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

**I TE KŌTI PĪRA O AOTEAROA**

**CA587/2018**
**[2021] NZCA 172**

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| BETWEEN | WUTI WELLINGTON WAA<br>Applicant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 25 March 2021 |
| Court: | Collins, Ellis and Muir JJ |
| Counsel: | G H Vear and C A Hardy for Applicant<br>C A Brook for Respondent |
| Judgment: | 10 May 2021 at 11.00 am |

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Collins J)

## Introduction

[1] On the evening of 19 December 1988 two men, each armed with a shotgun and wearing balaclavas, entered the owner's premises of the Northcote Motel. Inside the lounge of those premises were the owners Mr and Mrs Bell, and their 23-year-old daughter Ms Bell. The first intruder demanded money from Mr Bell. Ms Bell then attempted to escape but was caught in a corridor by the second of the intruders. At that moment, the first intruder fired a shot in the lounge at Mr Bell. He died soon

afterwards. When Mrs Bell approached the first intruder, she was struck on her head with the butt of the gun. The intruders then ransacked through the property and made good their escape, taking a small amount of money, jewellery and a glasses case that belonged to Ms Bell.

[2] Mr Cullen and Mr Waa were jointly charged with murdering Mr Bell, causing grievous bodily harm to Mrs Bell and aggravated robbery. They were convicted on all charges in 1990. Now, 31 years later, Mr Waa seeks leave to challenge his conviction for murder.

[3] At the time he was charged, the evidence against Mr Cullen comprised the following:

(a) Mr Cullen made an admission to his partner, Ms Corbett, on 20 December 1989, in which he said that he and Mr Waa had gone to the motel and that while he was out of the room, a shot was fired when Mr Bell "grabbed for the gun" held by Mr Waa.

(b) The glasses case owned by Ms Bell was found at the property where Mr Cullen was living.

(c) Mr Cullen made a written statement to the police on 27 January 1989, in which he said he went with a "mate" to the North Shore looking for a place to rob. He said he and his mate took loaded shotguns into the motel and that when he was restraining Ms Bell, he heard a shot discharged in the lounge.

[4] By the time of the trial, Mr Cullen's brother, "Doc" Cullen, had also become a witness for the Crown. Doc Cullen said his brother made admissions to him concerning the roles of Mr Cullen and Mr Waa in the attack at the motel.

[5] The principal evidence against Mr Waa at the time he was charged comprised the following:

(a) There was evidence of Mr Waa's association with Mr Cullen and his general opportunity to have been involved in the crimes. He was seen with Mr Cullen at a funeral around midday on 19 December 1988 and they were seen arriving together at a function at Te Papapa about two hours after the attack at the motel.

(b) A shoe print, formed in blood, was found on a piece of paper in the motel premises. The print was compared with a pair of shoes taken from Mr Waa. The forensic evidence was that the print in the motel must have been made by the right shoe taken from Mr Waa.

(c) Mr Waa made admissions to the police. On 27 January 1989, police interrogated Mr Waa and obtained admissions from him to the effect that he had shot Mr Bell during a tussle when Mr Bell tried to take Mr Waa's gun.

[6] Mr Waa applied to be tried separately from Mr Cullen. That application was dismissed by Thorp J on 12 October 1989.[1]

[7] In a second pre-trial decision issued on 12 March 1990, Thorp J ruled inadmissible the admissions made by Mr Waa to the police, when he was interrogated on 27 January 1989.[2] Those admissions were held to have been extracted by the police committing multiple breaches of the Judges' Rules and the rights of a suspect in police custody. The police were found to have lied to and misled Mr Waa about the evidence against him, and the consequences which would flow if Mr Waa only admitted to having accidentally shot Mr Bell. The police also prevented Mr Waa from consulting with his lawyer and they refused to honour Mr Waa's right to silence.

[8] By the time the trial commenced on 12 March 1990, the Crown had obtained evidence from Witness A, a prisoner who was in Mount Eden Prison during the time Mr Waa was on remand in that prison. The essence of Witness A's evidence was that Mr Waa had admitted to Witness A that he had shot Mr Bell.

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1 *R v Waa* HC Auckland T143/80, 12 October 1989 [Ruling on Severance].
2 *R v Cullen* HC Auckland T143/89, 12 March 1990.

[9] Witness A had been sentenced to 12 years' imprisonment on 27 October 1989 for importing heroin. His appeal against sentence was initially to be heard before the trial of Mr Cullen and Mr Waa. Witness A's appeal was, however, adjourned to a date after he gave evidence in the trial.

[10] In a pre-trial hearing on 8 March 1990, Witness A gave evidence and was briefly cross-examined by Mr Waa's trial counsel, Mr Bungay QC. Thereafter, counsel for both defendants informed Thorp J that there would be no further challenge to the admissibility of Witness A's evidence, but that counsel would submit that little to no weight should be placed upon the incriminatory evidence given by Witness A.

[11] At the trial, Witness A said that during the time he and Mr Waa were in Mount Eden Prison, Mr Waa spoke about the events on the night Mr Bell was shot. According to Witness A, Mr Cullen and Mr Waa had planned to abduct Mr Bell to find out where some krugerands (a type of gold coin from South Africa) were supposedly located. Witness A said Mr Waa told him that when he was in the lounge of the motel, Mr Bell moved towards him and that he, Mr Waa, "blew him away".

[12] Witness A was cross-examined during the trial by Mr Bungay about his extensive criminal history, the arrangements concerning the adjournment of his appeal and the occasions he had assisted authorities by providing information supplied to him by defendants. Witness A was questioned by Mr Bungay about the likelihood that he would be giving evidence against another prisoner, Mr Tamihere, in relation to what the latter had told Witness A concerning the murder of Heidi Paakkonen and Sven Hoglin, two Swedish tourists who were thought to have been murdered in the Coromandel area in April 1989. Mr Bungay also asked Witness A if Mr Waa had said he was responsible for the murder of Mr Bush at the Red Fox Tavern, a case that bore some similarity to the murder of Mr Bell, but for which no one had been charged. Witness A said Mr Waa had indeed told him he was responsible for the Red Fox Tavern murder.

[13] Mr Waa and Mr Cullen were convicted on 19 March 1990 and sentenced to life imprisonment for the murder of Mr Bell. On 10 April 1990 they were respectively

sentenced to concurrent terms of six and a half and five years' imprisonment for aggravated robbery and the attack on Mrs Bell.

[14] On 25 October 1990, Mr Waa sought leave to appeal to this Court pursuant to the procedure provided for in s 383 of the Crimes Act 1961. We explain that procedure at [20] to [31]. The notice of appeal/application for leave to appeal was prepared by a barrister and identified two grounds of appeal:

(a) The trial Judge erred in law by not granting Mr Waa's severance application.

(b) New unspecified information obtained under the Official Information Act 1982 may have undermined the credibility of Witness A if it had been disclosed before trial.

[15] Mr Waa's application was filed about six months out of time and, following what was referred to at the time as an "ex parte procedure", Mr Waa's appeal/application for leave to appeal was dismissed by this Court on 27 June 1991.[3] No reasons were recorded for this decision.

[16] Mr Waa was granted parole in 2002, and in 2003 he became involved in serious offending. Mr Waa was convicted in the Masterton District Court on seven charges of burglary and unlawfully taking a motor vehicle.[4] He was also convicted of possession of a shotgun and ammunition, reckless driving, using a crowbar as a weapon, theft of a vehicle and using a vehicle to assault a police officer.[5] He was recalled to prison and sentenced to four years and 11 months' imprisonment for his 2003 offending. Aside from the brief interlude in 2002 and 2003, Mr Waa has been in custody since his arrest on 27 January 1989 for the murder of Mr Bell.

[17] On 26 September 2018, Mr Waa filed an application for leave to appeal against his conviction for the murder of Mr Bell. His notice of appeal contended that:

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3 *Waa v R (ex parte)* per Casey, McKay and McGechan JJ.
4 *Waa v Police* HC Masterton CRI-2004-435-21, 7 December 2004.
5 *Waa v Police* HC Masterton CRI-2004-435-2, 21 May 2004.

(a) Witness A's evidence was unreliable and ought not to have been admitted.

(b) His trial should have been heard separately from that of Mr Cullen.

Three further grounds of appeal have been added since September 2018:

(c) The trial Judge's directions concerning Witness A were deficient.

(d) The trial Judge's directions on joint trials were also deficient.

(e) The references to the Red Fox Tavern murder were highly prejudicial and inadmissible.

[18] In *Waa v R,*[6] this Court held that it has inherent jurisdiction to revisit its 1991 decision dismissing Mr Waa's application for leave to appeal and directed that the leave application be determined separately from any substantive appeal that might be authorised. That decision was based upon *R v Smith*,[7] which held this Court's inherent jurisdiction enabled it to revisit decisions that had resulted in appeals being dismissed following the ex parte procedure; a process which had been ruled unlawful by the Privy Council in *R v Taito*.[8]

[19] In assessing Mr Waa's leave application, we shall first explain the jurisdiction for appeals under ss 383 and 385 of the Crimes Act, and then examine the grounds of appeal in the following sequence:

(a) severance;

(b) Witness A; and

(c) the Red Fox Tavern murder.

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6 *Waa v R* [2019] NZCA 536.
7 *R v Smith* [2003] 3 NZLR 617 (CA).
8 *Taito* v *R* [2002] UKPC 15, [2003] 3 NZLR 577.

**Section 383 of the Crimes Act 1961**

*Questions of law, fact and mixed law and fact*

[20] The relevant parts of s 383 of the Crimes Act provided:

> **383 Right of appeal against conviction or sentence**
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> (1) Any person convicted on indictment may appeal to the Court of Appeal—
>
> (a) Against his conviction on any ground of appeal which involves a question of law alone; and
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> (b) With the leave of the Court of Appeal or upon the certificate of the Judge who tried him, or before whom he appeared for sentence, that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; …
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> …

[21] Thus, at the time Mr Waa's appeal/application for leave to appeal was dismissed in 1991, distinctions were drawn between questions of law, questions of fact, and questions of mixed law and fact. Questions of law could give rise to an appeal as of right, whereas questions of fact and questions of mixed law and fact required either a Judge's certificate or the leave of the Court of Appeal.

[22] The distinction between questions of law and the types of questions that required leave was often not easy to discern. Authorities made it clear, however, that a ground of appeal did not constitute a question of law merely by being described as such in the notice of appeal or in counsel's submissions.[9]

[23] It was settled by 1990 that a decision in relation to facts might in some circumstances give rise to a question of law. Lord Radcliffe explained in *Edwards v Bairstow*,[10] that those circumstances might arise where "there is no evidence to support the determination" or where, "the evidence is inconsistent with and

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9 *R v Hinds* (1962) 46 Cr App R 327 (CA).

10 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36.

contradictory of the determination", or where, "the true and only reasonable conclusion contradicts the determination".

[24] Since this Court dismissed Mr Waa's appeal/application for leave to appeal, the Supreme Court has reaffirmed the distinction between questions of law and questions of fact.[11] In *R v Gwaze*, the Supreme Court disagreed with the approach that this Court had taken when determining the scope of the ability of the Crown to appeal questions of law following an acquittal.[12] Applying those cases to the circumstances of Mr Waa's application, a question of law could arise if the trial Judge:

(a) misdirected himself as to the legal requirements governing the application for separate trials;

(b) misdirected the jury on the factors they were to consider where there was a joint trial;

(c) misdirected himself as to the legal requirements governing the admissibility of the evidence from Witness A;

(d) misdirected the jury on the evidence of Witness A; and

(e) failed to properly consider and determine if the evidence about the Red Fox Tavern murder was admissible.

[25] Mrs Vear, senior counsel for Mr Waa, submitted that the trial Judge's decision declining separate trials for Mr Waa and Mr Cullen involved a question of law because the facts concerning that application were not contested and this aspect of the appeal was limited to the legal consequences that followed from those facts.[13]

[26] The approach advocated by Mrs Vear is too simplistic. An error of law normally arises where a Judge fails to properly identify the law and apply that law to

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11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721; and *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734.

12 *R v Gwaze*, above n 11, at [1].

13 Citing *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC).

the facts. Thus, the ruling on severance might give rise to a question of law if Thorp J failed to consider or apply the legal principles governing separate trials to the facts that were before him. Mrs Vear properly acknowledged that there were no further factual inquiries that could be made in relation to the severance issue and that her submissions before us addressed all of the legal arguments that she wished to make on that topic.

[27] We accept the alleged misdirections in the summing-up to the jury about the matters they were to consider in a joint trial and in relation to the jury's task in assessing the evidence of Witness A also raise questions of law. Similarly, the admissibility of Witness A's evidence and the admissibility of the reference to the Red Fox Tavern murder can also be categorised as questions of law.

*Leave criteria*

[28] Under s 383 of the Crimes Act, where leave was necessary, the Court usually heard full argument, before granting or refusing leave, and the decision as to leave was in effect a decision on the merits.[14] Under s 392(2) of the Crimes Act, where an appeal purported to raise a question of law and the Court considered the appeal was frivolous or vexatious it could determine it without a full hearing and dismiss the appeal "summarily, without calling on any persons to attend the hearing or to appear thereon". Although no reasons for dismissing Mr Waa's appeal/application for leave to appeal were given in 1991, it is possible the Court determined the purported question of law should be dismissed under s 392(2) of the Crimes Act and that leave should not be granted in relation to the second ground of appeal because it was considered to be without merit.

[29] The leave application in this case should engage the merits to the extent it is possible to do so and be granted if the proposed grounds of appeal are shown to be reasonably arguable.[15] This test is appropriate even where a ground of appeal is confined to a question of law because the Court is exercising its discretionary inherent jurisdiction to remedy an injustice but should only do so where an applicant

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14 *R v Ross* [1948] NZLR 167 (CA).
15 *Miller v R* [2020] NZCA 79 at [7].

demonstrates that the outcome may have been different had the Court followed correct procedures in the first place.

[30] The "reasonably arguable" test must be applied by reference to the criteria set out in s 385 of the Crimes Act concerning the determination of appeals in 1990:

> **385 Determination of appeals in ordinary cases**
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> (1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion—
>
> (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
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> (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
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> (c) That on any ground there was a miscarriage of justice; or
>
> (d) That the trial was a nullity—
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> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> …

[31] The proposed grounds of appeal appear to rely on ss 385(1)(b) and (c). In order for leave to be granted, a proposed ground of appeal must therefore be reasonably arguable, having regard to the relevant criteria for allowing an appeal set out in s 385(1) of the Crimes Act.

*Delay*

[32] There is a further factor in this case that might, in other circumstances have been determinative of the leave application. That factor concerns the extraordinary delay that has occurred in Mr Waa pursuing the application for a rehearing of his dismissed appeal/application for leave to appeal.

[33] The application that was filed in 1990 was required to be filed not later than 10 days after Mr Waa was sentenced.[16] It was filed approximately six months out of time and accordingly required an extension of time to appeal under s 388(2) of the Crimes Act. The Crown does not take issue with the six-month delay in filing the application for leave to appeal.

[34] There was, however, a further 15-year delay between when this Court delivered its judgment in *Smith* and Mr Waa filing his application for a rehearing of his dismissed appeal/application for leave to appeal. As we have previously noted, *Smith* established in 2003 the jurisdictional basis upon which Mr Waa could apply for a rehearing of his dismissed appeal/application for leave to appeal.

[35] Mr Waa has provided two explanations for his delay:

(a) He says that until an arrest was made in the Red Fox Tavern murder case, he did not want to draw attention to himself. Arrests were made in that case in 2017, and on 29 March 2021 two defendants were convicted of murdering Mr Bush at the Red Fox Tavern in October 1987.

(b) A jailhouse informant in Mr Tamihere's trial was, in 2017, prosecuted in a private prosecution for perjury.[17]

[36] Neither of these explanations is persuasive. As we note later in this judgment, there is no evidence that Mr Waa was ever at risk of being prosecuted for the Red Fox Tavern murder. Even if he were a suspect for that crime, we fail to see how that could affect his appeal in the present case. Furthermore, the witness who was prosecuted for giving false evidence in Mr Tamihere's trial was Witness C, not Witness A. Witness C was prosecuted after he acknowledged he gave false evidence in Mr Tamihere's trial, although he recanted that admission at a later date. Mr Waa appears to be drawing a connection between the prosecution of Witness C and his decision not to apply to have his leave application reinstated. It is impossible,

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16 Crimes Act 1961, s 388(1).
17 *Taylor v Witness C* [2017] NZHC 2610.

however, to understand how the prosecution of Witness C in 2017 could excuse Mr Waa's delay in pursuing his application to reinstate his application for leave to appeal.

[37] There are further concerns relating to Mr Waa's inordinate delay. A key ground of appeal concerns the admissibility of the evidence of Witness A. Part of the challenge to the admissibility of Witness A's evidence concerns his credibility. This would normally necessitate Witness A being cross-examined if Mr Waa's application for leave to appeal were granted. This point was not referred to in Mrs Vear's written submissions.

[38] Witness A is no longer available to give evidence. He passed away on 26 February 2021. This development was only revealed to us and Mrs Vear after the hearing. Nevertheless, Witness A's death is a source of profound prejudice to the parties in testing the credibility of his evidence.

[39] Additionally, although Mrs Vear said she was not criticising Mr Bungay's conduct of the trial, in reality, her attack on the way Mr Bungay asked Witness A questions about the Red Fox Tavern murder is a challenge to a tactical decision made by trial counsel. Mr Bungay is also no longer available to explain his conduct of the trial as, he passed away in 1993.

[40] Thus, while we will apply the test for leave that we have set out at [29], we are very concerned by the inordinate delay in Mr Waa pursuing his application. While the overall interests of justice must guide us, Mr Waa's decision not to pursue his application for many years flouts the fundamental principle of finality which underpins the statutory time limits governing criminal appeals. Those time limits reflect the balance between the interests of an appellant and those of others connected to the case, including victims and witnesses. Time limits in criminal trials also reflect legislative policies concerning the resources that the criminal justice system should apply to entertaining challenges to convictions obtained years earlier in accordance with the law as it was then understood.[18]

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[18] *R v Knight* [1998] 1 NZLR 583 (CA); and *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [13]–[16].

**Severance**

[41] There are three limbs to the severance issue that Mr Waa wishes to pursue if leave is granted for him to appeal:

(a) The High Court Judge erred in law when he declined to order separate trials for Mr Waa and Mr Cullen.

(b) The High Court erred by not reconsidering severance in light of changes in the evidence following the pre-trial decision.

(c) The "joint trial" directions given to the jury were inadequate.

*Pre-trial decision*

[42] Apart from cases involving accessories after the fact and receivers, the Crimes Act did not expressly provide for the joinder of two or more persons in one count or in one indictment.[19] However, "it [was always] permissible to join in one count all or any of the participants in an offence".[20]

[43] The following two principles governed the joinder of trials in 1990:

(a) "prima facie, where the evidence of the case was that prisoners were engaged in a common enterprise, it was obviously right and proper that they should be jointly indicted and jointly tried";[21] and

(b) "where there is such a volume of evidence against one accused, but not the other, that it would be well nigh impossible for a jury to perform the task of determining guilt or innocence by reference only to the evidence admissible against each, and the persuasive value of the inadmissible evidence is out of proportion to the probative value of the admissible evidence, severance will avoid injustice to one or both [accused]".[22]

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19 Section 340 of the Crimes Act provided for joinder of counts as opposed to joinder of offenders.

20 Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell (NZ), Wellington, 1971) at [2699].

21 *R v Ross*, above n 14, at 181; and *R v Iremonger* [1964] NZLR 517 (SC) at 519.

22 *R v Brown* (1987) 3 CRNZ 132 (CA) at 133, citing *R v Webb* [1953] NZLR 595 (SC) at 597.

[44] In his severance decision, Thorp J set out the principles and the authorities we have referred to at [43].[23]

[45] After carefully considering the evidence against Mr Cullen and Mr Waa separately, Thorp J said:[24]

> There is less extensive evidence of joint enterprise in this case than in some of the cases where that circumstance has been considered important. However it can hardly be argued, … that the Crown is not entitled to put its case on the basis … section 66(2) principles may apply.

[46] The Judge placed Mr Waa's alleged confession to one side and then asked himself whether the remaining evidence against Mr Waa was such as to trigger displacement of the usual rule of a joint trial. He concluded:[25]

> That question is not altogether easy. However I have finally come to the conclusion that even if the confessional statements by Mr Waa should be excluded, the remaining evidence against Waa, certainly as the footprint evidence presently stands, cannot be said to have such slight probative value that the prejudicial effect of Cullen's confessional statement is likely to dominate the juror's minds and prevent their proper determination of the case against Mr Waa.

[47] Mrs Vear argued that it was unrealistic for the jury to set aside the evidence from Ms Corbett and Doc Cullen and only assess the shoe print evidence without reference to Mr Cullen's admissions to those witnesses. Mrs Vear also took issue with a comment made by Thorp J, when he suggested it may have been of benefit to have Mr Cullen's statements before the jury because it would assist Mr Waa's case that the discharge of the gun was accidental.

[48] Mr Waa's defence was that he was not one of the motel intruders. It may therefore have been preferable for the Judge not to have considered the possible assistance to Mr Waa in having the jury learn that the gun may have been accidentally discharged. There can be no doubt, however, that the Judge properly stated the legal principles which we have set out at [43]. The Judge also carefully applied those principles to the facts before him when deciding that Mr Waa and Mr Cullen should be tried together. Having reviewed the evidence and the law that applied in 1990, we

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23 Ruling on Severance, above n 1, at 2–3.
24 At 7–8.
25 At 9.

are satisfied that in dismissing the severance application, Thorp J reached the only conclusion that was realistically available. This was a classic example of a Judge accurately stating the law and applying that law to the facts.

[49] There is no basis upon which it could be reasonably argued that either an error of fact or law arose from the way in which Thorp J determined the pre-trial severance application.

*Further evidence at trial*

[50] Mrs Vear argued Mr Waa's position became worse at trial because of the evidence of Witness A, and Doc Cullen. She took particular exception to a comment made by Witness A, who said that Mr Waa told him:

> … his biggest problem was [Mr Cullen] had done some pillow talking to his wife and told her it was [Mr Waa] who shot Rex Bell … and [Mr Cullen] also told Doc Cullen that it was [Mr Waa] who shot Rex Bell.

[51] Mrs Vear submitted there was an inevitable risk that the jury would utilise the inadmissible evidence of Mr Cullen's statements implicating Mr Waa to bolster the reliability and credibility of Witness A's evidence. She said that this risk could only have been alleviated through severance.

[52] We disagree:

(a) The evidence that we have set out at [50] was also contained in the evidence that Witness A gave on 8 March 1990 during the pre-trial voir dire. It did not emerge for the first time during the trial.

(b) In any event, this was a case in which two men set out to commit an armed robbery. The issue at trial was whether Mr Waa was one of those offenders. His association with Mr Cullen on the day of the robbery and the presence of a footprint at the scene that matched his shoe were very compelling evidence that justified Mr Waa being tried jointly with Mr Cullen.

[53] Any risk of unfair prejudice from Mr Cullen's statements which implicated Mr Waa was able to be properly addressed by clear directions to the jury not to have regard to that evidence when considering the case against Mr Waa. We examine those directions at [55]–[57].

[54] At trial, Mr Bungay acknowledged Witness A's evidence was admissible. Only the weight that the jury should place on Witness A's evidence was in issue. We therefore do not accept that there is a reasonable argument that the trial Judge erred by not reconsidering severance during the course of the trial.

*Jury directions*

[55] Thorp J directed the jury regarding the statements attributable to Mr Cullen in the following way:

> A good deal of the evidence is relevant and admissible against both men, but one class of evidence which is not admissible against both is evidence of statements made by one of the accused in the absence of the other. This principle is important in the present case because Mr Cullen made a series of statements to the Police and to his associates which directly or indirectly implicated Mr Waa. To the extent that his statements implicate him, Cullen, then of course they are material which you take into account when you are considering *his* responsibility, but they must not be taken into account when you are considering Mr Waa's position as they are not legally admissible against him. That is a principle which is a necessary part of our legal system, because were it otherwise self-serving statements could be made by one accused in the absence of the other and received in evidence against the other although he was not present at the time and had no opportunity to deny or correct them.
>
> I have not heard any counsel suggest and I cannot myself see any basis for a suggestion that any … statement made by Mr Waa after the event is likely to prejudice Mr Cullen. It is in the consideration of Mr Waa's position that the rule must be kept in mind. At that stage you must put aside all statements made by Mr Cullen oral or written.

[56] Mrs Vear criticised the adequacy of these directions, saying that it was imperative that the jury be reminded again in the Judge's summing-up of what evidence could be taken into account in determining the primary question of whether the offences were committed by Mr Waa.

[57] We disagree. The Judge's directions to the jury on how they should assess the statements attributed to Mr Cullen when considering the case against Mr Waa were

clear and unequivocal. There is no basis upon which it could reasonably be argued that an error occurred in the Judge's directions, which would engage the criteria in s 385(1) of the Crimes Act.

**Witness A**

[58] In examining the challenges to the admissibility of the evidence of Witness A, and the adequacy of the directions given to the jury by the trial Judge concerning the way they could permissibly assess his evidence, we shall:

(a) explain in further detail the background to Witness A giving his evidence;

(b) explain the key elements of the evidence given by Witness A;

(c) set out the directions given by the trial Judge;

(d) examine the specific challenges to the admissibility of Witness A's evidence; and

(e) examine the adequacy of the Judge's directions.

*Background to Witness A giving evidence*

[59] Witness A had an extensive history of criminal offending in Australia and New Zealand before he was arrested on 3 May 1989 and charged with importing and possessing approximately two kilograms of heroin for the purposes of supply.

[60] Records show that Witness A left New Zealand in 1976 and went to Australia. There he entered into a de facto relationship which ended when his partner was killed. Witness A was initially charged with her murder but convicted of manslaughter for which he was sentenced to 13 years' imprisonment. That sentence was reduced to eight years' imprisonment on appeal. Witness A was deported to New Zealand in December 1980 but returned to Australia a few days later. In 1985, he was sentenced to 12 years' imprisonment for supplying heroin. At the same time, he was sentenced to a concurrent term of two years' imprisonment for possession of a firearm. That

sentence was reduced on appeal to seven years' imprisonment. He served three years and three months in prison for this offending and on 23 December 1987, he was again deported to New Zealand.

[61] When Witness A was arrested in Auckland on 3 May 1989, he admitted his role in a significant heroin importation and distribution enterprise and agreed to assist the police in obtaining evidence against his co-offenders by wearing a concealed microphone to meetings with them. This resulted in police gathering important evidence against the co-offenders. Witness A also agreed to give evidence at the trial of two of his co-offenders.

[62] Following his arrest, Witness A was remanded in custody in Mount Eden Prison. While there he befriended both Mr Waa and Mr Tamihere. Mr Tamihere was awaiting trial for the murder of the two Swedish tourists who had gone missing on the Coromandel.

[63] According to Witness A, Mr Waa and Mr Tamihere "took [him] into their confidence and they gave [him] crucial information which was highly incriminating against themselves". Witness A passed on the information he gathered through his solicitor to the police. He instructed his solicitor to use the information to try and negotiate with police to have the importation of heroin charge withdrawn. However, according to Witness A, the police wanted him to plead guilty to the heroin charges in order to maintain his credibility as a witness. Witness A said that he agreed to this provided the sentence he received was "kept to a reasonable scale".

[64] On 26 September 1989, Witness A entered guilty pleas to the charges he faced. On 5 October, arrangements were made for Witness A to give a statement based on the notes he had made during his conversations with Mr Waa. The notes primarily concerned what Mr Waa was alleged to have told Witness A about the shooting of Mr Bell. In his notes, Witness A also referred to Mr Waa as having played a role in the Red Fox Tavern murder.

[65] Witness A was sentenced in the High Court at Auckland on 27 October 1989 by Thorp J. Thorp J had before him the following materials:

(a) a statement to the police by Witness A dated 3 May 1989, which related to the heroin importation and his use of the hidden microphone when talking to his co-accused;

(b) a statement comprising 15 pages that Witness A had given to his solicitor dated 25 September 1989, which contained information he obtained from Mr Tamihere concerning the murder investigations into the disappearance of the Swedish tourists; and

(c) a handwritten statement by Witness A relating to conversations with Mr Waa concerning the murder of Mr Bell.

[66] When sentencing Witness A, Thorp J said that the size of the heroin operation and Witness A's previous convictions justified the imposition of life imprisonment, the maximum sentence that was available. The Judge noted, however, that Witness A had assisted the police in relation to the heroin operation and other matters and that accordingly, the appropriate sentence would be one of 12 years' imprisonment. After receiving that sentence Witness A filed an appeal against his sentence.

[67] On 23 November 1989, Witness A met with three police officers at Mount Eden Prison and prepared a formal statement in the presence of his solicitor, concerning the information he had acquired from Mr Waa in relation to the shooting of Mr Bell.

[68] At about the same time Witness A's solicitor sought from the police a statement concerning the value of the information Witness A had provided to the police. This information was sought to assist Witness A's appeal. The police response was that the evidence Witness A had provided "only attains a value" once Witness A gave it to the Court.

[69] As we have previously noted, Witness A gave evidence in a voir dire hearing just before Mr Waa and Mr Cullen's trial commenced. In his voir dire hearing, Witness A claimed it made no difference to him whether the information he provided was given before he was sentenced and that it would make no difference to his sentence. Thorp J asked Witness A during the voir dire hearing whether there was an outstanding appeal

in respect of his 12-year sentence and when it was likely to be considered. Witness A confirmed there was an appeal but that it did not have a hearing date.

[70] On 15 March 1990, Witness A applied to this Court for an adjournment of his sentence appeal. The basis of the adjournment application was recorded as being his "willingness to give evidence [and the] need [for] more time regarding other assistance". The Crown's response is recorded as being "police would prefer adjournment till after evidence [is] given".

[71] Witness A gave his evidence against Mr Waa on 16 March 1990. He was the last witness in the trial.

[72] In May 1990, Witness A gave evidence against his co-offenders in relation to the heroin importation.

[73] Witness A's appeal against sentence was heard on 28 May 1990. This Court concluded that the assistance given to police by Witness A warranted greater recognition in fixing his sentence. The sentence of 12 years' imprisonment was reduced to eight years' imprisonment.[26]

[74] Witness A gave evidence in Mr Tamihere's trial in November 1990. When giving that evidence, Witness A produced some hand-drawn maps he said had been prepared by Mr Tamihere to demonstrate exactly where he had committed the murders. Witness A further stated that Mr Tamihere had told him:

(a) He met the Swedish tourists on a bush track in the Coromandel and that they agreed to let him and his "mates" act as their guides.

(b) He and three other males attacked and raped both victims.

(c) He killed the victims by breaking their necks.

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[26] *R v Accused (CA349/89)* [1990] 2 NZLR 316 (CA).

(d) He buried the bodies near the edge of a bluff because he considered pig hunters to be the most likely to find a human body and pig hunters do not as a rule, go near the edge of bluffs.

*Key elements of the evidence given by Witness A*

[75] In his evidence-in-chief, Witness A said that he received no inducements or promises of support from the police if he gave evidence against Mr Waa.

[76] Witness A explained how he had met Mr Waa in Mount Eden Prison and how they discussed Mr Waa's case and that Mr Waa was concerned about Mr Cullen's statements to his partner and brother in which Mr Cullen said it was Mr Waa who had shot Mr Bell. Witness A said he agreed with Mr Waa it was that evidence that "was dangerous" for Mr Waa.

[77] Witness A also relayed the details of how Mr Waa said he had blown away Mr Bell and that Mr Waa claimed he and Mr Cullen went to the motel in order to abduct Mr Bell in order to find where some krugerands were being kept.

[78] Witness A told the jury that Mr Waa said he was going to apply for severance and dismiss his then lawyer, Mr Nicholson QC, at short notice and engage either Mr Bungay or Mr Williams as his defence counsel. He also said Mr Cullen was planning on pleading guilty without warning his lawyer of his intention to do so.

[79] When cross-examined by Mr Bungay, Witness A denied having been a police informant in New South Wales. He acknowledged however, that when he was sentenced by Thorp J for the heroin offending, he received a lesser sentence than he might otherwise have received because of the assistance he had given to the police. Witness A accepted that he was pursuing an appeal against his 12-year sentence of imprisonment but said he was only doing so "on legal advice". He also accepted that his appeal had been adjourned until after he had given evidence for the Crown against Mr Waa.

[80] Witness A acknowledged in cross-examination that he had given information to the police about what Mr Tamihere had told him concerning the murders of the

Swedish tourists, although he said he did not know at that stage if he would be giving evidence in that trial.

[81] Mr Bungay suggested to Witness A that the fact he was giving evidence in major trials was a matter he wanted the Court of Appeal to take into account when determining his sentence appeal. Witness A's answer was "I don't think so. I don't think they give any weight to that." When asked if Witness A had any other cases "in the pipeline" the response was "not at the moment".

[82] As we have previously noted, Mr Bungay also asked Witness A if Mr Waa had confessed to the Red Fox Tavern murder. Witness A responded in the affirmative. We return to this topic at [109]–[113].

*Directions given by the trial Judge*

[83] When directing the jury on how they should approach Witness A's evidence, Thorp J said:

> It may already be obvious to you, but the fact is that [Witness A], as you were told, was sentenced last October to 12 years imprisonment for his involvement in the importation of heroin, and that he has, as he is fully entitled to do, given notice of appeal against that sentence: and it is reasonably clear that he will seek to persuade the Court of Appeal that the totality of the assistance he has provided deserves greater credit than has so far been given. It would have simplified the assessment of his evidence if his appeal had been determined before he gave evidence here, as it would have meant that he had nothing to gain from assisting the police further, but that proved impracticable, which means that [Witness A] is still in the position where there is an incentive for him to give evidence which favours the prosecution. Now that is a matter you need to know, but I add it is just one of the matters which your commonsense will inform you you need to take into account in deciding what you make of his evidence, what weight you are prepared to give to any part of it. In the end it must be for you in respect of [Witness A], as with any other witness, to decide what his evidence is worth.

*Challenges to the admissibility of Witness A's evidence*

[84] The challenges to the admissibility of Witness A's evidence focused upon:

(a) his incentives to give false evidence;

(b) the absence of corroboration of his evidence; and

(c) the credibility of Witness A.

Incentives

[85] Mrs Vear submitted that Witness A's evidence in relation to incentives was either false or deliberately designed to mislead the jury as to his motivation. This, she said, seriously impacted upon his credibility and diminished the value of his evidence.

[86] Mrs Vear criticised the following aspects of Witness A's evidence:

(a) While he had appealed the length of his sentence, he was doing so in accordance with "legal advice".

(b) He had not been confirmed as a witness in the "Swedes' trial".

(c) He did not think the Court of Appeal would take into account the evidence he was giving in major trials.

(d) He was not seeking greater credit for giving evidence.

(e) He had "nothing else in the pipeline".

[87] Mrs Vear submitted that the statements we have summarised at [86] were false and that the issues associated with Witness A's evidence were exacerbated by the fact he lied about his motivation and the Crown failed to disclose the incentives that were being offered to Witness A at the time he gave his evidence.

[88] Mrs Vear also said that it became apparent after Witness A gave his evidence that he sought to benefit from a reward of $20,000 that had been offered by the police for information leading to the arrest and conviction of the persons responsible for the murder of Mr Bell. The only evidence to support this claim was a letter dated 19 February 1992 from Witness A to a senior police officer, complaining about the fact that he would not be receiving part of the reward. There is no evidence about when Witness A applied for the reward, or if he anticipated being eligible for the reward when he gave his evidence.

Absence of corroboration

[89] Mrs Vear submitted that it was telling that the police were unable to find any information that supported Witness A's evidence that the whole incident was motivated by a plan to locate krugerands.

[90] The Crown submitted that Witness A's evidence was corroborated when it became apparent Mr Waa had sought severance, Mr Nicholson had been replaced by Mr Bungay as Mr Waa's counsel and when, shortly before the trial, Mr Cullen wrote to the Court without the knowledge of his counsel trying to plead guilty to the charges.

Credibility of Witness A

[91] Mrs Vear said that the credibility of Witness A was substantially undermined by the fact that evidence he gave against Mr Tamihere proved to be factually incorrect. Mr Hoglin's remains were discovered in October 1991, some 10 months after Mr Tamihere's trial. The discovery of Mr Hoglin's body revealed that:

(a) His body was located about 73 kilometres from where, according to Witness A's evidence, the murders had taken place.

(b) The body was found by pig hunters near the foot of a bluff, rather than near the edge of one.

(c) There was no evidence to substantiate the sexual assaults that were described.

(d) Mr Hoglin's neck was not broken. Pathologists were of the opinion he had died as a result of stab wounds and a possible attempt at decapitation.

[92] Mrs Vear said there was further evidence to undermine Witness A's credibility, namely:

(a) After he had given his evidence against Mr Waa, Witness A was transferred to Invercargill Prison. He later provided information to police about alleged misconduct of prison officers.

(b) While incarcerated in Whanganui Prison following his sentence appeal, Witness A was found to have participated in the making of "false and malicious allegations" against prison officers.

(c) In 2006 Witness A left New Zealand for Australia using a passport obtained with another person's identity.

[93] In summary, Mrs Vear submitted that:

(a) Witness A was clearly incentivised to give false information when testifying against Mr Waa.

(b) There was an absence of corroboration of his evidence.

(c) The evidence Witness A had provided as an informant in respect of the prosecution of Mr Tamihere was factually incorrect.

(d) The additional matters we have referred to at [92] further undermined Witness A's credibility.

Analysis

[94] Mr Waa was represented at his trial by very experienced counsel who, after cross-examining Mr Waa during the pre-trial voir dire, determined that there was no basis upon which he could challenge the admissibility of Witness A's evidence. Notwithstanding that decision, Mrs Vear argues that the evidence of Witness A was inadmissible.

[95] In *W v R*,[27] the Supreme Court identified the key considerations concerning the admissibility of prison informants' evidence. The Supreme Court said:

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[27] *W v R* [2020] NZSC 93 citing *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1.

(a) A key consideration is whether the connection between the evidence and the proof is "worth the price to be paid by admitting it" in evidence.

(b) Reliability will be a consideration in the balancing test between the probative value and unfair prejudice.

(c) Relevant considerations for this type of evidence might include:

(i) the credibility of the witness in an informant context;

(ii) any incentives or expectations of preference at play (including the inability of the prosecution to confirm whether incentives have been offered or given); and

(iii) the likely weight to be attached to the evidence.

(d) However, the role of the jury as factfinder needs to be respected. The court is only acting as a gatekeeper, and unfair prejudice may be dealt with by way of jury directions where appropriate rather than exclusion.

(e) If the informant's evidence as it emerges at trial is such that it could not reasonably be accepted, a trial Judge will need to direct the jury to disregard it.

[96] These principles substantially reflected the test for excluding unreliable evidence that could be found in the Evidence Act 1908. In applying those principles we shall analyse Witness A's evidence under the following headings:

(a) incentives;

(b) corroboration; and

(c) credibility.

[97] We shall then examine the Judge's summing-up concerning Witness A.

Incentives

[98] Mrs Vear is correct when she points out that there is now more evidence to support the contention that Witness A may have given his evidence believing that it would assist his appeal against sentence. That point was, however, plainly obvious at Mr Waa's trial. Mr Bungay's cross-examination of Witness A shows how he exposed Witness A's track record as a prison informant and the likelihood he expected to get credit for the assistance he had given the authorities. Although we no longer have the closing addresses of counsel, it is inconceivable that Mr Bungay would not have emphasised these points during his address to the jury. This conclusion is reinforced by the fact the trial Judge pointed out to the jury that it was obvious that Witness A was hoping to get greater credit for the assistance that he had given to the authorities when his sentence appeal was heard by the Court of Appeal.

[99] In our assessment, the contention that Witness A was incentivised to give his evidence was a matter that was plainly before the jury, albeit, possibly without the level of detail Mrs Vear says could have been established. Nevertheless, we consider it is not reasonably arguable that Mr Waa's conviction should be quashed because further evidence may now be available about the incentives he had to give his evidence.

Corroboration

[100] The absence of corroboration of the details of the "krugerand" explanation for Mr Waa and Mr Cullen going to the motel is also a matter that Mr Bungay would inevitably have emphasised to the jury. The transcript shows that Doc Cullen, who was supposedly connected to the krugerand story was cross-examined by Mr Bungay and said he had no idea what a krugerand was or from what country they came. That would inevitably have provided fertile territory for Mr Bungay to have submitted to the jury that the krugerand story was false.

[101] We do not know what, if any, weight the Crown placed upon the fact that Witness A's evidence was, to some degree, corroborated by the procedural information that he provided in his testimony concerning Mr Waa seeking severance, the change

of his lawyer and Mr Cullen's efforts to plead guilty. They are, frankly, minor matters that may well not have been relied upon at all by counsel for the Crown.

[102] In any event, the degree to which there was no corroboration of Witness A's evidence does not provide a reasonable basis to argue that Mr A's conviction should now be quashed.

Credibility

[103] Whilst it is correct that Witness A's evidence about what Mr Tamihere told him proved to be wrong in many material respects, there are two reasons why the suggestion that this new evidence undermines the credibility of Witness A is overstated:

(a) In his appeal against conviction, it is recorded Mr Tamihere made it very clear that he "fed false stories of different kinds to five or six fellow prisoners so that he could identify those whom he believed might try to wrongly inform on him".[28]

(b) Witness A was not endeavouring to assert that what Mr Tamihere told him was the truth. He was merely conveying to the jury what he said Mr Tamihere told him.

[104] In relation to the further evidence which Mrs Vear said undermined Witness A's credibility:

(a) Ms Brook has correctly pointed out that the findings made against Witness A were of a relatively insignificant nature.

(b) The fact Witness A may have used a false passport when leaving New Zealand in 2006 is not evidence that seriously undermines his credibility.

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[28] *Tamihere v R* CA428/90, 21 May 1992 at 11.

[105] The materials Mrs Vear relies upon do not lay an adequate foundation to reasonably argue that Mr Waa's conviction should be quashed because of concerns about the reliability of Witness A.

*The Judge's directions*

[106] Mrs Vear criticised the trial Judge's summing up in relation to the way the jury should assess Witness A's evidence. She relied on a passage from the opinion of the Privy Council in *Benedetto v R*, in which it was said:[29]

> In the case of a cell confession it is that the evidence of a prison informer is inherently unreliable, in view of the personal advantage which such witnesses think they may obtain by providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice. They are men who, as Simon Brown LJ put in *R v Bailey* … tend not to have shrunk from trickery and a good deal worse. And they will almost always have strong reasons of self-interest for seeking to ingratiate themselves with those who may be in a position to reward them for volunteering confession evidence. The prisoner against whom that evidence is given is always at a disadvantage. He is afforded none of the usual protections against the inaccurate recording or invention of words used by him when interviewed by the police. And it may be difficult for him to obtain all the information that is needed to expose fully the informer's bad character.

[107] *Benedetto* was decided 13 years after Mr Waa's trial. While today, a Judge may give stronger cautions to a jury before they accept the evidence of prison informants, Thorp J cannot be criticised for failing to anticipate what would be said in *Benedetto*.

[108] More fundamentally however, Thorp J instructed the jury to bear in mind the incentive that Witness A may have been expecting when giving his evidence. That instruction was entirely consistent with the law that applied in 1990.

**Rex Fox Tavern murder**

[109] For obvious reasons the Crown did not adduce from Witness A evidence that he had recorded in his notes to the effect that Mr Waa had claimed responsibility for the Red Fox Tavern robbery and murder. Mr Bungay, however, made a tactical decision to ask Witness A the following question:

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[29] *Benedetto v R* [2003] UKPC 27, [2003] 1 WLR 1545 at [32].

Q I suppose he also said to you he was responsible for the Red Fox murder as well?

A He did say that, yes.

[110] We do not accept that there was any irregularity in the way in which Mr Bungay cross-examined Witness A on this topic. It is plain that Mr Bungay's question was laced with sarcasm and that he intended to lay a platform for submitting to the jury that Witness A was willing to say that Mr Waa was responsible for crimes for which he had never been charged.

[111] We consider it inconceivable that Mr Bungay would have asked the question that he asked of Witness A if there was the slightest risk that Mr Waa was suspected of having committed the Red Fox Tavern murder. In any event, as we have noted at [36], there is no evidence to suggest that Mr Waa was ever at risk of being prosecuted for the Red Fox Tavern murder.

[112] Thorp J did not consider it necessary to refer to the statement made by Witness A about the Red Fox Tavern murder when summing up to the jury. He no doubt thought it was a topic that was best left alone least he undermine any tactical advantage Mr Bungay's cross-examination may have achieved.

[113] We cannot see any basis upon which the Judge erred by not giving the jury a direction about the Red Fox Tavern murder evidence, let alone a possible error or omission that would engage s 385(1) of the Crimes Act.

**Conclusions**

[114] None of the grounds advanced in support of the proposed appeal are reasonably arguable. On the contrary, the directions given to the jury in Mr Waa's trial and the rulings made by the trial Judge were entirely orthodox and totally consistent with the law that applied in 1990.

## Result

[115] The application for leave to appeal is dismissed.

Solicitors:
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