IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA703/2017
[2021] NZCA 56

BETWEEN	VINCENT MANA GEORGE Appellant
AND	THE QUEEN Respondent

CA711/2017

BETWEEN	DENIS ROBERT HENRY SOLOMON Appellant
AND	THE QUEEN Respondent

Hearing:	2 December 2020
Court:	French, Whata and Mander JJ
Counsel:	G C Gotlieb and H Z L Krebs for Appellant George M W Ryan and J E Tulloch for Appellant Solomon L C Preston for Respondent
Judgment:	10 March 2021 at 9 am

JUDGMENT OF THE COURT

A The application for leave to adduce the evidence of Fairlane Michelle Henare is declined.

B The appeal brought by Vincent Mana George (CA703/2017) is dismissed.

C The appeal brought by Denis Robert Henry Solomon (CA711/2017) is dismissed.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Mr George and Mr Solomon are two patched members of the Tribesmen gang. A High Court jury found them both guilty of the murder of a 24-year-old gang prospect called Clayton Ratima.

[2] Both men now appeal their convictions.

Background

[3] At about 1.20 pm on Sunday 21 February 2016, two Tribesmen gang members driving a white Honda Odyssey motor vehicle dropped an unconscious Mr Ratima off at an Auckland hospital.

[4] The serious nature of his injuries prompted medical staff to alert the police.

[5] One of the two men who had driven the silver Honda Odyssey was still at the hospital when the police arrived. He claimed they had found Mr Ratima lying on the roadside. The other man had already left the hospital in the car which was later discovered abandoned.

[6] Mr Solomon was the registered owner of the vehicle.

[7] Mr Ratima was put on life support, pronounced brain dead the following day and on Wednesday 24 February 2016 after his family had had a chance to say their goodbyes, he was taken off life support.

[8] According to the pathologist who undertook the post mortem, Mr Ratima had sustained multiple blunt force injuries to his neck and head, consistent with approximately eight discrete blows inflicted by fists and/or feet. In the pathologist's opinion, it was apparent that significant force had been used because of the nature of the injuries including fractures to two vertebrae in Mr Ratima's neck. She said the ultimate cause of death was subdural and intra-brain bleeding and herniation caused by the blunt force trauma to the head and neck.

[9] A police investigation was launched. It was impeded by a lack of co-operation from gang members. But a breakthrough came when a friend of the appellants changed his story and implicated the appellants. They were arrested in November 2016.

The Crown case at trial

[10] Evidence was given that at around 3 pm on Saturday 20 February 2016 Mr Ratima started his 24-hour gate duty shift at the Tribesmen gang pad. During the ensuing hours there were various comings and goings at the pad.

[11] In the afternoon, a number of gang members including the appellants left the pad to attend a concert. A male friend of Mr Ratima and two females stayed behind with him. At some point the two females departed and Mr Ratima and his friend were joined by a second male friend. The two male friends left the pad at around 11 pm that night and said Mr Ratima was fine. At about the same time as they left, a

Mr Paruru arrived. He was a patched member and also the person for whom Mr Ratima was prospecting. He and Mr Ratima were the only people at the pad. Mr Paruru left the pad at around 3 am on Sunday morning leaving Mr Ratima on his own. Mr Paruru testified that when he left at 3 am, Mr Ratima was fine.

[12] According to the Crown, about an hour and a half after Mr Paruru's departure, the appellants returned to the pad, the fatal assault taking place sometime between 5 am and 5.18 am. It was a fast, frenzied attack concentrated on the head and neck of a man the appellants knew could not fight back. The gang code was that when being hit by a patched member, prospects were not allowed to fight back.

[13] The two appellants were jointly charged with murder. On the Crown evidence, it was not clear which of them had inflicted the fatal blows and accordingly each was charged on the basis of being either the principal offender or a secondary offender who had assisted the other.[1]

[14] The Crown did not seek to argue that the appellants had intended to kill Mr Ratima. Rather, it relied on the form of murderous intent under s 167(b) of the Crimes Act 1961, namely that either (a) each intended to inflict bodily injury that was known to them to be likely to cause death and were reckless whether death ensued or not or (b) knew those factors applied to the other.[2]

[15] The key witness for the Crown was a Mr Te Hariona Paul Grace, known as "TH". He claimed to have been present when the fatal assault took place. As the Crown prosecutor acknowledged in her closing address, without TH's evidence there would not be a case against the appellants.

[16] TH was not a gang member himself but he knew Mr Solomon and Mr George. He described them as "friends" and also said he was a "real close" friend of Mr George's younger brother Sid. TH and Sid had been at school together.

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1 Pursuant to Crimes Act 1961, s 66(1).

2 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [81]–[83]; *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [22] and [25]; *R v Renata* [1992] 2 NZLR 346 (CA); and *R v Witika* (1991) 7 CRNZ 621 (CA).

[17] TH's evidence was as follows.

[18] He had met up with Mr George and Mr Solomon at a night club sometime around midnight Saturday 20 February 2016. Messrs George and Solomon had been to a concert. We pause here to interpolate that another witness who knew both the appellants and TH was also at the club and saw the three of them there. In the early hours of Sunday morning, TH left the night club and travelled to the Tribesmen gang pad with the appellants and a third man whom he did not know. TH was drunk and fell asleep in the car.

[19] Polling data from cellphone towers suggest the journey to the gang pad took place between 3.37 am and 4.39 am on Sunday 21 February 2016. Polling data from Mr George's phone shows him arriving in the vicinity of the pad at 4.39 am.

[20] TH says he was woken up at the gang pad by Mr George saying to him "this guy wants a fight". "This guy" was Clayton Ratima who had been on gate duty all night at the pad. TH knew Clayton Ratima. He did not remember anyone else being at the pad apart from Mr Ratima and the other occupants of the car he had travelled in, that is the two appellants and the unknown man.

[21] TH told them he did not want to fight and flailed around with Mr Ratima while Messrs Solomon and George swore at them. TH described the fight as "soft" and "messy" and "all over the place". He was unclear whether he had connected with Mr Ratima. TH said he eventually stopped saying to the appellants he "didn't come here for this shit." Mr Solomon and Mr George told him not to be a fag. As TH walked away, the two of them rushed past him in the direction of Mr Ratima and "launched" themselves at the latter with a punch. TH explained that by "launching" he meant "leaping" at Mr Ratima to punch him. TH saw one punch being thrown. He was not sure by which of the two men but said they were the only two launching at Mr Ratima.

[22] TH then walked away. Based on what he had seen and heard, he believed Mr Ratima was about to get a hiding and he did not want to be any part of it. As he was walking away, he could hear scuffling, yelling and swearing.

[23] After what seemed to TH like just a few seconds or minutes, Mr George and Mr Solomon and the unknown man returned to the car from the direction of the fight and left with TH. The unknown man was driving.

[24] At around 5.18 am a Lucinda McDougall arrived at the pad to meet a gang member. The significance of her evidence from the Crown's perspective was that she saw men leaving, observed strange conduct on the part of the gang member she was meeting which suggested something had happened and also saw a person lying by the back fence who looked as though he had passed out. There was a bottle lying beside him — deliberately staged, the Crown argued, to make it look as if the man on the ground had been drinking. Her description of the person who opened the gate did not match Mr Ratima. Yet, his gate duty would not have finished until later that day.

[25] At 5.27 am — just under ten minutes after Ms McDougall's arrival — Mr George sent a text to a third party asking that person to come and pick him up.

[26] Ms McDougall herself left the pad sometime before 6.28 am. Another woman Ms Sunitta McClutchie arrived at around 7 am. She too saw a man lying on the ground by the fence. She saw he had a blanket on him and could see his face. He looked as if he was sleeping.

[27] In inviting the jury to accept TH's account of what had happened sometime between 5 am and 5.18 am as being reliable, the Crown submitted it was consistent with the medical evidence indicating a swift, targeted attack.

[28] TH's account was also said to be supported by the evidence of a bar worker who worked at a brothel where Mr Solomon went to after leaving the gang pad. He arrived at the brothel at around 6 am. The bar worker, a Ms Puru, knew Mr Solomon. Her evidence was described by the Crown in closing as the second most significant item of evidence.

[29] Ms Puru said Mr Solomon was crying and asked if she and a few others would write to him when he was in prison. He said they had done something stupid and his van had been used for something. He had a graze on his right knuckles that was raw

and red. Ms Puru testified that he was still there when she left work at around 7.30 am. She did not see Mr George.[3]

[30] In addition to Ms Puru's testimony and the medical evidence, the other supporting evidence relied on by the Crown was:

(a) Hearsay evidence in the form of a formal statement made to the police on 7 March 2016 by a Mr Putt who later died before the trial. The thrust of the statement was that Mr Putt attended a gang meeting where the two appellants attempted to persuade one of the younger prospects present to take the rap for the assault on Mr Ratima.

(b) Evidence of demonstrably false statements made by Mr Solomon to police regarding the use of his car and his movements at the relevant times.

(c) Unchallenged evidence of Mr George attempting to dissuade TH from talking about the incident.

(d) Evidence of Mr George's past conduct towards Mr Ratima involving him directing punches to Mr Ratima's head, causing the latter to stumble and fall.

(e) Inferences to be drawn from the contents of a text sent by a gang member to Mr George and the latter's lack of response to it. The text was sent by a gang member at 6.07 pm on Sunday 21 February 2016 to Mr George (and no other gang member) stating that Mr Ratima was in hospital and there was a possibility "he may not wake up because of the beating…".

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[3] In his evidence TH said he thought Mr George may have gone to the brothel as well but was not sure.

The defence at trial

[31] Mr Solomon and Mr George each called one witness. Neither gave evidence themselves.

[32] The witness called by Mr George was the founding member of the Tribesmen Gang. He claimed no such gang meeting as described by Mr Putt had ever taken place.

[33] Mr Solomon called an English pathologist Dr Hamilton who had reviewed the autopsy records. In his view, the cause of death was not the neck and head injuries as postulated by the Crown pathologist who had carried out the post mortem but rather the head injuries alone. Dr Hamilton conceded the spinal fractures were significant, could only have been caused by direct trauma to that area and would have required significant force, but he did not accept they contributed to death. He also did not accept the injuries were necessarily inflicted at the same time and opined further that the subdural hematoma that led directly to death could have been caused by a fall.

[34] In his closing address, trial counsel for Mr George said his client's defence was that he had nothing to do with Mr Ratima being assaulted and that the evidence fell short of showing exactly how Mr Ratima was assaulted and who did it.[4] The defence was that there were a number of possibilities. In relation to Mr George, all that the evidence showed was that Mr George may have been one of the last people to see Mr Ratima alive.

[35] Counsel attacked the credibility and reliability of TH's evidence pointing out TH had made previous inconsistent statements and by his own admission was drunk at the time. It was further contended that the Crown had failed to exclude other reasonable possibilities such as that the true assailant was the unknown fourth man who accompanied TH and the appellants to the pad, one of the men Ms McDougall saw leaving the pad (she was not sure but thought there may have been 12 men), or the man who opened the gate for her or TH himself.[5] Moreover, TH did not actually

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4 None of the counsel representing the appellants in this Court was trial counsel.

5 It was never put to TH in cross-examination that there was any other person nearby and/or involved, other than the fourth man.

see the attack, did not know who had struck the blows and did not hear anyone encouraging the attack.

[36] Reliance was also placed on the absence of any forensic evidence linking Mr George to the crime. The adverse inferences which the Crown sought to draw from circumstantial evidence were challenged and aspects of Mr George's conduct such as attending Mr Ratima's tangi were said to be the actions of an innocent man.

[37] Trial counsel for Mr Solomon relied on the evidence of Dr Hamilton and also challenged the reliability of the witnesses called by the Crown particularly TH and the bar worker as well as the reliability of Mr Putt's hearsay statement.

Grounds of appeal

Mr Solomon's appeal

[38] The primary ground of Mr Solomon's appeal is that new evidence has come to light suggesting someone else was the true assailant.

[39] Mr Solomon also raises what his counsel Mr Ryan termed secondary grounds of appeal. These concern alleged errors made in admitting a statement Mr Solomon made to police, an allegedly improper submission made by the prosecutor to the jury in her closing address about the defence pathologist, an inadequate judicial direction on intent and a defective question trail.

[40] In Mr Ryan's submission, considered collectively, the errors in question demonstrate that the trial was unfair and that accordingly there has been a miscarriage of justice.

Mr George's appeal

[41] Mr George's appeal also involves a challenge to the Judge's directions on intent and the question trail. In addition, he challenges the admissibility of Mr Putt's hearsay statement, and the admissibility of the evidence of a Mr Kamoto.[6]

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[6] A ground of appeal concerning the direction the trial judge gave the jury on party liability was abandoned.

[42] We turn first to address Mr Solomon's application to adduce fresh evidence. We then consider arguments raised about the admissibility of various items of evidence before addressing concerns related to the conduct of the trial.

The new evidence

[43] The new evidence Mr Solomon seeks to adduce consists of an affidavit from a Ms Fairlane Henare, also known as Fairlane Collier.

[44] Ms Henare was an associate of Mr Ratima and other members of the Tribesmen gang including Mr Paruru whom she knew as Peneki. It will be recalled that Mr Paruru (whom for ease of reference we will refer to as Peneki in the rest of the judgment) was the patched gang member for whom Mr Ratima was prospecting.

[45] It will also be recalled that Peneki gave evidence at the trial. He said he was at the gang pad at between 10.30pm on the Saturday of the weekend Mr Ratima was assaulted and left around 3am to buy some bread on his way home. He said Mr Ratima was the only other person at the pad and they watched some movies in the lounge. When he left the pad at 3am, Mr Ratima was fine.

[46] In her affidavit filed in this Court, Ms Henare says Mr Ratima's death was talked about quite widely amongst "our group" and "lots of people" talked about the events leading up to it. Ms Henare claims to have been told that it was Peneki who set Mr Ratima up to be killed.

[47] The salient features of the information she claims to have heard, including she says from Peneki himself, are:

(a) A fight had broken out between Mr Ratima and Mr George's brother Sid when Mr Ratima had failed to open the gates of the pad on the Saturday evening after a group of gang members had returned from the concert.

(b) Mr Ratima had given Mr George's brother Sid a hiding and when Mr Ratima was winning "a bunch of other boys", around seven to nine in total, jumped in and attacked Mr Ratima.

(c) On the orders of Peneki, Mr Ratima was beaten and tortured.

(d) The beating went on for ages and involved Mr Ratima being put on a barbecue and cigarette smokes put out on him.

(e) They were all high on drugs and pissed and as a result it got out of hand and it went too far.

(f) She never heard anyone other than the police say Mr Solomon was involved.

(g) Mr George was there when Mr Ratima got hurt and was the person who had his reasons for hitting on Mr Ratima.

(h) The reason for the beating was because of the "Sid thing" and also because Peneki was sick of Mr Ratima "fucking up" as a prospect and embarrassing him.

(i) There were around nine people involved in beating Mr Ratima.

(j) Peneki left the pad at one point to get some bread and when he returned Mr Ratima was "fucked". Peneki freaked out and ordered the others to get rid of the body. But his orders were disobeyed and Mr Ratima was taken to the hospital instead.

[48] Mr Solomon's appellate counsel were alerted to Ms Henare's claims after Crown disclosed a transcript of an interview made on 12 October 2017[7] during a police

[7] The transcript of the interview shows the date as 12 November 2017. However, that appears to be an error because the officer conducting the interview commences it by noting it is Thursday 12 October 2017. 12 October 2017 was a Thursday but 12 November 2017 was a Sunday. It is unlikely the officer would have got both the day of the week and the month wrong.

interview about an unrelated matter. By 12 October 2017, the trial of Mr Solomon and Mr George had already taken place.

[49] Ms Henare however claims to have talked to the police about who was said to be responsible for Mr Ratima's death prior to October 2017.

[50] The first occasion was shortly after Mr Ratima's death. According to Ms Henare, the interview lasted 45 minutes to an hour. She was asked whether she knew anything about the death and replied no because she didn't at that time. However, despite not knowing anything, she says she did go on to tell police on this first occasion that she knew Mr Ratima was prospecting under Peneki, that Peneki had had enough, everything turned to shit and two prospects were supposed to get rid of Mr Ratima but did not.

[51] There is no record of Ms Henare making those statements implicating Peneki in the death of Mr Ratima to police in 2016.

[52] The second occasion is said to have been when she was interviewed by police about an allegation of assault and theft made against her by her landlady. Ms Henare claims police told her they could make all this go away if you talk about Mr Ratima. She says she told them she still didn't know anything but told them what she had heard. Ms Henare does not specify what it was she told police that she had heard, other to say she told them "all of that stuff".

[53] Police records indicate that police spoke to Ms Henare on 9 May 2016 about a complaint of assault made by her landlady. There is no record of her saying anything about Mr Ratima. She was not spoken to about an allegation of theft. That was a later complaint made by the landlady on 8 June 2016. The theft file was closed due to insufficient evidence without police ever talking to Ms Henare about it because they could not locate her.

[54] The police interview of Ms Henare in October 2017 came about because she was a suspect in a a serious assault against the same landlady, June. It was alleged Ms Henare had struck June on the head with a hammer.

[55] During the course of the 2017 interview, Ms Henare falsely denied the hammer allegation and provided what can fairly be described as an elaborate account of having been double crossed by Peneki which had resulted in a fracas during which the complainant was wounded. Although Ms Henare admitted throwing the hammer at the complainant, she denied it ever hit her and contended that it was Peneki who did the wounding.

[56] In order to bolster this false version of events, she told police the reason she was being set up by Peneki was because she had spoken to police about the death of Mr Ratima. Then later in the interview when asked to explain the account of four other witnesses identifying her as the person who pulled the hammer out of nowhere and struck the complainant, she told police it was because they were all scared of Peneki, knowing what he did to Mr Ratima. That included her partner who was also scared because of how Peneki set Mr Ratima up to be killed.

[57] In the course of the interview, Ms Henare did not provide any details about the killing of Mr Ratima other than to say "apparently" it was because Peneki found out Mr Ratima had been making a lot of money on the side that he wasn't giving to the club and he was killed for that. She did not tell police how she came to know this. Nor did she mention that she had told police of Peneki's involvement before. In fact, the implication from what she says is that she was claiming she didn't tell police that before but that Peneki may think she did.

[58] Subsequently, Ms Henare pleaded guilty to causing grievous bodily harm and wounding with intent to injure. She was sentenced to a term of imprisonment.

[59] After receiving a copy of her 2017 police interview, appellate counsel instructed an investigator to make inquiries of Ms Henare. The investigator says he worked with Ms Henare in prison to prepare the affidavit.

[60] On appeal, Ms Tulloch who argued this part of Mr Solomon's appeal, submitted that this new evidence was significant because it diminished the Crown case that it was just the two appellants and strengthened the possibility raised at trial that

someone else was responsible for Mr Ratima's death. It thus raised the possibility of a different verdict and so demonstrated there had been a miscarriage of justice.

Analysis of the new evidence

[61] The principles governing the admission of new evidence on appeal are that the evidence must be fresh, credible and cogent.[8]

[62] Ms Henare's evidence is fresh in the sense that trial counsel had no way of knowing about the statements she made to police on 12 October 2017 which was after the trial.

[63] On the other hand, at trial Mr Solomon (and Mr George) never disputed being present at the pad with TH at 5 am, never disputed being there when the messy fight between TH and Mr Ratima took place and never disputed being there at the time Mr Ratima was attacked. Defence counsel also never put to TH that anyone else other than the appellants and the unknown fourth man were outside at the time and/or involved. It was also never put to TH or Peneki himself that Peneki was at the pad and controlling events. Yet if all of that were true, that would have been information known to Mr Solomon (and Mr George) because they were there. Further, unlike TH, there is no doubt the two appellants knew Peneki. They, unlike TH, must also have known who the fourth man was who was driving the car.

[64] It follows that this new evidence is not in fact fresh. In the absence of any waiver of solicitor-client privilege, we are not prepared to speculate that Mr Solomon's trial counsel may not have followed instructions nor are we prepared to speculate that if trial counsel was following instructions why Mr Solomon may have given the instructions he did. Contrary to a submission made by Ms Tulloch, it is not a sufficient answer to say that had trial counsel had the benefit of Ms Henare's evidence, the cross-examination would have been different.

[65] Further, in any event, regardless of whether the evidence is fresh, we have come to a clear view that the evidence is not credible or cogent.

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8 *R v Bain* [2004] 1 NZLR 638 (CA) at [22]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [117]–[119]

[66] We say that for the following reasons.

[67] First, the evidence is inherently unreliable being essentially an amalgam of information — much of it hearsay — garnered from several different sources over a period of time. There are also internal contradictions. In one part of the affidavit, Ms Henare claims Peneki told her there were around nine people involved in beating Mr Ratima. In a later section, she says Peneki "and others" had said that the person who inflicted the actual injuries on Mr Ratima was Mr George.

[68] It is also a somewhat garbled account. It combines Peneki setting Mr Ratima up to be killed as well as a spontaneous fight. Sid was a patched member. On Ms Henare's account, he started the fight due to poor guard duty and for Mr Ratima to have supposedly then given him a hiding would have required Mr Ratima to consciously decide not to follow the gang code, a big call for him to have made. It is implausible that Peneki could be such a mastermind to have contemplated all that happening in advance.

[69] Secondly, the evidence has a dishonest genesis. The 2017 allegations about Peneki were made in order to bolster a false story. Further it was a false story that like the present one also involved an allegation about Peneki setting people up and being the one who did the wounding. We do not accept the allegations in relation to the Ratima homicide were ever raised with police before the 2017 interview. It would be reasonable to expect Ms Henare to have said in the 2017 interview that she has told police this before if she had. But, as already mentioned, she did not say that. We also consider it highly implausible that in the middle of what was a difficult homicide investigation, the police would not have recorded and actively pursued the allegations against Peneki if they had been made in 2016. We consider it much more likely that Ms Henare has appreciated that her claims might carry more weight if they were not tarnished by the context of the November 2017 interview and so has falsely stated they were raised with police earlier.

[70] Thirdly, critical aspects of the information in the affidavit are demonstrably wrong and inconsistent with unchallenged evidence.

[71] Importantly in particular, Ms Henare's affidavit is not consistent with the medical evidence. Neither pathologist noted burn injuries or any signs of torture including injuries consistent with the use of weapons. Contrary to another submission made by Ms Tulloch, the fact the pathologists could not with certainty tell from the bruising that all the injuries had happened at once does not logically detract from the absence of evidence of a sustained beating of the sort described by Ms Henare as occurring on 21 February 2016.

[72] Ms Tulloch points out the affidavit's reference to seven to nine men being involved is consistent with Ms McDougall's evidence of seeing what she estimated as 12 men — could have been more, could have been less — leaving the pad as she arrived at approximately 5.18 am.

[73] That may be so, viewed in isolation, but the remainder of Ms Henare's narrative is problematic. The man on the ground seen shortly after 5.18 am with the whiskey bottle alongside must have been Clayton Ratima. He was still lying there after 7 am with a blanket giving the impression he was asleep when Ms McClutchie visited. If Peneki had thought once he returned from getting some bread that Mr Ratima was dead and ordered the body to be disposed of, it does not make sense why he or those who supposedly disobeyed him would have just left the body on the ground with a bottle and a blanket before deciding to disobey him and eight hours later go to the hospital instead.

[74] Ms Henare's account is also inconsistent with the unchallenged evidence that it was two patched members and not two prospects (over whom Peneki would have had authority) who took Mr Ratima to the hospital.

[75] We note too that Ms Henare says "lots of people" in her circles talked about the events that led to Clay's killing but she never heard anyone say that Mr Solomon was involved. That seems very unlikely seeing as how it was his vehicle that was used to transport Mr Ratima to the hospital and even more telling there was unchallenged evidence that Mr Solomon himself said to police that he knew "everyone" was saying he was involved.

[76] In light of all the above, we have come to a clear view that the evidence does not satisfy the test for admitting new evidence on appeal and that it would not be in the interests of justice to admit it. The application for leave is accordingly declined.

Mr Putt's hearsay statement

[77] This is a ground of appeal advanced on behalf of Mr George.

[78] Mr Putt's hearsay statement was admitted in evidence as the result of a pre-trial ruling by Downs J.[9] Mr George sought leave to appeal that ruling on the ground Downs J had erred in declining to make an oral examination order to permit contrary evidence to be heard at the pre-trial hearing. This Court held that such an argument was untenable and declined leave.[10] It was not necessary for the Court to engage in the substantive merits of Downs J's decision and therefore we accept that the usual constraints on re-visiting earlier decisions of this Court are not applicable.[11]

[79] In determining whether to admit the statement, Downs J first considered whether the circumstances relating to it provided reasonable assurance of its reliability. The Judge held that it did relying on the fact that it was a formal written statement signed by Mr Putt and made by him in the knowledge it could be used in these proceedings and in the knowledge of the legal consequences of making a false statement.[12] As Downs J further observed, Mr Putt would have known too that by allegedly "narking", he had "crossed one of the underworld's few bright lines".[13]

[80] The Judge also relied on the fact the statement had been made at a time when the events in question were still fresh as reflected in the detail Mr Putt was able to provide including naming 13 other attendees at the meeting.[14] The Judge was also satisfied there had been no inducement to make the statement and no suggestion Mr Putt was under the influence of drugs or alcohol at the time.[15]

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9 *R v Solomon* [2017] NZHC 1148.
10 *George v R* [2017] NZCA 318.
11 For a discussion of the approach taken when it is sought to relitigate previous pre-trial decisions of this Court on a conviction appeal, see *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305 at [47]–[49].
12 *R v Solomon*, above n 9, at [28].
13 At [26].
14 At [28].
15 At [22].

[81] The Judge acknowledged that Mr Putt who in 2016 was aged 32 had a criminal history of dishonest offending including a significant number of burglaries and theft convictions. However, this was outweighed by the other factors which in the Judge's assessment strongly favoured a determination of threshold reliability.[16]

[82] Having reached that conclusion, the Judge then turned to the second stage of the inquiry namely whether the probative value of the evidence was outweighed by the risk it would have an unfairly prejudicial effect on the proceeding. He considered that this was not a case where the matters identified by the appellants as affecting reliability could only be addressed in cross-examination of Mr Putt. For example, information about the circumstances in which the statement was taken, namely that Mr Putt was facing charges himself and wanting assistance from the police to get bail, as well as information about Mr Putt's criminal record could all be put before the jury.[17]

[83] The Judge was further satisfied that any remaining risk of unfair prejudice in not having Mr Putt available for cross-examination could be sufficiently mitigated by judicial direction.[18]

[84] At trial, the trial Judge, Hinton J, gave the jury the standard hearsay direction. She instructed the jury to treat the statement with caution and reminded them that it had not been tested by cross-examination.

[85] On appeal, no issue was taken with Hinton J's direction. Rather the focus was on the correctness of the pre-trial decision. Counsel for Mr George, Mr Gotlieb, advanced a number of reasons why in his submission that decision was wrong.

[86] First, he pointed out that Mr George was not actually named by Mr Putt as being in attendance at the meeting. Mr Putt referred to a "Memphis" identifying him as "Mana Diamond".

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16 At [27]–[28].
17 At [35].
18 At [36].

[87] This argument is without merit. There was ample evidence establishing that Mr George went by the name of Mana, was known as Memphis and his brother was Sid Diamond.

[88] Secondly, Mr Gotlieb argued that the Judge gave insufficient weight to the fact Mr Putt may have been motivated to make a false statement in order to get a favourable bail outcome. However, the evidence was that the officer taking the statement had categorically told Mr Putt before he made his statement that the police could not and would not assist him with his bail application.

[89] Another argument raised by Mr Gotlieb was that the Judge failed to take into account an internal inconsistency in the statement when considering the unfair prejudice caused by not being able to cross-examine Mr Putt. Mr Putt says in one passage that Denz (Mr Solomon) was the one asking for someone to take the rap. But later in the statement, he talks about the guys that "Memphis and Denz were trying to get to take the rap."

[90] Mr Gotlieb submitted this was an example of a throwaway line which would normally be able to be challenged in cross-examination. We do not accept it was a throwaway line. In any event it was a matter that was easily able to be the subject of a submission to the jury without the risk attendant on asking Mr Putt why he had the impression it was both appellants.

[91] Finally, Mr Gotlieb contended the Judge had placed insufficient weight on Mr Putt's criminal record. However, while that record was certainly a relevant factor bearing on Mr Putt's veracity, it is also relevant he did not have any convictions for perjury or attempting to pervert the course of justice. We agree with the Judge that considered overall the criminal record was outweighed by the indicators of reliability.

[92] In short, we are satisfied Downs J's comprehensive and well-reasoned decision was correct. The evidence of Mr Putt's hearsay statement was properly admitted at trial and this ground of appeal is not sustainable.

Admissibility of the evidence of Mr Kamoto

[93] This too is a ground of appeal brought by Mr George.

[94] It relates to evidence given by a Mr Kamoto which the Crown sought to adduce as propensity evidence. Mr Kamoto was a former gang prospect and good friend of Clayton Ratima. He was one of the two friends who spent time with Mr Ratima at the pad on the Saturday evening.

[95] For present purposes, the essence of Mr Kamoto's evidence at trial was that a few months before Mr Ratima's death, he saw Mr George hardening Mr Ratima up by punching him in the shoulder. The punch was aimed at the head but blocked by Mr Ratima who had put his arms up to protect his face. The force of the punch caused Mr Ratima to stumble and fall. Mr Kamoto confirmed that Mr Ratima did not fight back because of the gang rules that prospects do not fight back when members punch them. Mr Kamoto also claimed to have witnessed another similar incident involving Mr George punching Mr Ratima but did not provide any details, other than to say it was the same thing.

[96] The admissibility of Mr Kamoto's evidence had also been the subject of a pre-trial ruling by Downs J.[19] The Judge held that the evidence before him demonstrated a pattern of hostility and violent conduct on the part of Mr George towards Mr Ratima and therefore bore on the issue of identity. The Judge's decision allowing the evidence to be called was appealed to this Court but leave was declined, again primarily on the procedural point that oral examination of witnesses at a pre-trial hearing is generally inappropriate.[20]

[97] On appeal, Mr Gotlieb submitted that what Mr Kamoto had seen was of a very different nature to the homicidal assault alleged by the Crown. It was more in the nature of a consensual fight and therefore had little or no probative value. The fact Mr George might have been a person who was prepared to engage in rough play

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[19] *R v Solomon*, above n 9, at [39]–[64]. That judgment also granted the Crown's application to adduce the evidence of another propensity witness to similar effect. However, her evidence was not led at trial.

[20] *George v R*, above n 10, at [26]–[27].

fighting did not demonstrate a willingness to use lethal force in the company of another. While the evidence had little or no probative value, it was unfairly prejudicial to a high degree. It should have been excluded.

[98] Contrary to a submission made by Mr Gotlieb, it appears that the evidence Mr Kamoto gave at trial differed in some significant respects from the witness statement that was before Downs J. According to the latter's decision, Mr Kamoto had stated that Mr George and another gang member would pick on Mr Ratima and shin kick him while drunk. He also described seeing Mr George give Mr Ratima "a hiding … over nothing".[21]

[99] At trial however, when asked what his impression was of how Mr Ratima was treated by other members of the gang, for example, were they good to him, Mr Kamoto replied "all good". They would, he said, give Mr Ratima "shit" but it was just play fighting and joking around. He also initially claimed not to remember the punching incident involving Mr George but after refreshing his memory from his witness statement described it as "sparring", a "harden up thing", and "rough foreplaying." He did not use the phrase "hiding over nothing". In cross-examination, he also agreed that play fighting was something that often went on at the pad and that it was just a form of training to keep prospects in check, to get ready for a real fight. He also said it was not serious fighting, just play fighting.

[100] In her closing address, the prosecutor submitted the evidence showed that Mr George had got the better of Mr Ratima before, he had shown him who the boss was in a ritual yet forceful fight where Mr Ratima also wasn't allowed to fight back. Mr George was able to knock him off his feet on that day too.

[101] For his part, trial counsel for Mr George submitted the jury should put the evidence to one side as of no consequence. It was just about play fighting and not indicative of any long standing dispute between Mr Ratima and Mr George. He also reminded the jury that a former girlfriend of Mr Ratima had testified that, in her three year relationship with Mr Ratima, she had never seen Mr George being violent towards Mr Ratima or beat him up.

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21 *R v Solomon*, above n 9, at [39].

[102] The trial Judge repeated the defence submissions in her summing up but did not give a propensity direction.

[103] On the basis of the brief of evidence that was before Downs J, we consider his decision to allow the Crown application was correct. However, although Mr Gotlieb submitted that the evidence given by Mr Kamoto at the trial was "more or less" the same as that before Downs J, in our view it is clear that Mr Kamoto did not fully come up to brief. Indeed, in the absence of evidence that Mr George was the only gang member who participated in rough fighting with prospects and/or Mr Ratima involving forceful punches aimed at the head or that he was the only gang member able to knock a large man down with a punch, we consider the only relevance of the evidence was as evidence of general gang violence, practices and rules. It follows contrary to a submission made by the Crown, that we consider its probative value in relation to the identity of which gang member attacked Mr Ratima to be very low.

[104] That of course raises the issue of whether the trial Judge should have told the jury to ignore the evidence or should have explained its limitations and the use they could make of it and instructed them not to reason that because Mr George had punched Mr Ratima before, he must have done so this time.

[105] However, we have come to the conclusion that the limitations of the evidence were self-evident and would have been obvious to the jury. Although it was relied on as an item of supporting evidence by the Crown, it was not given any prominence and only rated a brief mention in the various closing addresses and the summing up. Its admission was not capable in our view of affecting the outcome of the trial nor did the failure to give a specific direction render the trial unfair. For completeness, we note that the Judge did give the jury a warning about not allowing any prejudices they might have about gangs to influence them.

Admissibility of statement made to police by Mr Solomon on 23 February 2016

[106] During the trial, Mr Solomon unsuccessfully sought to exclude evidence of a statement he made to a Detective Ralph on 23 February 2016.[22] 23 February was the day after Mr Ratima had been declared brain dead but was still on life support.

[107] By that time, the police had ascertained that Mr Solomon was the owner of the vehicle used to transport Mr Ratima to the hospital but they had not yet recovered the vehicle itself. A constable had spoken to Mr Solomon over the weekend about the vehicle and Mr Solomon's movements. The officer had made notebook entries of their conversation but had not obtained a signed statement.

[108] Detective Ralph's evidence was to the following effect.

[109] He was tasked on 23 February 2016 with locating Mr Solomon to take a witness statement from him regarding the fact his vehicle had been used and to see if he had any information that might assist in the inquiry. At that stage there was no information to suggest Mr Solomon had been involved in the assault and he was not regarded as a suspect.

[110] When the detective located Mr Solomon, the latter was initially hostile and told him to go away. In Detective Ralph's experience of interactions with gang members, that was not an unexpected response. He told Mr Solomon he needed to know about the use of his car and (as he later explained at a voir dire) tried to appeal to his decency by stressing the importance of the information given Mr Ratima's extremely serious situation. He also informed Mr Solomon that he might be liable for arrest as a party to the assault if he were later found to have assisted persons involved for example by the use of his car.

[111] Mr Solomon agreed to go to the police station where he was taken to a witness interview room and a statement was taken on a witness statement form. A witness statement form was used because Mr Solomon was not a suspect and there was no

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22 *R v Solomon* HC Auckland CRI-2016-092-12807, 8 July 2019.

information to suggest he was involved in the assault. Because of that, he was also not read his rights nor was he cautioned.

[112] The statement read as follows:

> "I am the registered owner of a Honda Odyssey motor vehicle with the registration DBK440.
>
> On Friday the 19th of February 2016 I gave this vehicle to a guy named Clayton NGAHA to use.
>
> I have not used or seen the vehicle since. I do not know where the vehicle is.
>
> I do not know what happened to Clayton. I am not involved and I don't know who is."

[113] The grounds of the application to exclude the statement were that it had been improperly obtained because, in breach of Mr Solomon's rights, Detective Ralph had not cautioned him.

[114] After conducting a voir dire in which only Detective Ralph gave evidence, the Judge held the evidence had not been improperly obtained and was admissible. She further held that even if it had been improperly obtained, the evidence should be admitted under s 30 of the Evidence Act 2006.

[115] On appeal, Mr Solomon's counsel argued that Mr Solomon was effectively compelled to go to the police station and felt pressured to make the statement because of the threat of arrest. Had it not been for that threat and the failure to remind him of his rights, he would not have provided the statement.

[116] However, that submission is simply not sustainable in light of the evidence given by Detective Ralph at the voir dire. That evidence amply justified the Judge's finding that the advice about liability to arrest did not amount to a suggestion it was compulsory to answer police questions, that Mr Solomon got into the car of his own accord, that he was never under any compulsion, that he could not have felt he was under compulsion and that he was not detained.

[117] In particular, when asked how it was that Mr Solomon went from being abusive to hopping voluntarily into the car, Detective Ralph explained that it was common

when dealing with gang members for there to be an initial front of hostility but that he had found from experience that if you just keep talking to them and explain there is a very real reason for them to talk to you, they will start talking back normally. He said Mr Solomon was fine to deal with from the point he was in the vehicle and remained calm throughout. The reference to a possibility of arrest was not a threat of arrest, it was a threat he could potentially be arrested if he were found to be liable for assisting people by letting them use his vehicle.

[118] In his submissions, counsel Mr Ryan relied on a dissenting judgment of Mallon J in *W v R*.[23] In *W*, Mallon J found on the facts of that case that there had not been a true waiver of rights in circumstances where although the appellant was a seasoned criminal and aware of his rights, his claims to have felt under pressure when questioned by police were plausible.[24] However, not only was that finding a minority view, it was based on evidence given by W himself. In contrast, in the present case, Mr Solomon did not give evidence. And unlike W he was not being accused of murder. There was no evidence in this case from which any inference that he felt under pressure could properly be drawn.

[119] Finally, we note that the written statement provided to Detective Ralph was substantially the same as the statements Mr Solomon had previously made to the constable about the car on the Sunday as recorded in the constable's notebook.

[120] We conclude the statement made to Detective Ralph was properly before the jury and that this ground of appeal lacks merit.

Closing address of prosecutor

[121] Mr Solomon takes issue with a submission made by the prosecutor in her closing address which he contends was incorrect and improper.

[122] The impugned comment relates to the evidence of the defence pathologist who gave his evidence from the United Kingdom by AVL. It will be recalled that the pathologist Dr Hamilton opined that the fatal brain injuries could have been caused by

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23 *W (CA226/2019) v R* [2019] NZCA 558.
24 At [142]–[143].

a fall. He supported that opinion by reference to photographs which he said showed an abrasion on the back of Mr Ratima's head.

[123] In cross-examination, the prosecutor put to him that the abrasion was in fact in the nape of the neck and referred him to Dr Vertes' post-mortem body sketch. Dr Hamilton indicated he did not have the sketch, only photographs. There was then a brief adjournment while the sketch was sent to Dr Hamilton. The sketch recorded an abrasion in the nape of the neck and no other abrasion on the back of Mr Ratima's head. When his evidence resumed, Dr Hamilton did not resile from his opinion about the location of the abrasion. He preferred to rely on the photographs.

[124] Mr Solomon's complaint on appeal is that the prosecutor unfairly told the jury in closing that Dr Hamilton had not seen the sketch plan before the trial. The submission is said to have been without foundation because it was never put to Dr Hamilton and it unfairly undermined his evidence.

[125] What the prosecutor said was:

> Dr Hamilton, when first questioned about the sketch plans, said that he didn't have them. Clearly, it appeared he hadn't reviewed them previously or, if he had, he hadn't recalled that. We took a short adjournment of the trial to enable him to receive them but, even after he'd had a chance to look at them, he refused to accept that he might have been wrong on this point. The Crown suggest he may have, in fact, been dogmatic on it, simply refusing to concede a point that he really should have, and that was despite his concession at the very beginning that he accepted Dr Vertes documentation was accurate and that he accepted the descriptions of the injuries that she had given as accurate and that the physical realities of what was present during the examination were accurate.

[126] Given what had unfolded at the trial, we consider the submission which postulated two alternative inferences was available and proper. We reject this ground of appeal.

The Judge's direction on intent and the question trail

[127] Both appellants submit the Judge's direction on murderous intent was inadequate and that the question trail she provided to the jury was defective.

[128] Mr Gotlieb for Mr George contends the Judge's explanation and treatment of intent was unhelpful and confusing and may well have led the jury into error. He also adopts and endorses the criticism made on behalf of Mr Solomon that the Judge should have instructed the jury on the meaning of recklessness. Both appellants further contend that the deficiencies in the direction on intent were compounded by the Judge's error in combining both defendants into one series of questions in a composite question trail.

[129] The Judge's directions on intent were structured around the question trail.

[130] The first question addressed the issues of assault and causation. It asked the jury whether they were sure that Clayton Ratima was assaulted at the Tribesmen pad on 21 February 2016 by being punched multiple times in the head and neck causing bodily injury to him and later his death. As the Judge explained to the jury, that involved consideration of the evidence of the pathologists and whether there was a reasonable possibility the death had been caused by a fall.

[131] The question went on to say that if the jury's answer was "no", then Mr Solomon and Mr George were not guilty of murder and not guilty of manslaughter. If the answer was "yes", then the jury needed to go to Question 2.

[132] Question 2 addressed the issue of identification of the defendant's respective participation as either principal or party. Question 2 read:

> **Are you sure that Mr Solomon and Mr George (and no one else) <u>EITHER</u> intentionally committed the assault on Mr Ratima that caused bodily injury to him and later his death <u>OR</u> intentionally assisted in the assault by participating in it?**

[133] The question was followed by a note that if the jury considered there was a reasonable possibility that someone else either intentionally committed the assault or intentionally assisted in the assault, they were to find both defendants not guilty of murder and not guilty of manslaughter.

[134] The question trail continued:

> If your answer in respect of Mr Solomon is NO, find both Mr Solomon and Mr George **not guilty of murder and not guilty of manslaughter**.
>
> If your answer in respect of Mr George is NO, find both Mr George and Mr Solomon **not guilty of murder and not guilty of manslaughter**.

[135] Conversely if their answer in respect of both Mr Solomon and Mr George was "yes", then they were to go to Question 3 and Question 4.

[136] Questions 3 and 4 were about murderous intent. Question 3 related only to Mr Solomon and Question 4 in identical terms related to Mr George.

[137] Question 3 read:

> **Are you sure that Mr Solomon:**
>
> **(i) intended to cause Mr Ratima bodily injury (or knew that Mr George intended to cause him bodily injury, likely to cause death, and was reckless as to whether death ensued); AND**
>
> **(ii) knew that the injury was likely to cause death; AND**
>
> **(iii) was taking a conscious risk that death would ensue?**
>
> If your answer is NO to any part of question 3, Mr Solomon is **not guilty of murder but guilty of manslaughter.**
>
> If your answer is YES to all parts of question 3, find Mr Solomon **guilty of murder.**
>
> (Footnote omitted.)

[138] The Judge told the jury that Questions 3 and 4 required them to determine each of the defendant's state of mind at the time of the assault. She went on to say:

> [119] These questions require you to determine each of the defendant's state of mind at the time of the assault. A state of mind is a question of fact, but you have to answer it from inferences from the surrounding circumstances. I have talked to you earlier about inferences and how careful you have to be with them.
>
> [120] When you look at intention, you should consider what Mr Solomon and Mr George did and said according to the evidence, such evidence as you accept, before, during and after the incident to see what that evidence establishes about their state of mind. So usually the most telling evidence as to a person's state of mind is the nature of their acts or actions or words at the time.

> [121] The Crown points to the medical evidence of Mr Ratima being punched multiple times in the head and neck, if that is what you found, which you will have done if you are looking at these questions, the head and neck being the most vulnerable part of the body.
>
> [122] The Crown also points to [TH's] evidence that the defendants called him a fag after he pulled out of the fight. They say that shows an intent to do more than just the messy fighting that [TH] was engaged in, according to [TH's] evidence.
>
> [123] You will need to consider whether a statement such as that could be evidence of intent to cause a bodily injury likely to cause death. It is up to you whether you consider all of the facts leave you sure of the answers to the individual questions 3 and 4. I remind you again that Mr Solomon and Mr George are entitled to the benefit of the doubt. So if your answer is no to any part of question 3, Mr Solomon is not guilty of murder, but is guilty of manslaughter and that flows from the fact that you have answered yes to the previous question. The same then applies, not necessarily the same answer, but the same question and consequence follows in question 4. If your answer is no to any part of question 4, Mr George is not guilty of murder, but guilty of manslaughter flowing from the answer to the previous question, i.e. to question 2. If your answer is yes to all parts of question 4, then you find Mr George guilty of murder.

[139] In support of his contention that these directions were inadequate, Mr Ryan referred us to authority that the s 167(b) definition of murder under the Crimes Act is concerned with a particular kind of risk taking, namely conscious appreciation of the likelihood of causing death rather than a degree of knowledge on the defendant's part in some lesser or vague sense, such as possession of the necessary general knowledge to have appreciated the risk if he had thought about it.[25] As we understand it, Mr Ryan's contention is that the Judge should have provided an exposition of recklessness presumably along those lines.

[140] Mr Ryan says further that combining the the two defendants in one question trail would have created further confusion and misled the jury into thinking they should consider the two defendants in all respects together and thus if one was found guilty then the other one would be too.

[141] Mr Ryan also submitted that "the inadequacies present in the Judge's direction of murderous intent and the error of combining both defendants in one series of

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[25] *R v Harney* [1987] 2 NZLR 576 at581 (CA); and *R v Dixon* [1979] 1 NZLR 641 (CA) at 647.

questions collectively means there is a real risk the defence theory was not properly considered."

[142] We do not accept those submissions in the context of this trial and having regard to the defence theory that was run.

[143] The defence theory for both appellants was very much focused on the identity of the true perpetrators. As mentioned, the defence for Mr George was expressly stated to be that "Mr George just was not involved in the assault on Mr Ratima at all". For obvious reasons, questions of intent and recklessness were accordingly only briefly mentioned. As submitted by the Crown on appeal, there was no competing defence case on mens rea available to be put.

[144] In closing, trial counsel for Mr Solomon did not specifically address murderous intent. Rather the focus was on reasonable doubt and the inadequacies of the evidence regarding how Mr Ratima had come to be fatally injured.

[145] Trial counsel for Mr George did specifically mention murderous intent in his closing but only briefly, making three points. First, he submitted relying on Dr Hamilton's evidence that it was very possible this could have been just a one hit manslaughter where someone punched Mr Ratima and he fell back onto something hard. Secondly, he argued the absence of any use of a weapon was consistent with a lack of any murderous intent. The third point was the absence of any evidence of a motive on the part of Mr George to want to kill Mr Ratima.

[146] The Crown was not of course required to prove motive and in relation to the particular form of murderous intent it relied on, motive to want to kill was largely irrelevant. Further, by the time the jury reached Questions 3 and 4 of the question trail, they would have already excluded the possibility of there being a fall or any other cause of death other than an attack with significant force to the head and neck. They would also have already rejected the possibility of there being any other assailants. To have reached Questions 3 and 4 would have meant too that they had accepted TH's account of those aspects of the appellants' conduct from which an inference of murderous intent could be drawn, such as their rushing at Mr Ratima.

[147] In our view, in the circumstances of this case, little purpose would have been served by the Judge defining recklessness by using some other form of words than those contained in the question trail. The phrases the Judge used were knowing the injury was likely to cause death and with that knowledge taking a conscious risk that death would ensue. In our view, that adequately conveyed the concept of recklessness. None of the authorities cited by Mr Ryan suggest otherwise. Nor for that matter did the experienced defence counsel at the time, despite having been consulted over the question trail and despite being given an opportunity to raise any concerns after the summing up but before the jury retired for its deliberations.

[148] In this case, proof of the requisite intent was of course entirely dependent on the drawing of inferences but in our view notwithstanding the absence of a weapon those inferences on the evidence were irresistible — in particular, the inferences to be drawn from the medical evidence. The blows were all concentrated in the most vulnerable parts of the body, making it clear that whoever assaulted Mr Ratima had deliberately targeted that area. Further, the fact of the two fractured vertebrae also meant it was clear the blows had been inflicted on those parts of the body with very significant force. Mr Ratima was a big man — 190 centimetres in height and weighing 133 kgs. As already mentioned, there was also uncontested evidence that a prospect like Mr Ratima was not permitted to respond and that was something the appellants would have known. In all those circumstances, a finding of the requisite intent was we consider inevitable.

[149] As regards the structure of the question trail, we accept that other trial judges may have provided the jury with separate question trails. That was certainly something trial counsel for Mr George advocated for at the time. However, in our view it was not an error to have combined them. Further, the questions were themselves concise and clear and we are satisfied would not have confused the jury nor led them astray and taken them down illegitimate pathways.

[150] Importantly, the Judge also made it very clear in oral directions that each appellant was to be tried solely on the evidence admissible against him. The Judge explained that meant the jury was required to consider the position of each defendant separately and come to a separate considered decision about each. She also stated that

because they were jointly charged that did not mean they must both be guilty or both not guilty. The same message had been strongly conveyed by all counsel and of course, as already mentioned, the questions on intent were individualised.

[151] We are satisfied that the Judge's directions on intent were sufficient in the context of the trial and that the use of the composite question trail was not an error warranting appellate intervention.

Summary of conclusions

[152] In relation to Mr Solomon's appeal, we decline to admit the evidence of Ms Henare on appeal and in our view none of the other grounds of appeal whether viewed individually or collectively warrant appellate intervention. There was no error in the Judge's question trail and her directions on intent were appropriate. The prosecutor's statement in closing about the evidence of Dr Hamilton was available to her and the witness statement made by Mr Solomon to police was properly admissible.

[153] As regards Mr George's appeal, we have found that the hearsay statement of Mr Putt was properly before the jury and although the evidence of Mr Kamoto differed at trial from the evidence on which the original decision to admit his evidence was based, the giving of Mr Kamoto's evidence and the way it was treated at trial has not occasioned the risk of a miscarriage of justice. The Judge's question trail would not have confused the jury and it would not have resulted in them failing to consider the case against each appellant separately. The Judge's direction on intent was adequate.

Outcome

[154] The application for leave to adduce the evidence of Fairlane Michelle Henare is declined.

[155] The appeal brought by Vincent Mana George (CA703/2017) is dismissed.

[156] The appeal brought by Denis Robert Henry Solomon (CA711/2017) is dismissed.

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