether a statement is in furtherance of the common purpose] is not to be found by categorising the event referred to as past, present or future; that answer is to be found by an examination of the words spoken, the context in which they were spoken and the status of the persons by whom and to whom the words were spoken. If the person to whom the words are spoken was not then a participant in the scheme (as in this case) and there is not to be seen in the words spoken an intention to enlist the listener as a knowing or unknowing participant (a matter to which we return) it will be more difficult to regard the utterances as made in the furtherance of the common purpose.

[45] The Court in *Ousley* found that almost all of the recorded conversation between the co-conspirator and a woman who was not part of the conspiracy was inadmissible against others in the joint enterprise, describing the utterances made by the co-conspirator as "the troubled outpourings of a man who appreciates a good listener".[32]

[46] A similar approach was taken in New Zealand in *R v Afamasaga*.[33] In that case one of the defendants sent text messages to a woman to whom he was romantically attached including one which said, in effect, that Mr Afamasaga was going to shoot the victim of a killing for which Mr Afamasaga was standing trial for murder. Woolford J ruled the text messages were inadmissible against Mr Afamasaga and

---

30 *R v Ousley* (1996) 87 A Crim R 326 (VSCA).

31 At 336.

32 At 336.

33 *R v Afamasaga* HC Auckland CRI-2013-090-475, 20 June 2014. The appeal to the Court of Appeal did not engage this issue: *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640. See also *Afamasaga v R* [2019] NZSC 16.

another defendant. He found the text messages were sent to impress the woman and were not in furtherance of the conspiracy.[34]

[47] We have already emphasised the need for caution in the interpretation of s 22A. We think it is important not to stretch the ambit of the section by the use of tests that may be seen as more expansive than that set out in the section itself. Parliament chose to adopt the "in furtherance" wording used in *Messenger* and the cases that preceded it and we do not think there is much to be gained by substituting those words with phrases such as "the enterprise in operation", particularly where the statement in issue is made by a participant in the joint enterprise to a non-participant.

[48] If the statement involved the attempted recruitment of an additional person to the joint enterprise or the acquisition of something required for the intended criminal actions of the joint enterprise, it would obviously be in furtherance of the joint enterprise. We see the statement in issue in this case as in a different category. We explain this conclusion by applying the helpful approach adopted in the excerpt from *Ousley* set out above.

[49] To put the "arming up" text in context it is necessary to go back to a text exchange between Mr Hanson and his girlfriend that took place earlier in the day. We can begin with a message just before 3.30 pm on the day of the incident (30 August 2015) in which Mr Hanson told his girlfriend, "jst sorting fam bisness". Mr Hanson's girlfriend responded saying, "Ok well I'm seeing my mate later and need to sort my business". She continued, "Can I assume you'll be back by 6". Mr Hanson responded promptly saying, "yes if i have a black eye dont judge me ok lol". Later, at about 5.20 pm, Mr Hanson sends her a further message stating, "nope jst getting ready for my beat down lol [I] love ths sht". It is not clear to what this message is responding. Similarly, it is unclear to what Mr Hanson is responding when he sends his girlfriend a further message at 7.10 pm which says, "some ones threating my brothers sis and said hes going to fuk my mum do I need to say more im soz but u knw". The next relevant message is from Mr Hanson's girlfriend sent to him at about 7.12 pm in which she asks, "Are you home?". Mr Hanson responds, "in hornby". Within seconds, with

---

[34] At [23].

no further query from her, Mr Hanson sends her the "arming up to dn wht we do" message.

[50] It is apparent from these messages that the "arming up" text is part of an exchange of a domestic nature, the arrangements being made are domestic ones. The exchanges are with Mr Hanson's girlfriend who is not part of the joint enterprise and there is no suggestion of any intention to enlist her or to acquire anything necessary for the intended criminal actions. Indeed, the statement is not prompted by any particular inquiry from her.

[51] The argument for the respondent on this point was that Mr Hanson was effectively making arrangements, albeit domestic, which were necessary to facilitate the joint enterprise such that the arming up text was in furtherance of it. Ms Brook in this respect referred to other text exchanges that day indicating Mr Hanson and the others were expecting something to happen, but they do not alter the context in which the statement in issue is to be considered. The statement cannot be seen as truly in furtherance of the joint enterprise. In the present case, the Court of Appeal acknowledged that the arming up text was a statement made before Mr Winter had agreed to assist Ms McGrath and Mr Hanson and was not made to enlist them, instruct them or advance their objectives.[35] That was effectively a finding that the statement was not made in furtherance of the joint enterprise, but the Court did not make a ruling to that effect. Instead it found the District Court Judge's finding, though "debatable", was open to him.[36] However, as this Court held in *R v Gwaze*, admissibility is a question of law.[37] As such, it requires determination, one way or the other.

[52] We conclude that the District Court Judge erred in finding the arming up text was a statement made in furtherance of the joint enterprise. It should not have been admitted in evidence against Mr Winter under s 22A.

---

35 CA judgment, above n 2, at [30].
36 At [32], quoted above at [29].
37 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49]–[52].

Was the arming up text inadmissible under s 8?

[53] Mr Huda argued that the prejudicial effect of the arming up text outweighed its probative value and it should therefore have been excluded under s 8 even if admissible under s 22A. This was based on the proposition that the jury would have interpreted the arming up text as associated with the Bandidos gang (with which Mr Hanson and Mr Winter were associated, as was apparent to the jury from evidence led at the trial) and concluded that it was customary for the gang to inflict violence using a weapon.

[54] As we have found the arming up text was inadmissible under s 22A it is unnecessary to engage with this argument. But as our analysis of the next issue illustrates, we do consider the prejudice alleged to have arisen was based on speculation and any actual prejudice was neutralised by the Judge's directions to the jury.

Did the wrongful admission of the arming up text lead to a miscarriage of justice?

[55] As mentioned earlier, the Judge's directions emphasised that the jury could not use the arming up text to prove that Mr Winter knew that Mr Hanson had a knife. He directed the jury that they could use the arming up text (and other related texts) to ascertain whether there was a common agreement between Mr Hanson and Ms McGrath. He also told the jury they could use the arming up text to prove that Mr Hanson was, in fact, arming up. He then gave the following direction:

> [89] If you find that Mr Kumar and Mr Winter entered the common agreement at a later stage, then you are able to use those texts involving Mr Hanson and Ms McGrath against Mr Kumar and Mr Winter. Remember however, that Mr Kumar and Mr Winter are not parties to those texts. Mr Kumar and Mr Winter did not see those texts involving Ms McGrath and Mr Hanson about, "Smashing Dan," or, "Arming up," but as I have said, those texts can be used by the Crown to prove a common intention on all of the parties to carry out a serious assault. You can also take those into account in considering whether there was any agreement by the parties who entered any common plan.
>
> [90] I direct you, however, that the texts cannot be used by you to prove knowledge that Mr Kumar and Mr Winter had any knowledge of the knife in the possession of Mr Hanson. That must be proved in some other way such as the Crown inviting you to draw the inference about the possession of the knife by Mr Hanson from the presence of the knife box.

[56] Mr Huda argued that the admission of the arming up text was prejudicial to Mr Winter because the jury would have associated it with the evidence about Mr Winter's connection to the Bandidos gang and interpreted it as saying that arming up was what the Bandidos do (construing the reference to "we" as a reference to the gang). He said this would have led the jury to conclude that Mr Hanson did arm himself with a knife, that it was his usual practice to do so when violence was contemplated, that it was customary for the Bandidos gang to use weapons in the course of violent conduct and that Mr Hanson would have informed the others in the group that he was armed given he told someone (his girlfriend) who was not a member. He said that the Judge's directions were given in the middle of a lengthy summing up and would not have neutralised this harm.

[57] We do not accept this submission. The jury knew of the connections with the Bandidos gang from other evidence given at the trial. They knew Mr Hanson had a knife when the assaults took place because they knew he had pleaded guilty to the charges which involved assaulting the victims with a knife. There is no reason to assume that the jury would then have made any assessment of what the Bandidos gang customarily did or what Mr Hanson would have told the other participants in the joint enterprise. In effect, the submission we are asked to accept is that the jury did exactly what the trial Judge told them not to do, and used the text to prove that Mr Winter had knowledge of Mr Hanson's possession of a weapon when the assault took place. There is no reason for us to assume that the jury failed in their duty to determine a case in accordance with the Judge's directions and we do not do so.

[58] Once the speculation about what the jury might have concluded about the Bandidos gang is put to one side, it becomes clear that the direction given by the Judge neutralised any prejudice that might have arisen from the admission of the arming up text. In those circumstances, we are satisfied that the admission of the arming up text did not lead to a miscarriage of justice as that term is defined in s 232(4) of the Criminal Procedure Act.

First point of appeal: conclusion

[59] We conclude that the arming up text should not have been admitted in evidence but that, given the Judge's directions to the jury, its admission did not lead to a miscarriage of justice. The first ground of appeal therefore fails.

Non-hearsay statements

[60] Before proceeding to the second ground of appeal, we comment briefly on a matter raised at the hearing but not the subject of extended argument.

[61] The argument in relation to the arming up text was predicated on the proposition that the arming up text was led to prove the truth of its contents and was therefore a hearsay statement. If it had been led only to prove that Mr Hanson *said* he was arming up, but not to prove that Mr Hanson actually was arming up, then it would not have been a hearsay statement as defined in s 4 of the Evidence Act. That would have raised an issue as to whether the statement was inadmissible under s 27(1), which provides that evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against a co-defendant only if admitted under s 22A. That would require us to resolve whether Mr Hanson, who had pleaded guilty before the trial but had not yet been sentenced, remained a "defendant" for the purposes of s 27(1), a subject discussed in the decision of Palmer J in *R v Wellington*.[38]

[62] Assuming Mr Hanson was a defendant for that purpose, then the arming up text, if it were not a hearsay statement, would arguably not be admissible at all. This is because s 27(1) provides that a statement by a defendant is admissible against a co-defendant only if admitted under s 22A, and s 22A allows only for the admission of hearsay statements, but not non-hearsay statements.

[63] This problem has been the subject of comment by Palmer J in *Wellington* and *R v Liev*.[39] The Law Commission has also referred to the problem in its report

---

[38] *R v Wellington* [2018] NZHC 2080 at [53]. Palmer J concluded that a person in a similar position to Mr Hanson was a defendant, which on the facts of the present case would make Mr Winter a co-defendant of Mr Hanson for the purposes of s 27(1). But see *Williams v R* [2017] NZCA 176, (2017) 28 CRNZ 471 at [18]–[24].

[39] *Wellington*, above n 38, at [61]–[69]; and *R v Liev* [2017] NZHC 830 at [14].

following its second review of the Evidence Act.[40] The Law Commission has recommended replacing s 22A with a new s 27AA, with the new section extending the ambit of what is now s 22A to cover both hearsay and non-hearsay statements. That would allow for the admission of a non-hearsay statement against a co-conspirator (assuming he or she was also a co-defendant) as long as the requirements that currently appear in s 22A were met. On the face of it, however, that would still not replicate the common law as explained in *Messenger*.[41] In *Messenger*, the Court of Appeal said:[42]

> … the existence of the conspiracy or joint enterprise must be shown to the requisite standard without the use of hearsay evidence. Statements made by other persons about what they are intending to do, against the background of their statements about what they have done, however, can be led as evidence of the state of mind of those other persons at the time of speaking. Such statements are led not to prove the truth of the participation of a person who is not a party to the conversation, but as facts from which the existence of the agreement or combination to engage in an illegal common enterprise may be inferred. The existence of a conspiracy can thus be shown by the statements of all alleged participants, including what they have said about the accused … .

Second point of appeal – included charges

[64] We turn now to address whether the Court of Appeal was right to reject the appellant's submission that the trial Judge erred in not directing the jury to consider an included lesser offence on the charge of wounding with intent. That question raises two principal issues. The first issue is as to the circumstances in which a judge is required to leave an included charge to the jury. The second issue is whether, applying the correct approach, an included lesser charge should have been left to the jury in this case.

[65] Included charges are dealt with in s 143 of the Criminal Procedure Act. Section 143 provides that where the commission of an offence "includes the commission of any other offence, the defendant may be convicted of that other offence

---

40 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at 243–244.

41 *Messenger*, above n 5. The position outlined in *Messenger* is consistent with the position in Australia, as described by the High Court of Australia in *Ahern v R* (1988) 165 CLR 87 at 93.

42 *Messenger*, above n 5, at [13].

if it is proved".[43] This case addresses the approach to s 143 but, for completeness, we note that s 110 of the Criminal Procedure Act provides that on a charge of murder "if the evidence proves manslaughter but does not prove murder" the jury may find the defendant guilty of manslaughter.

[66] It is common ground that whether or not the trial Judge was obliged to leave an included charge to the jury turns on whether that was necessary in the interests of justice. However, the appellant says that the assessment of the interests of justice in relation to the provision equivalent to s 143 in the United Kingdom now differs from that in New Zealand. It is the appellant's case that in contrast to the "broad", almost unfettered discretion referred to in the leading New Zealand authority,[44] the effect of the United Kingdom authorities is that the trial judge has no, or limited, discretion on this issue. Rather, there is a presumption that an included charge should be left. The appellant also says if an included charge is not left to the jury, that will almost inevitably lead to the conclusion the conviction should be quashed. By contrast, it is submitted the threshold for appellate intervention in New Zealand is a high one. Finally, the appellant contends that this Court should adopt the United Kingdom approach and, if that approach is applied, the failure to have left a lesser included charge in this case has given rise to a miscarriage of justice.

[67] The respondent's case is that there is no meaningful distinction between the United Kingdom and New Zealand approaches to the question of when an included charge should be left and no need to alter the way in which New Zealand courts approach this issue. The respondent accepts the threshold for appellate intervention where the trial judge has erred is expressed differently in the United Kingdom. However, the respondent says that the outcomes of the two tests are not, in practical terms, different. Finally, the respondent submits that the Court of Appeal approached the matter correctly because there was no included charge that could properly be left to the jury.

---

[43] Section 143 largely reflects the now repealed s 339(1) of the Crimes Act 1961. Section 339(1) provided that every count was "deemed divisible; and if the commission of the crime charged, as described in the enactment creating the crime or as charged in the count, includes the commission of any other crime, the person accused may be convicted" of any crime which is included, even though "the whole crime charged is not proved".

[44] *R v Mokaraka* [2002] 1 NZLR 793 (CA).

[68] We begin with a summary of the New Zealand position. Next, given the emphasis on the United Kingdom approach, we discuss the relevant authorities from the United Kingdom. There was some discussion before us of the approach in Canada and Australia and we canvas the relevant authorities in those jurisdictions before discussing in more detail the way in which New Zealand courts have approached the matter.

The position in New Zealand

[69] In the leading case of *R v Mokaraka*, Mr Mokaraka and his co-accused, Mr Te Hira, were convicted of one charge of aggravated burglary.[45] On their appeal against conviction they contended that the trial Judge erred in declining to leave with the jury the lesser included charge, entering with intent. Mr Te Hira's appeal on this point was successful but the Court rejected Mr Mokaraka's appeal on this ground. In determining the appeals the Court of Appeal considered the principles applicable to included charges. The Court began by noting that just because an included charge was possible that did not mean it must be left to the jury, rather, that was a matter of discretion for the trial judge. The relevant test was what was "necessary in the interests of justice".[46] What was necessary in the interests of justice was to be determined in this way:[47]

> … there must be a live issue as to whether no more than the elements of the lesser charge will be proved. The question of lesser verdicts need not be addressed if it simply does not arise on the way in which the case was presented to the Court: … .

[70] Further, the Court said:[48]

> The question is whether the evidence raises the very real possibility that all the elements of the included charge will be established without the additional elements required for the major charge. The jury must have been squarely confronted with that possibility.

[71] The Court noted there would be circumstances where nonetheless an included charge should not be put. In a subsequent decision of the Court of Appeal, the

---

45 *Mokaraka*, above n 44.
46 At [14].
47 At [15].
48 At [15].

circumstances identified by the Court as "[telling] against putting the included charge" were aptly summarised as follows:[49]

> … the lesser charge is trifling whereas the principal charge is very serious such that the lesser charge could distract the jury; the question of included charges is raised too late in proceedings such that prejudice results to one party in the way the trial is conducted; the inclusion of the lesser charge provides a pretext for the jury softening its verdict where, if it discharged its duty, it could only find the accused guilty on the principal charge or not guilty; … .

[72] The Court in *Mokaraka* stated that, ultimately, there remained:[50]

> … a broad discretion to be exercised by the trial Judge in the light of the particular circumstances of the particular case. The aim is to ensure that the issues left to the jury reflect those that fairly arise on the evidence without unnecessary distractions.

[73] Finally, the Court said that the threshold for appellate intervention was limited to those situations where the Court was "satisfied that the jury may have convicted out of a reluctance to see the defendant get away with what, on any view, was disgraceful conduct".[51] In this respect the Court applied the approach in *R v Maxwell* which, as we will see, is no longer followed in the United Kingdom.[52]

The position in the United Kingdom

[74] The statutory framework in the United Kingdom is similar to that in New Zealand.

The relevant statutory provisions

[75] Section 6(3) of the Criminal Law Act 1967 (UK) (the 1967 Act) equates with s 143 of the Criminal Procedure Act and provides that:

> (3) Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court

---

49 *R v McDonald* [2007] NZCA 142 at [11(c)]; leave to appeal declined: *McDonald v R* [2007] NZSC 66 (the Court noted it was not suggested that the principles in *Mokaraka* were wrong: at [3]).

50 At [18].

51 At [18].

52 *R v Maxwell* [1990] 1 WLR 401 (HL).

> of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

[76] Section 6(2) of the 1967 Act equates with s 110 of the Criminal Procedure Act. Section 6(2) provides for a verdict of manslaughter or of causing grievous bodily harm with intent to do so to be substituted on an indictment for murder where a defendant is found not guilty of murder.

The relevant authorities

[77] The current position in the United Kingdom is as set out by the House of Lords in *R v Coutts*.[53] But it is necessary to make some reference first to the earlier House of Lords decision, *R v Maxwell*, the leading case prior to *Coutts*.[54]

[78] Mr Maxwell was convicted of robbery. At trial, he admitted making arrangements connected with the robbery. However, he maintained he had never intended there would be violence used on the family who were the victims of the crime so as to be guilty of robbery. He made a submission at trial that if charged with the lesser offence of burglary he would have pleaded guilty to it. The prosecution was not prepared to seek leave to amend the indictment. In the course of deliberations, the jury asked whether conviction on a lesser charge was an available option. The trial Judge told them that was not possible. Because of the emphasis placed by the defence on the possible alternative of burglary, there was no suggestion the jury could have brought in a verdict of guilty on the even lesser offence of theft.

[79] On the facts of the case, the House of Lords considered the refusal to amend the indictment by adding a count of burglary was correct where the alternative would have been a distraction. Their Lordships also considered the Judge was entitled not to distract the jury by leaving the charge of theft where theft was so relatively "trifling" a charge in comparison to the principal offence.[55] Lord Ackner, delivering the

---

53 *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154.
54 *R v Maxwell*, above n 52.
55 At 408 per Lord Ackner.

judgment of the House of Lords, said that before interfering with a verdict on the basis an included charge should have been left, the appellate court:[56]

> … must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. If they are so satisfied then the conviction cannot be safe or satisfactory.

[80] This position was reconsidered in *Coutts*. Lord Bingham explained the principles underlying the approach to included charges in this way:[57]

> 12 In any criminal prosecution for a serious offence there is an important public interest in the outcome: … The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it.

[81] Lord Bingham went on to note the trial judge had the ultimate responsibility in this respect.

[82] Their Lordships unanimously agreed that the *Maxwell* description of the threshold for appellate intervention was no longer appropriate. In its place the House of Lords, with reference to Australian authorities, adopted a new test applicable other than in summary cases.[58] Slightly differing formulations for the test as to when an

---

56 At 408.

57 *Coutts*, above n 53.

58 Lord Bingham at [20] noted the observation of Callinan J in *Gilbert v R* [2000] HCA 15, (2000) 201 CLR 414 at [101] that: "The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice". See also at [88] per Lord Rodger and [100] per Lord Mance.

included charge should be left were expressed in each of the speeches in *Coutts*. However, the approach taken is aptly summarised by Lord Mance in this way:[59]

> … where, … an obvious alternative verdict presents itself in respect of some more than trifling offence and can without injustice be left for the jury to consider, the judge should in fairness ensure that this is done, even if the alternative only arises on the defence case in circumstances where as a matter of law there should apart from that alternative be a complete acquittal.

[83] Their Lordships also agreed that in some cases it would still nonetheless not be appropriate to leave an included charge. For example, Lord Mance stated that the obligation to leave an included charge did not apply where the alternative was "trifling".[60] Nor did the obligation apply where that would "infringe a defendant's right to a fair trial".[61] For example, where trial decisions would not have been made if the possibility of this alternative verdict was envisaged.[62] Their Lordships concluded that manslaughter should have been left to the jury as an alternative to murder in that case even though the defence at trial did not want manslaughter to be left to the jury.[63]

[84] The approach in *Coutts* has been applied and explained in a number of cases subsequently. It is worthwhile canvassing some of these authorities to provide a snapshot of the nature of the obligation on the trial judge.

[85] We begin with the decision of the Court of Appeal of England and Wales in *R v Ali*.[64] The appeal from conviction on a single charge of causing grievous bodily harm with intent was allowed in that case and a conviction for assault occasioning actual bodily harm was substituted. This was on the basis an alternative verdict should have been left to the jury and the conviction was unsafe because of the omission to do so.

---

59 At [100]. See also at [23] per Lord Bingham, [39] per Lord Hutton and [84] per Lord Rodger. Lord Nicholls agreed with the reasoning of the other judges: at [28].

60 At [100].

61 At [24] per Lord Bingham. See also at [45] per Lord Hutton and [84] per Lord Rodger.

62 At [24] per Lord Bingham, [45] per Lord Hutton and [84] per Lord Rodger.

63 It is accepted for present purposes that nothing turns on the fact *Coutts* dealt with murder and manslaughter. Nothing turns on this distinction in the United Kingdom: *R v Foster* [2007] EWCA Crim 2869, [2008] 1 WLR 1615 at [36].

64 *R v Ali* [2006] EWCA Crim 2906.

[86] The facts of that case were that there had been some friction between the appellant and the complainant. The complainant said he was attacked whilst sitting in his car by the appellant and two other men. His evidence was that the appellant had kicked him and then the three men set upon him with weapons. The appellant accepted there had been some sort of altercation outside of the car although not of the type described by the complainant. He also accepted he had punched the complainant.

[87] It was accordingly apparent that there was a real issue as to whether the injuries amounted to grievous bodily harm and whether the appellant acted with the requisite intent. Indeed, the trial Judge had raised the possibility of including an alternative verdict and the Crown supported the suggestion. It was, however, resisted by defence counsel. Nonetheless, the Court of Appeal said the appellant could rely on appeal on the failure to leave the alternative count. Moreover, the Court stated that anyone defending the appellant:[65]

> … would anticipate that, once a stance was taken on lack of intent and/or lack of grievous bodily harm, the possibility of an alternative count stood out like a sore thumb.

[88] Next, the Court considered whether the conviction was unsafe as a result. The Court noted there was evidence on which the jury could convict on the grievous bodily harm charge. But, because "there were genuine issues as to intent and to the proper description of the injury", the Court concluded the conviction could not stand.[66]

[89] In *R v Foster* the Court of Appeal discussed *Ali* in the context of a more extended discussion of *Coutts*.[67] The Court said that *Ali* and the other cases referred to illustrated it did not automatically follow from a defendant's admission of a lesser or different crime that a lesser charge had to be left to the jury. For example, there may be cases where the alternative verdict was "remote from the more serious allegation made by the prosecution and the real issues in the case".[68] Rather, the effect of *Coutts* was that before any obligation to leave an alternative arose, that alternative must be "obviously" raised by the evidence.[69] That means that the verdict must

---

65 At [8].
66 At [11].
67 *R v Foster*, above n 63, at [36].
68 At [59].
69 At [54].

suggest itself to the mind "of any ordinarily knowledgeable and alert criminal judge".[70] The Court added that there was "a proportionality consideration" in addition to "specific issues of fairness".[71] Thus, the Court continued:[72]

> The judge is not in error if he decides that a lesser alternative verdict should not be left to the jury if that verdict can properly be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case. He must, of course, reconsider any decision he may have reached about alternative verdicts in the light of any question which the jury may see fit to ask, … However when the defence to a specific charge amounts to the admission or assertion of a lesser offence, the primary obligation of the judge is to ensure that the defence is left to the jury. If it is not, on elementary principles, the summing up will be seriously defective and the conviction will almost inevitably be unsafe.

[90] The Court explained that the assessment of whether a lesser alternative should be left required:[73]

> … an examination of all the evidence, … and the issues of law and fact to which it has given rise. Within that case specific framework the judge must examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the judge enjoys "the feel of the case" which this court lacks. On appeal the problem which arises is not whether a direction in relation to a lesser alternative verdict was omitted, and whether its omission was erroneous, but whether the safety of the conviction is undermined.[74]

[91] As is apparent, an important consideration in this analysis is whether the included charge reflects a possible conclusion the jury could reach. For example, in one of the appeals consolidated in the *Foster* case, Mr Newman was convicted of attempted murder. The complainant was the director of the business at which Mr Newman worked. Mr Newman accepted his responsibility for her injuries (he grabbed her by the throat and did not release her until she fell to the ground). On appeal, he argued that an included charge of either assault occasioning bodily harm or

---

70 At [54], citing *Coutts*, above n 53, at [23] per Lord Bingham. Lord Hutton further commented in *Coutts* that the alternative verdict should only be left to the jury if it was one to which "a jury could reasonably come": at [62], citing *Von Starck v R* [2000] 1 WLR 1270 (PC) at 1275.

71 At [61].

72 At [61].

73 At [61].

74 Lucraft, above n 26, at [7-99] suggests that the final sentence of this excerpt is not consistent with *Coutts* because "The omission will only be erroneous if the jury ought to have been instructed about the available alternative, which they only ought to have been if it was an 'obvious' alternative."

attempting to cause grievous bodily harm should have been put to the jury. The first was considered to be trifling and the second did not arise on the defendant's evidence because the single issue at trial was his intention to kill; on his evidence he did not intend to harm her.[75]

[92] Reference can also be made to three further illustrations of the application of *Coutts* to cases involving charges of wounding with intent to cause grievous bodily harm.

[93] The appellant in *R v Hodson* was convicted of wounding with intent to cause grievous bodily harm.[76] A discussion in a night club became heated. At one point the complainant was hit in the face with a glass the appellant had been holding. The glass broke when it contacted the complainant's face resulting in a 10 cm cut requiring surgery. The prosecution case was that the appellant deliberately hit the complainant. The appellant's defence was one of self-defence or accident (an involuntary upward movement). An expert for the prosecution said the injury could well have occurred from a single blow in an upward movement.

[94] The Court allowed the appeal on the basis the conviction was unsafe as a lesser charge had not been left. In doing so, the Court found the jury could have concluded Ms Hodson had intentionally hit the complainant with the glass but did not have the intent to cause grievous bodily harm. The Court referred to the commentary on *Coutts* in *Foster* noting that if the alternative verdict was:[77]

> … a realistically available verdict on the evidence, as an interpretation properly open to the jury, without trivialising the offending conduct, then it should be left.

[95] In a different case involving a defendant with the same surname as that described above, *R v Foster*, the Court quashed the appellant's conviction for causing grievous bodily harm with intent and substituted a conviction for a lesser charge.[78] That case involved a fight outside a bar whilst Mr Foster waited for a taxi. During the

---

75 At [72].
76 *R v Hodson* [2009] EWCA Crim 1590, [2010] Crim LR 248.
77 At [10].
78 *R v Foster* [2009] EWCA Crim 2214.

trial and on appeal, he argued an alternative lesser charge of assault occasioning actual bodily harm should have been put to the jury. The Court said although the prospect of an alternative had not been raised until just prior to the closing addresses, that was not too late.

[96] The issue of the alternative charge arose there because of the "highly equivocal" evidence about the gravity of the injuries.[79] In those circumstances, the Court was satisfied the lesser charge should have been left.

[97] In summary, we consider the position from the United Kingdom is:[80]

(a) The decision whether to put the included charge is a matter for the trial judge.

(b) The primary test is whether the alternative verdict would suggest itself to the mind of an ordinarily knowledgeable and alert criminal judge.

(c) Such a verdict should ordinarily be left if it is obviously raised on the evidence.

(d) The mere absence of the choice is capable of making a conviction unsafe.

(e) Not every theoretical alternative verdict must be left to the jury. This analysis is fact specific. Examples of included charges that need not be put to the jury include:

(i) A verdict for which there is no evidential basis.

(ii) Where the alternative would be insignificant in comparison to the principal charge.

(iii) Where to leave the verdict would result in unfairness to a party.[81]

---

79 At [26].

80 This summary draws heavily on summaries provided by the Court of Appeal in *R v Matthew* [2010] EWCA Crim 1859 at [15]; and *R v Barre* [2016] EWCA Crim 216, [2016] Crim LR 768 at [22]. See also the summary of principles provided in Lucraft, above n 26, at [4-532]–[4-533].

81 In summarising the position in *R v Foster*, above n 63, at [51], the Court referred to the need to "have in mind the possibility of any consequent unfairness, usually to the defendant, but not excluding the possibility of unfairness to the prosecution". In other cases the focus is on the possibility of unfairness to a defendant, for example, in *R v Matthew*, above n 80, at [15] and in *R v Barre*, above n 80, at [22]. We do not, however, read those cases as excluding the possible relevance of unfairness to the prosecution.

(f) In all cases, the crucial question for the appellate court is whether the verdicts are unsafe because an available alternative verdict was not left.

Canada

[98] The position in Canada is as set out in *Smith v R* in which the Supreme Court of Canada dealt with a Crown appeal against acquittal on a charge of rape.[82] The Court said offences of attempted rape and indecent assault should have been left to the jury where consent and penetration were live issues. Delivering the judgment of the Court, Laskin CJ said that the trial judge did not have an "untrammelled discretion to choose or refuse to charge the jury on included offences".[83] Rather, the trial judge:[84]

> … must be governed by the issues that are thrown up by the evidence. There may be cases where evidence of an issue referable to an included offence is so tenuous as to justify him in refusing to charge on it, and yet he would not necessarily be in error if he did so charge.

[99] Some useful guidance on the application of *Smith* was provided by the Ontario Court of Appeal in *R v Wong*.[85] Delivering the judgment of the Court, Doherty JA said this of the obligation to leave an included charge:[86]

> A trial judge is not, however, obliged to instruct a jury on all offences that are as a matter of law included offences. The trial judge's obligation to instruct on included offences will depend on the evidence led, the issues raised and the positions of the parties: see *R v Smith*. It has long been recognized that in some cases, having regard to the entirety of the evidence, the issues raised by the evidence, and the positions taken by the parties, an "all or nothing" instruction leaving the jury with only two possible verdicts — guilty or not guilty — is appropriate … .

[100] That case involved a charge of aggravated assault by wounding. It was accepted that the appellant had struck the complainant across the chin with a knife. There were two defences: first, a lack of intention to strike the complainant with the knife and, second, self-defence. The appellant was convicted of an included lesser charge of assault causing bodily harm. On appeal, he argued that the lesser charge should not have been left to the jury as this was an "all or nothing" case. That

---

82 *Smith v R* [1979] 1 SCR 215.
83 At 216.
84 At 216.
85 *R v Wong* (2006) 209 CCC (3d) 520 (ONCA).
86 At [11] (citation omitted).

characterisation of the case was accepted by the Court of Appeal and the appeal was allowed.

[101] Subsequent cases have distinguished *Wong* but only on the basis of the facts of the case.[87] More recently, *Smith* and *Wong* were relied on in *R v Romano*.[88] David Paciocco JA set out the principles as follows:

> 13 It is generally necessary for a trial judge to charge the jury about included offences: see *R v Smith* [1979] 1 SCR 215. This is because a person charged with an offence that includes another offence is effectively put on notice that they are alleged to have committed both offences, and are technically charged with both offences.
>
> 14 The law is sensible, though. As was recognized in *R v Luciano* 2011 ONCA 89, (2011) 273 OAC 273 at para 75:
>
> > The obligation of a trial judge to instruct jurors about the availability of a verdict of an included offence is … conditioned upon an air of reality in the evidence adduced at trial to permit a reasonable jury, properly instructed, to conclude that the essential elements of the included offence have been established.
>
> 15 The propriety of refusing to leave the jury with a verdict option that a reasonable jury, properly instructed, could not arrive at makes obvious sense. A jury should not be left with the option of making an unreasonable decision.
>
> 16 It follows that included offences that cannot lead to legally appropriate verdicts should not be left with juries. [Citing *R v Wong* at [12].]

Where a lesser included charge should have been left to the jury, that is treated as an error requiring reversal.[89] However, it has been accepted that there may be cases where despite that error the Crown can show the verdict would "necessarily have been the same had the error not been committed".[90]

Australia

[102] The Australian approach is expressed in broadly similar terms except that the High Court of Australia has made it clear there are separate principles applicable to

---

87 For example, *R v Mikasinovic* 2018 ONCA 573, (2018) 147 WCB (2d) 512 at [7]; and *R v Lewis* 2017 ONCA 216, (2017) 137 OR (3d) 486 at [15].

88 *R v Romano* 2017 ONCA 837, (2017) 41 CR (7th) 305.

89 *R v Sarrazin* 2011 SCC 54, [2011] 3 SCR 505 at [31].

90 *R v Jackson* (1991) 68 CCC (3d) 385 (ONCA) at 431; aff'd *R v Jackson* [1993] 4 SCR 573.

murder and manslaughter.[91] In *James v R*, the High Court was dealing with s 239 of the Criminal Procedure Act 2009 (Vic). That section is based on s 6(3) of the 1967 Act.[92] Section 239 relevantly provides as follows:[93]

> (1) On a trial on indictment for an offence other than treason or murder, if the jury finds the accused not guilty of the offence charged but the allegations in the indictment amount to or include, whether expressly or impliedly, an allegation of another offence that is within the jurisdiction of the court, the jury may find the accused guilty of that other offence.

[103] The majority in *James v R* saw the trial Judge's duty in relation to directions on alternative verdicts as "an aspect of the duty to secure the fair trial of the accused".[94] Whether the failure to leave an alternative verdict gave rise to a miscarriage of justice depended on the appellate court's assessment of what was required in the interests of justice.[95] The Court continued:[96]

> That assessment takes into account the real issues in the trial and the forensic choices of counsel. As earlier noted, not infrequently defence counsel will decide not to sully the defence case (that the only proper verdict is one of outright acquittal) by an invitation to the jury to consider the accused's guilt of a lesser offence. Such a forensic choice does not prevent counsel from submitting that the alternative verdict should nonetheless be left. Much less does it prevent counsel from making that submission where, as here, he or she is asked about the matter. It remains that the forensic choices of counsel are not determinative. The duty to secure a fair trial rests with the trial judge and on occasions its discharge will require that an alternative verdict is left despite defence counsel's objection.

[104] On the facts of that case a majority of the Court found that the omission to leave the alternative charge had not given rise to a miscarriage of justice. The

---

91 *Gilbert v R*, above n 58, and *Gillard v R* [2003] HCA 64, (2003) 219 CLR 1 set out the principles applicable to murder and manslaughter. In *James v R* [2014] HCA 6, (2014) 253 CLR 475 at [23] the Court said "*Gilbert* and *Gillard* do not state any wider principle respecting the obligation to leave alternative verdicts for included offences (including alternative verdicts for offences other than manslaughter on an indictment of murder) or the consequences of the failure to do so" (footnote omitted).

92 *James v R*, above n 91, at [14].

93 The position in the other States in Australia varies somewhat. Unlike in Victoria, other States provide for specific instances where alternative verdicts may be given. See for example Criminal Procedure Act 1986 (NSW), s 162 (dealing with alternative verdicts of attempts or assault); and Criminal Code Compilation Act 1913 (WA), ss 10A–10I (provides that a person may be convicted of an alternative verdict where available and a series of instances where those verdicts are available).

94 At [38].

95 At [38].

96 At [38].

appellant had been convicted of intentionally causing serious injury to another person. The alternative count before the jury was that of recklessly causing serious injury to another person. Following a jury question the trial Judge refused to leave a further alternative count, namely, that the appellant had intentionally caused injury to the complainant.

[105] The complainant had suffered numerous injuries after being struck by a car which the appellant was driving. The defence case was that the complainant was struck accidentally while the appellant moved his car in reverse to try to get away from the complainant, "who was menacing him with a knife".[97]

[106] The majority concluded that fairness did not require an additional alternative charge to be left to the jury. The majority said:[98]

> To have instructed the jury on the alternative verdicts at the conclusion of the trial might rightly be judged to have jeopardised the appellant's chances of acquittal. It might have done so because the central issue at trial – had the prosecution excluded the reasonable possibility that the appellant struck Mr Sleiman inadvertently as he manoeuvred the vehicle – may have been blurred in a summing-up which introduced additional, uncharged, pathways to conviction.

Application of *Mokaraka* in New Zealand

[107] A discussion of some of the other New Zealand authorities exemplifies the way in which *Mokaraka* has been applied in practice.

[108] We can begin with the case counsel identified as the only example they had located which succeeded on this ground post-*Mokaraka*, that is, *Piwari v R*.[99] Ms Piwari was convicted after trial along with her partner of aggravated robbery of a pharmacy. One of the principal offenders pleaded guilty to aggravated robbery. Aggravated robbery was charged on the basis the offenders were armed with an imitation pistol.

---

97 At [1].
98 At [48].
99 *Piwari v R* [2010] NZCA 19.

[109] Ms Piwari accepted she had gone into the pharmacy to buy latex gloves some minutes prior to the robbery and that she was the driver of the getaway vehicle. Her defence was that the two co-offenders did not reveal their intention to rob the pharmacy before they left the vehicle. On this basis, she said she was not a party to the crime. Her secondary defence was that, even if a party, there was no evidence she knew an imitation pistol would be used and so she should not be convicted of aggravated robbery.

[110] On appeal it was argued robbery should have been left as an alternative charge. The jury had asked about this. The trial Judge accordingly discussed the matter with counsel. The Crown suggested the Judge might direct on robbery as an included verdict but, after taking instructions, defence counsel resisted that. The jury were not directed on robbery.

[111] The Court of Appeal considered the omission had given rise to a "material" error.[100] Despite the view of defence counsel, robbery should have been put and the Court noted there was "an evidential foundation in support of robbery and no suggestion of prejudice".[101] Further, the Court saw this as a case where the error had given rise to a risk of a miscarriage of justice where:[102]

> There is no direct evidence capable of showing that the appellant was aware of the presence of the imitation pistol in the build-up to the robbery. Nor do we think an inference to that effect was available. It follows that the failure to put robbery as an included charge was a causative error.

[112] The conviction for aggravated robbery was quashed and one for simple robbery substituted.

[113] In *R v McDonald* the Court of Appeal dismissed an appeal against conviction for wounding with intent to injure.[103] The charges arose out of an incident of domestic violence. It was argued on appeal that a charge of common assault should have been included.

---

100 At [23].
101 At [24].
102 At [25].
103 *McDonald*, above n 49.

[114] The appellant in his statement to the police accepted that in response to violence from the complainant whilst they were in the lounge he had punched her in the face a couple of times. On the Crown case, amongst other things, the appellant had kicked the complainant in the face while she lay on the bedroom floor.

[115] The Court rejected the argument based on the failure to leave an included charge on the following basis: the assault the appellant accepted had occurred was not the subject of any charges; there was no proper evidential basis for the alternative scenario which would have founded the included charge; the verdict of not guilty was "clearly available" on the evidence; and, if the complainant's evidence was accepted "there would be no trouble in finding the requisite intent for the charge as laid by the Crown".[104] This case accordingly is factually similar to Mr Newman's case which was considered in *Foster* because there was an absence of any narrative at trial to found the included charge.[105]

[116] *R v Li* is another illustration of a case where the failure to put the alternative included charge was not critical because it was not "fairly raised on the evidence".[106] Ms Li was convicted of forgery under s 256(1) of the Crimes Act. The charges arose out of a printing business Ms Li ran which sold counterfeit degrees and diplomas. Under s 256(1) it is an offence to make a false document with intent to benefit. On appeal she argued that an alternative charge under s 256(2) of making a false document, knowing it to be false, with intent that it be used should have been left to the jury. It was not considered necessary to put that lesser charge where Ms Li's defence was that she was not the forger or counterfeiter. In addition the Court said there was "clear evidence" that would satisfy the use requirement in terms of s 256(1).[107] Again, on that basis, there would be no different outcome applying *Coutts*.

[117] *R v Feterika* provides a further example of the application of the principles in *Mokaraka*.[108] Mr Feterika was convicted of wounding with intent to cause grievous bodily harm.[109] The Crown case was that Mr Feterika's punch to a man believed to

---

104 At [15].
105 See above at [91].
106 *R v Li* [2007] NZCA 402, [2008] 1 NZLR 554 at [26].
107 At [26].
108 *R v Feterika* [2008] NZCA 127.
109 Crimes Act, s 188(1).

be a rival gang member was a signal to the other defendants that they were to engage. The complainant was then assaulted by a number of other gang members, some of whom had weapons. Mr Feterika was charged as a party under either s 66(1) or (2) of the Crimes Act. The Crown also said Mr Feterika was in a car that was part of a convoy travelling to the fight and that he knew others in the vehicles were armed. This, it was said, meant he knew that grievous bodily harm was a probable consequence of the fight.

[118] Mr Feterika's case was that he "coincidentally came upon the scene";[110] he was acting in self-defence when he hit the complainant and denied knowing what was going to happen or encouraging others to attack the complainant.

[119] The Court in rejecting Mr Feterika's argument based on the omission to leave an included charge noted there was no issue that the complainant had been wounded and had suffered serious bodily harm.[111] In terms of his case, therefore, the Court said:[112]

> … the jury questions were whether the Crown could prove he was a party … and disprove that he was acting in self-defence at the time. If the appellant's evidence was accepted, then he would not have been guilty of any criminal offending.

[120] This result accords with the approach in the United Kingdom. The defence was run on the basis Mr Feterika had not committed an offence at all and the harm to the complainant was not in issue.

[121] The appellant in *Saili v R* was convicted of an offence under s 188(1) of the Crimes Act.[113] He appealed against conviction on the basis the trial Judge's decision to decline to amend the indictment to include a lesser charge had caused a miscarriage of justice.

[122] The charge arose out of an incident in which the complainant was badly beaten. Mr Saili said he had punched or kicked the complainant between 50 and 120 times and

---

110 At [7].
111 At [31].
112 At [31].
113 *Saili v R* [2012] NZCA 149.

hit him with a weapon. The Crown relied on the "ferocity and duration" of the attack to establish intent.[114] Whether the necessary intent was established was the trial issue and the defence relied on psychiatric reports as to Mr Saili's mental health difficulties as well as the consumption of alcohol.

[123] The Court of Appeal gave three reasons for dismissing the appeal. First, this was an "all or nothing" situation, either Mr Saili caused the grievous bodily harm with the requisite intent or he had no intention to cause harm.[115] Secondly, the Court saw the case as different from *Mokaraka*. The Court suggested Mr Te Hira's appeal in *Mokaraka* had succeeded in part because the Judge had declined to leave the lesser charge in the face of the jury's question as to whether the jury could consider a lesser charge. In addition, in *Mokaraka* the Judge had not cautioned the jury against convicting Mr Te Hira out of a "reluctance to see him get away with … disgraceful conduct".[116] In Mr Saili's case there had been no request from the jury and the Judge directed the jury not to think along those lines. Finally, the Court saw the inclusion of a lesser charge as risking "a compromise verdict, or diverting the jury from its task".[117]

[124] The second of these reasons would not be relevant now in the United Kingdom context. But, because the defence was run on an all or nothing basis as to intent, there was no real alternative to put so no difference in outcome was possible. Further, the ongoing nature and ferocity of the blows distinguished *Saili* from *Hodson*, for example, where the Court found the jury could have concluded that while the striking was intentional there was no intention to cause grievous bodily harm.

[125] It is useful also to refer to *Haimona v R* which involved a challenge to a conviction of wounding with intent to cause grievous bodily harm.[118] Mr Haimona was discharged on a further count of wounding with intent to injure. The charges arose out of an attack outside a community hall. There were two victims, one of whom was very seriously injured suffering fractures to his skull and brain haemorrhaging.

---

114 At [8].
115 At [18].
116 At [19(b)].
117 At [21].
118 *Haimona v R* [2011] NZCA 375.

[126] The Crown case was that Mr Haimona, along with two others, was a party to the attacks on both complainants and that all three either inflicted kicks or blows on the complainant who was seriously injured, or assisted or encouraged the infliction of the more serious injuries. The Crown put its case on an "all or nothing" basis. Mr Haimona's defence was that he had not kicked the complainant at the relevant time. He admitted an earlier (more minor) assault but said he had not participated in the much more serious assault. In summing up the Judge also put to the jury that the defence case included a suggestion Mr Haimona lacked the intent to cause grievous bodily harm as he did not know his co-defendant would kick the victim in the head. No alternative count was put although the prospect was raised over the course of the trial.

[127] The Court of Appeal said that in the circumstances "the possibility of an included charge of assault could not arise" on the primary defence for Mr Haimona which was that he had not kicked the complainant who had suffered the more serious injuries on the pathway.[119] Rather, the Court observed:[120]

> It could arise only on the alternative defence [of] lack of intent. That was an issue for the jury. We consider that to have left to the jury an included count of assault, in the event that the jury found that Mr Haimona had kicked [the complainant] … but did not have the requisite intent to establish the more serious charge, would have involved a serious risk of distracting the jury from the real point of the case.

[128] The Court considered the position was further complicated by the fact Mr Haimona had admitted an assault on the victim earlier in the fracas. The Court saw this as strengthening not weakening the case against leaving the included charge of assault. That was because:[121]

> On the very clear summary of the respective cases for Crown and defence given by the judge, … the focus of the jury was placed squarely on events while [the seriously injured complainant] was lying on the pathway. It would have been entirely inappropriate to leave with the jury an included charge of assault based on that earlier assault, which was not the assault relied upon by the Crown as making Mr Haimona liable as a party to the more serious offence.

---

119 At [17].
120 At [17].
121 At [19].

[129] Finally, the Court also placed some reliance on the clarity of the Judge's directions in summing up and on inclusion of the usual direction to put aside feelings of sympathy or prejudice.

[130] Again, no different outcome would have been reached on similar facts in the United Kingdom. There may have been some question about intent but it is hard to see how it could have been accepted Mr Haimona did not foresee grievous bodily harm would eventuate from the kicking, punching and stomping of the complainant. Moreover, given the life threatening nature of the injuries inflicted, a conviction for assault would have been trifling by comparison to wounding with intent to cause grievous bodily harm.

[131] Finally, to complete this survey of the New Zealand authorities, we note that in *Ropiha v R*, the Court of Appeal dismissed an appeal against conviction which was brought primarily on the basis that a miscarriage of justice had occurred because the trial Judge had left an included charge to the jury.[122] Mr Ropiha was acquitted on a charge of assault with intent to injure and found guilty on a charge of common assault, the included charge. Defence counsel at trial had opposed the addition of the included charge on the basis that would be a distraction.

[132] The Court in dismissing the appeal noted the authorities on included charges had "established the general principle that the underlying issue is the need for there to be a fair trial from the defendant's perspective".[123] Referring to *Mokaraka* and to the decision of the High Court of Australia in *James*, the Court considered the question for a trial judge is "normally to balance the choice made by the prosecutor to frame a charging document in a particular way, and the fair trial interest (from the defendant's perspective) of leaving the jury with the included charge where it is properly available".[124] The Court suggested that this was the context of the observation in *Mokaraka* that there will be "few" cases in which a trial judge will be required to take the initiative was to be understood.[125] Usually, the initiative will come from the defence.

---

122 *Ropiha v R* [2014] NZCA 633.
123 At [17].
124 At [26].
125 At [26].

[133] On the facts of that case where there was no risk of prejudice or unfairness to Mr Ropiha, the Judge made no error in leaving the included charge.[126]

[134] We turn now to consider whether there is in fact a practical difference between the approach in New Zealand and that in the United Kingdom in the way in which the trial judge's obligations should be expressed.

A different approach in New Zealand?

[135] The Court of Appeal in the present case identified two principal differences between the position in the United Kingdom and that in New Zealand. The first of these differences related to the nature of the obligation on the trial judge and the second concerned the threshold for appellate intervention. As to the first, the Court said that in the United Kingdom:[127]

> … it is not a matter of broad discretion for the trial judge to direct the jury on an included offence when one of the elements of the offence charged is in doubt but the defendant is plainly guilty of some offence. The trial judge must do so where there is an obvious alternative offence which is raised by the evidence. While it may suit either side not to have the included charge put to the jury for tactical reasons, the trial judge has a responsibility to do so in the interests of justice …

[136] On the second aspect, the Court observed that in the United Kingdom:[128]

> … where an obvious included offence is not put to the jury, an appellate court's intervention is not subject to being satisfied that the jury may have convicted out of a reluctance to see a defendant "get away" with disgraceful conduct. The failure to put an obvious included offence raised by the evidence is a material misdirection rendering the conviction unsafe.

[137] The Court said it was not necessary to resolve the differences it had identified because there was no included charge that could properly be left to the jury and, in addition, it was not appropriate for a divisional court to undertake the review sought by the appellant.

---

126 The Court placed some reliance on *R v Lahaye* [2005] EWCA Crim 2847, [2006] 1 Cr App R 205 where the same issue was considered by the Court of Appeal of England and Wales.

127 CA judgment, above n 2, at [48] (footnotes omitted).

128 At [49].

[138] At first blush the reference in *Mokaraka* to a "discretion" which is "broad" suggests a trial judge in New Zealand has greater leeway and less of an obligation than is the case in the United Kingdom. As we have seen, however, an analysis of the New Zealand cases in which reliance has been placed on this ground to challenge a conviction shows the same factors are considered in very much the same way with no discernible difference in outcome. Importantly, the situations in which it will be necessary in the interests of justice to leave an included charge are characterised in similar terms. The United Kingdom formulation refers to what "obviously" arises on the case and all of the evidence and the New Zealand approach refers to what "squarely confronts" the trial judge on the case and all of the evidence. As to the countervailing considerations, again, there is reasonable consistency across the two jurisdictions as to the nature of those considerations.

[139] The way in which the threshold for appellate intervention is expressed in the two jurisdictions is different.[129] And, as we discuss below, we do not consider *Maxwell* should continue to apply as the threshold. That said, our survey of the cases suggests there has been no substantive difference in application.

[140] It follows that we consider that the approach taken in the two jurisdictions as it has been applied is broadly consistent. We now address whether, despite the consistency in approach, the test for what is necessary in the interests of justice should be re-formulated.

The principles to be applied

[141] The policy considerations underlying the interests of justice test are captured very well in the excerpt we have quoted from Lord Bingham in *Coutts*.[130] Fair trial interests which in turn may involve considerations of defence autonomy are also relevant. (In referring to defence autonomy we make it clear that is not to deny the responsibility that remains with the trial judge.)[131] In addition, the approach should

---

129 The terminology in the United Kingdom reflects the language in the Criminal Appeal Act 1968 (UK), s 2(1)(a).

130 See above at [80].

131 Further, as this Court noted in *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 there will be "rare cases, … where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown" to have given rise to a miscarriage of justice: at [67].

continue to reflect the responsibilities which, in a New Zealand context, are placed on the prosecution in terms of the laying of charges and the various checks and balances on those responsibilities.

[142] With those principles in mind, it is helpful to clarify the position in this way. The starting point in determining what the interests of justice will require is that the trial judge will need to put an included charge where the jury is squarely confronted by that possibility on an examination of the case at trial and all of the evidence. This will require the trial judge to consider the elements of the charge(s) before the jury and the elements of the lesser charge and ask whether there is a real possibility that all of the additional elements of the lesser included charge are proved on the evidence without any of the additional elements of the principal charge. It follows that the question of putting a lesser charge need not be addressed where it "simply does not arise on the way in which the case was presented".[132]

[143] It is not helpful in our view to describe the decision whether to leave an included charge as a discretion, as *Mokaraka* does.[133] That description is not apt because the reality is that if the prerequisites for leaving the included charge are met, it will be necessary to put that charge absent of course any of the countervailing considerations outlined in *Mokaraka* and *Coutts*.

[144] The countervailing factors as identified in *Mokaraka* that will tell against putting the included charge, are as follows:[134]

(a) where the lesser charge is "trifling" relative to the principal charge;

(b) the question of the included charge is raised too late in the piece resulting in unfairness in the proceeding;[135] and

---

132 *Mokaraka*, above n 44, at [15].
133 At [18].
134 At [16].
135 In *Mokaraka*, above n 44, at [16], this factor is described by reference to "prejudice" resulting to "a party" in the way the trial is conducted. The description above simply updates the language to reflect the terminology in the Evidence Act. No change in substance is intended.

(c) the inclusion of the lesser charge would simply distract the jury from its task where, if the jury discharged its duty, it could only find the defendant guilty or not guilty of the principal charge.

[145] Finally, on an appeal brought on the basis that an included charge should have been left to the jury, the appellate court will have to consider the outcome in terms of s 232 of the Criminal Procedure Act, that is, whether or not the omission has given rise to a miscarriage of justice.

[146] As we have noted, the description of the threshold for appellate intervention in *Mokaraka* reflected the *Maxwell* approach. That formulation should no longer be applied. As Lord Bingham said, *Maxwell* "is not an easy authority".[136] Lord Hutton's concern was that the approach appeared "to oblige the appellate court to engage in speculation as to the factors which may have influenced the jury's decision".[137] We agree. Further, as Lord Rodger noted, it is hard to see how the appellate court can be satisfied the *Maxwell* test is met. His Lordship also made the point "the test supposes that the jury will have consciously convicted the defendant in the face of the judge's directions" where that supposition is contrary to the assumption on which trial by jury operates.[138] Lord Mance made similar observations in concluding the *Maxwell* test was "unworkable".[139] It is accordingly no longer the case that there is a limited threshold for appellate intervention as stated in [73] above.

[147] The authorities we have discussed illustrate the way in which the approach is to be applied. But a useful example is provided by the contrasting outcomes reached in the two appeals dealt with in *Mokaraka*. Both of the appellants in that case were charged with aggravated burglary.

[148] Mr Te Hira admitted he had entered the house on the evening in question but he maintained he did not know a weapon was going to be taken or used and he did not see one. In that case then, "the only realistic issue at trial was whether [Mr Te Hira]

---

136 *Coutts*, above n 53, at [19].
137 At [60].
138 At [87]. This is well-recognised: see for example *Mussa v R* [2010] NZCA 123 at [41]; *Weatherston v R* [2011] NZCA 276 at [24]; and *Green v R* [2016] NZCA 196 at [23]–[25].
139 At [99].

knew that one of the group would have a weapon".[140] Although he had not formally admitted the other elements of the offence those elements were not "seriously in contention".[141] In these circumstances, the threshold requirement for leaving the lesser included charge of unlawfully entering with intent was met. None of the circumstances identified as counting against leaving the lesser charge were present and the Court concluded that Mr Te Hira's appeal must be allowed.

[149] By contrast, Mr Mokaraka denied he was present and produced alibi evidence in support. As the Court noted, there had been no suggestion that Mr Mokaraka may have been present "but oblivious to the weapon" and while that was of course a matter for the Crown to prove, realistically that was not a live issue "in the sense demanded for the purpose of included charge principles".[142] His appeal was accordingly dismissed. We turn next to consider the application of these principles to the present case.

This case

[150] In concluding the interests of justice did not require leaving an included charge, the Court of Appeal dealt with two possible included charges, assault with a weapon[143] and wounding with intent to injure.[144] In relation to the first of these possibilities, the Court of Appeal made the point that, as the Crown case was put, for Mr Winter to have been convicted as a party to this charge he needed to have knowledge of the knife. And, "If he had that knowledge, then he was properly convicted as a party to wounding with intent to cause grievous bodily harm."[145]

[151] The Court then dealt with the possibility of including wounding with intent to injure. The Court said that if the co-offender wounded the victims with intent to cause

---

140 *Mokaraka*, above n 44, at [25].
141 At [25].
142 At [37].
143 Crimes Act, s 202C (maximum penalty of five years' imprisonment).
144 Crimes Act, s 188(2) (maximum penalty of seven years' imprisonment).
145 CA judgment, above n 2, at [60].

grievous bodily harm that also comprised wounding with intent to injure as grievous bodily harm was a very serious "injury". "However", the Court said:

> [61] … in this case there is the complication that the wounding occurred to people who were not the target of the common plan. It is conceivable that someone other than the target may be wounded in a plan to carry out serious injury to the target, if a member of the joint enterprise is armed with a knife. But if Mr Winter, as a member of the joint enterprise, did not know that one of their number [had] a knife, could the jury have been sure that he knew as a probable consequence that someone other than the target would be wounded? In our view that would not be a safe inference. It was the knife that elevated the risks of the enterprise and the potential for others to be harmed in carrying out the enterprise.
>
> [62] We consider it is reasoning along these lines that is likely to have been in the Judge's mind in not taking up defence counsel's suggestion of putting wounding with intent to injure to the jury. This is consistent with the Judge's ruling that the jury had to be sure Mr Winter knew about the knife. …

[152] If Mr Winter's knowledge of the knife was not established, the Court continued:[146]

> … there was no specific evidence as to the level of violence to someone other than Mr Hatcher that Mr Winter should have anticipated as a probable consequence. This left assault as a potential alternative. That was so trifling in the context of this group violence that it was not required to be put to the jury in the interests of justice.[147] The United Kingdom approach requires putting obvious alternatives to the jury, not any alternative at all.

[153] We agree with that analysis. The particular feature of this case was that the complainants were not the intended targets of the common plan. The central question was whether, in those circumstances, the intent to cause grievous bodily harm could be attributed to the group in relation to the two men, Mr Ambrose and Mr Williams, who were ultimately attacked.

[154] On the Crown case the requisite intent could be established but, as the case was ultimately run, that depended on establishing knowledge of the knife. Without that knowledge, the jury could not have been satisfied Mr Winter would have foreseen a reasonable possibility of two strangers being hurt in this way. As the Court of Appeal noted, the Crown "pitched its case on an all or nothing basis".[148] If the jury were not

---

146 At [63] (footnote omitted).
147 The maximum penalty for assault is a term of imprisonment of one year: Crimes Act, s 196.
148 At [54].

sure Mr Winter knew about the knife, Mr Winter could not be convicted. That aspect was accordingly the focus of the Crown and defence closing addresses. And the Judge directed the jury they could only find "the infliction of really serious harm to someone other than Mr Hatcher was a probable consequence if they knew 'at the time of engagement with' the victims that Mr Hanson was armed".[149]

[155] Against that background, we do not consider it was appropriate to put the lesser charge contended for in this Court, injuring with intent to injure.[150] As counsel for the respondent submits that charge would turn on the consequences for the complainant, which were not in dispute. It would also be artificial to put this charge when the central issue was as to Mr Winter's knowledge of the knife.[151] There is also some force in Ms Brook's submission that the lesser maximum penalty for this offence comes close to trifling given the serious injuries caused to Mr Ambrose.

[156] Of the other theoretical possibilities for lesser charges, the only real contender is that of assault with intent to injure (carrying a maximum penalty of three years' imprisonment).[152] In context, that would have been trifling given the maximum penalty.

Second point of appeal: conclusion

[157] Accordingly, we consider the Court of Appeal was correct to conclude it was not necessary in the interests of justice to leave an included charge with the jury. The second point of appeal therefore fails.

---

149 At [57]. As noted, above at [27], n 16, the jury asked for clarification as to the timing of the "point of engagement": at [58].

150 Crimes Act, s 189(2) (maximum penalty five years' imprisonment). Mr Bailey makes the point that although the Court of Appeal noted this was the included offence contended for, it was not one of the offences considered. He also says the Court was incorrect to suggest that in the District Court the included offence contended for was wounding with intent to injure.

151 It was also put that Mr Winter may have travelled to the house bus where the incident occurred but did not go down the driveway, in other words, that he did not participate in the incident at all: see above at [16], n 4.

152 Crimes Act, s 193.

Result

[158] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent