IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA450/2020
[2022] NZCA 204

BETWEEN	SCOTT WATSON Appellant
AND	THE QUEEN Respondent

Hearing:	1 March 2022
Court:	Kós P, Gilbert and Collins JJ
Counsel:	N P Chisnall, K H Cook and L A Elborough for Appellant M F Laracy and T R Simpson for Respondent
Judgment:	25 May 2022 at 10 am

JUDGMENT OF THE COURT

The proposed identification ground may be considered at the appeal.

REASONS OF THE COURT

(Given by Kós P)

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[1] May an appellant whose conviction has been referred back to this Court by the Governor-General[1] present a ground of appeal not expressed in the reference?

[2] This question concerns the extent of jurisdiction of this Court on an appeal arising by reference.

Background

[3] The circumstances of this appeal are profoundly well known. Almost a quarter century ago Olivia Hope, then aged 17, and her friend Ben Smart, then aged 21, attended the 1998 New Year celebrations at Furneaux Lodge in the Marlborough Sounds. They were last seen boarding a yacht at the lodge anchorage in the early hours of the morning, in the company of another man. He was said to have offered them a place to sleep when there was none remaining aboard the yacht Ms Hope travelled there on. Ms Hope and Mr Smart have not been seen since. Their bodies and possessions have never been located.

[4] The appellant, Mr Watson, was convicted of the murder of Ms Hope and Mr Smart in the High Court at Wellington on 11 September 1999. He appealed his conviction to this Court. The grounds of appeal included alleged improper communications by police to witnesses, Crown jury vetting, verdict unreasonableness, the admissibility of the evidence of three witnesses and the summing-up by the trial Judge. A further ground involving fresh evidence concerned potential accidental contamination of DNA extracted from scene samples in another case.

[5] None of these grounds succeeded. The appeal was dismissed on 8 May 2000.[2] An application for special leave to appeal to the Privy Council was dismissed in November 2003.

[6] An application to the Governor-General in 2008 for exercise of the Royal prerogative of mercy was declined in July 2013. A second application was made in November 2017, relying inter alia on reports by a forensic scientist concerning

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1 Under s 406(1)(a) of the Crimes Act 1961.
2 *Watson v R* CA384/99, 8 May 2000.

the reliability of forensic evidence at trial regarding hairs said to be Ms Hope's which had been recovered from Mr Watson's yacht.

[7] On 10 August 2020 the Governor-General by Order in Council referred to this Court "the question of the convictions of Scott Watson for murder, entered in the High Court at Wellington on 11 September 1999".[3]

[8] The reference is made expressly under s 406(1) of the Crimes Act 1961, which provided:[4]

> **406 Prerogative of mercy**
>
> (1) Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time he or she thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
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> (a) refer the question of the conviction or sentence to the Court of Appeal or, where the person's right of appeal against conviction under section 229 of the Criminal Procedure Act 2011 was to the District Court or the High Court, to the High Court, and the question so referred shall then be heard and determined by the court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or
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> (b) if he or she desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

[9] To be clear, then, the question referred to this Court is simply the convictions of Mr Watson. Not the sentence. It is to be dealt with by this Court as an appeal against conviction.

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3 "Reference to the Court of Appeal of the Question of the Convictions of Scott Watson for Murder" (10 August 2020) *New Zealand Gazette* No 2020-ps3636.

4 Section 406 was repealed on 1 July 2020 by s 54 of the Criminal Cases Review Commission Act 2019. However, by operation of cl 3(1) and (2) of sch 1, pt 1 of that Act, the reference continues to be one made under s 406.

[10] The reference further states that "[t]he background to and reason for the reference appear in the Schedule". The background we have related sufficiently above. The "reason for the reference" is then stated in these terms:

Reason for reference

6 Reason

(1) The matter referred to in clause 5(4) and (5) indicates that evidence has become available since the applicant's trial and appeal against conviction that may raise doubts about the reliability of an important aspect of the prosecution case, namely the forensic evidence referred to in clause 2(4)(e) and (5).

(2) The question of the applicant's convictions is referred to the Court of Appeal so that it may—

(a) consider evidence about the matter referred to in clause 5(4) and (5); and

(b) consider whether any of the evidence given at the applicant's trial should be reconsidered in the light of evidence about the matter referred to in clause 5(4) and (5); and

(c) determine, in the light of its consideration, whether a miscarriage of justice may have occurred.

[11] The issue we must grapple with is whether the reason expressed in the reference circumscribes the grounds of appeal Mr Watson may maintain.

A preliminary question about jurisdiction

[12] A crucial part of the Crown case against Mr Watson was his identification by the late Mr Guy Wallace, the water-taxi driver who delivered the three New Year revellers to the yacht. Mr Wallace had identified Mr Watson via a photographic montage. Although he otherwise repudiated the proposition that Mr Watson was the "third man" in evidence, he maintained that the person shown in photograph 3 of the montage was the man he had transported. Photograph 3 depicts Mr Watson. As this Court observed in 2000:[5]

> It is beyond question that the case against [Mr Watson] depended substantially on the correctness of [Mr Wallace's] identifications, because if they were incorrect the Crown case was seriously undermined.

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5 *Watson v R*, above n 2, at [26].

[13] The admissibility of the montage was challenged pre-trial. The Judge however held it to be admissible.[6] That ruling was not challenged on appeal in 2000. Mr Watson now wishes to argue the Judge erred in admitting the montage. It may be noted that a report prepared by the Independent Police Conduct Authority in May 2010 concluded that the compilation of this montage, and the showing of a single photograph to Mr Wallace, "fell well short of best practice" and was "highly undesirable".[7] Whether that is so, and whether it is productive of a miscarriage of justice, are of course matters for this Court to decide if this is a ground Mr Watson may advance.

[14] The jurisdictional question now arising is whether on the appeal to this Court generated by the Governor-General's reference, this additional ground, not within the express reasons given for reference, may be advanced by Mr Watson.

[15] Mr Watson seeks to persuade us that the prior decisions of this Court in *Ellis v R*[8] and *R v Ellis*[9] either do not preclude this additional argument or are wrong. Alternatively, he wishes to argue that the reference is broad enough to encompass the additional ground. The Crown contends the statutory wording and *Ellis* preclude enlargement of appeal grounds beyond the expressed reasons given in the reference.

The prerogative and its auxiliary legislation

[16] The prerogative of mercy is distinctively an executive power. It has been described as "the foremost of the Crown's prerogatives in the administration of justice", a "safety net" and "an integral element in the criminal justice system".[10]

[17] The exercise of the prerogative may be traced back to the reign of Edward the Confessor.[11] Blackstone had it that the King was "a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved, holding a court of equity in

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6 *Watson v R* T2693/98, 13 May 1999 at 10.

7 Independent Police Conduct Authority *Response to Complaint About Operation Tam* (17 May 2010) at [24] and [27].

8 *Ellis v R* [1998] 3 NZLR 555 (CA).

9 *R v Ellis* [2000] 1 NZLR 513 (CA).

10 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [19.4.2(10)(a)]; and *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 681–682.

11 C H Rolph *The Queen's Pardon* (Cassell, London, 1978) at 16.

his own breast".[12] It was first set out in statutory form by Henry VIII in the Jurisdiction of Liberties Act 1535 (Eng), which ratified and preserved royal powers.[13]

[18] Inevitably perhaps, judges intruded into this entirely executive process in the late 18th century, when they came to recommend exercise of the prerogative when profoundly dissatisfied with a jury verdict, or perhaps on other purely compassionate grounds.[14] In this relationship there was no particular discord. But within the executive there most certainly was. In 1830 the Prime Minister (the Duke of Wellington) and Home Secretary (Sir Robert Peel) successfully resisted a royal command to commute sentence given by George IV (whom the criminologist C H Rolph described as "notoriously, nothing if not human").[15] Thereafter the Royal prerogative was exercised only on the advice of ministers. The prerogative narrowed; mere compassionate appeals "ad misericordiam" would not justify its exercise. By the end of the 19th century free pardon was granted only on legal grounds, where innocence was ascertainable or there was real doubt as to guilt.[16]

[19] In New Zealand the Letters Patent Constituting the Office of the Governor-General of New Zealand provide expressly for the prerogative.[17] The power in question is plainly that of the Governor-General, and is to grant a pardon ("either free or subject to lawful conditions"),[18] a respite ("either indefinite or for a specified period"),[19] or to remit the whole or part of any sentence.[20]

[20] Auxiliary legislation supports the prerogative. Until recently this took the form of s 406 of the Crimes Act.[21] That provision's origins can be traced back to s 19 of the Criminal Appeal Act 1907 (UK), which established the Court of Criminal Appeal,

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12 William Blackstone *Commentaries on the Laws of England* (15th ed, Professional Books, Abingdon, 1982) vol 4 at 397.
13 Rolph, above n 11, at 19.
14 At 24.
15 At 26 and 28.
16 At 28–29.
17 Letters Patent Constituting the Office of the Governor-General 1983, cl 11.
18 Clause 11(a).
19 Clause 11(b).
20 Clause 11(c).
21 See n 4 above.

a development said to be the consequence of "political necessity born of a traumatic experience".[22] Section 19 provided:

> Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—
>
> (a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or,
>
> (b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

To state the obvious inference from the opening words of that provision, the legislation supports, and is auxiliary to, the executive prerogative.

[21] Statutory provision auxiliary to the prerogative had been enacted in rather different terms in this country in the Criminal Code Act 1893,[23] and later the Crimes Act 1908. Section 447 of the latter Act provided:

> **New trial by order of Governor-General in Council.—**Where on application for the mercy of the Crown on behalf of any person convicted of a crime the Governor-General in Council entertains a doubt whether such person ought to have been convicted, he may, instead of remitting or commuting the sentence, after such inquiry as he thinks proper, by an order in writing, direct a new trial at such time and before such Court as he thinks proper.

[22] New Zealand however failed to follow the English criminal appellate reforms for four decades, until the Criminal Appeal Act 1945 — described as "arguably the most important legislative reform relating to appeals upon indictment in New Zealand".[24] This provided a right of appeal against conviction on a question of law and, with the leave of this Court or the trial judge, against conviction:[25]

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22 Leon Radzinowicz and Roger Hood *A History of English Criminal Law and its Administration from 1750* (Stevens & Sons, London, 1986) vol 5 at 766. The "traumatic experience" was the miscarriage of justice in the case of Adolph Beck, and the sustained public response to it.

23 Criminal Code Act 1893, s 417.

24 Christopher Corns and Douglas Ewen *Criminal Appeals and Reviews in New Zealand* (Thomson Reuters, Wellington, 2019) at [2.10.1].

25 Criminal Appeal Act 1945, s 3(a) and (b).

> … 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.

[23] As to the prerogative, s 17 of the 1945 Act provided (in terms essentially repeating the 1907 English provision):

> Nothing in this Act shall affect the prerogative of mercy, but the Governor-General, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of a person on indictment or to the sentence (other than a sentence fixed by law) passed on a person so convicted, may, if he thinks fit, at any time, by Order in Council, either—
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> (a) Refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court of Appeal as in the case of an appeal by a person convicted; or
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> (b) If he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

[24] That provision was then replaced in the Crimes Act 1961 with the provision we must deal with in this application: s 406. It is set out at [8] above, but for convenience we repeat it here:

> **406 Prerogative of mercy**
>
> (1) Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time he or she thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
>
> (a) refer the question of the conviction or sentence to the Court of Appeal or, where the person's right of appeal against conviction under section 229 of the Criminal Procedure Act 2011 was to the District Court or the High Court, to the High Court, and the question so referred shall then be heard and determined by the court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or
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> (b) if he or she desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for

> its opinion thereon, and the court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.

[25] The change was made between the introduction of the Crimes Bill 1957 — the wording of which retained (with only immaterial changes) the 1945 wording set out at [23] above[26] — and the reintroduction of the Bill in 1961 (in the terms above at [24]).[27] A retired Judge, Sir George Finlay, had reviewed the 1957 Bill.[28] We have reviewed his report, but it says nothing on the subject of the prerogative.

[26] At this stage, and subject to the examination of precedent that follows, we make a number of observations about the legislation, and the change effected in 1961.

[27] First, the legislative history and admissible extrinsic materials are entirely opaque as to why the change from "the whole case" to "the question of the conviction or sentence" was made. The only light cast on the change by the explanatory note to the 1961 Bill concerned the extension of the power to decisions of the Magistrate's Court:[29]

> *Clause 406(a)* has been extended to allow the Governor-General in Council, on an application for the exercise of the prerogative of mercy, to refer to the Supreme Court a conviction or sentence by a Magistrate's Court.

Ultimately, however, we agree with Ms Laracy's observation, for the Crown, that the legislative history provides no insight into the change.

[28] Secondly, no particular mischief — in terms of abuse of the reference process — appears to have generated the change from "the whole case" to "the question of the conviction or sentence" between the 1945 and 1961 Acts. Counsel were unable to point to circumstances necessitating any restriction of scope. But, in particular, it certainly cannot be said that the change was prompted by the more liberal view of the 1907/1945 "whole case" formulation taken by the House of Lords in *R v Chard*,

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26 Crimes Bill 1957 (135-1), cl 418.

27 The delay may be explained by the National Government losing office in 1957, and regaining it in 1960, but this time with the more liberally minded Rt Hon Keith Holyoake as Prime Minister and, in particular, the Hon Ralph Hanan as Minister of Justice.

28 George Finlay *Report on the Crimes Bill 1957* (30 September 1959).

29 Crimes Bill 1961 (82-1) (explanatory note) at xxxviii.

a decision we will consider a little later in this judgment.[30] *Chard* was decided in 1983, more than two decades after the 1961 Act.

[29] Thirdly, the unaltered effect of para (a) in both the 1945 and 1961 formulations was to resolve the exercise of prerogative by reference to this Court, in effect granting a second appeal. The executive would then have no further function to perform, the matter now effectively lying in the hands of this Court. That is in contrast to para (b), where this Court might be asked for its advice but have no other dispositive role. In the case of a reference under para (b), exercise of the prerogative still remains for the executive in light of the answers it receives from this Court.[31]

[30] Fourthly, we consider the most likely rationale for the linguistic change to the start of para (a) to be no more than to distinguish between reference of the conviction, or sentence, or both; a distinction otherwise obscured by the 1945 wording concerning "the whole case". What we do not find in the wording of either formulation is a warrant confining the reference to particular questions, thereby tying the hands of the receiving court. As we will see shortly, although that view was initially taken by the Court of Criminal Appeal in England and Wales, under the 1945 ("whole case") formulation, that view was very firmly repudiated by the House of Lords in *Chard.* It held "the whole case" meant just that, and it was for the Court to manage grounds that were either hopeless or an abuse of process.[32] In agreement with Mr Chisnall's argument, for Mr Watson, we consider "the question of the conviction or sentence" is simply another way of saying the court must consider the whole case — at least as regards the conviction — including the trial process and evidence resulting in the conviction.

[31] Fifthly, we do not discern in the 1961 revision an intention on Parliament's part to alter the former approach. The 1961 revision refers "the question of the conviction or sentence", evidently referencing the application which will relate to one or the other. It makes no provision for definition by the Governor-General of particular grounds motivating reference, and it is far from clear why Parliament would have wanted to do

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30 *R v Chard* [1984] 1 AC 279 (HL), discussed at [35]–[40] below.

31 Section 406(1)(b) of the Crimes Act was engaged in the prerogative application by David Bain: Corns and Ewen, above n 24, at [7.11.3(2)], n 1239.

32 *R v Chard*, above n 30, at 291 and 293–294.

that, or indeed chosen such innocuous words to effect that purpose if it did. We do not, in particular, agree with Ms Laracy's submission before us that the wording in s 406 "supports a targeted and focussed approach to the reference procedure". Rather, we agree with Mr Chisnall and Mr Cook's submission that if Parliament had intended to dilute the 1945 procedure, it might have been expected to have said so expressly. It is evident from *R v Morgan* (a 1962 prerogative reference) that it was not the executive's practice at the time to refer specific questions to this Court.[33] As we will observe shortly, when we discuss that case, this Court then thought reasons a good idea, but did not suggest they were either mandatory or defining. In that context it might also be observed that given the variable degree of executive resource that could be applied to the examination of applications for the exercise of the prerogative,[34] especially in the earlier days of s 406, it is entirely unclear why Parliament would have intended the s 406(1)(a) appeal process to be controlled by the reasons (if any) given in the reference, instead of allowing the ordinary appellate process to take its course.

[32] Sixthly, proceeding in this manner and subject to any question of binding authority otherwise, we see "the question of the conviction or sentence" as initiating an appeal as to either matter, but without constraining what grounds may then be advanced. However, as English and Australian authorities make clear, the rules or practice of the appellate court may then confine the appeal — if, for instance, a ground advanced is frivolous, vexatious or abusive — for example, because it simply re-runs, without more, grounds that had already been adjudicated upon in the original appeal.[35] Because that discipline exists, at least under the s 406 case law, we do not accept that renewal of a general right of appeal "would render meaningless the unique character of the Governor-General's power under s 406", as Ms Laracy submitted before us.

[33] Finally, and for completeness we note that s 17(1) of the Criminal Cases Review Commission Act 2019 provides for reference to this Court in somewhat more simple terms than s 406(1)(a):

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33 *R v Morgan* [1963] NZLR 593 (CA), discussed at [47]–[48] below.
34 See generally Malcolm Birdling "Correcting Miscarriages of Justice" [2013] NZLJ 413.
35 See the discussion at [35]–[45] below.

> **17 Ground for referring conviction or sentence to appeal court**
>
> (1) The Commission may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so.

Section 19 then provides:

> **19 Commission must give appeal court reasons for referral**
>
> The Commission, when referring a conviction or a sentence to the appeal court, must give the court a statement of its reasons for the referral.

The 2019 Act, like the 1961 or 1945 Acts, does not provide that the statement of reasons then binds the scope of the appeal. Section 20 simply provides:

> **20 Hearing and determination of appeal**
>
> The appeal court to which the Commission refers a conviction or sentence must hear and determine the matter as if it were a first appeal against the conviction or sentence.

On the face of it, s 20 leaves to this Court the ability to manage its own processes as regards further grounds either differing from the statement of reasons given by the Commission or repeating ones previously advanced on the first appeal, albeit bearing in mind the guidance given in the concluding words of that provision.

Precedent in cognate jurisdictions

[34] We here touch on the leading authorities in England and Australia.

England

[35] It will suffice to discuss the leading authority in England and Wales, that of the House of Lords in *R v Chard*.[36] The police case against Mr Chard had been that he was the armourer for a gang engaged in armed robberies. Following his conviction, one of the Crown witnesses, an accomplice, recanted. The Home Secretary then, in exercise of his powers under s 17(1)(a) of the Criminal Appeal Act 1968 (UK), referred to the Court of Appeal "the whole of the case of Alan John Chard for

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[36] *R v Chard*, above n 30.

determination in respect of his conviction on 7 November 1975 of three offences of conspiracy to rob".[37]

[36] The provision just referred to, s 17(1)(a), involved a further reformulation of the 1907 legislative formulation. It was in these terms:

> **17 Reference by Home Secretary**
>
> (1) Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Secretary of State may, if he thinks fit, at any time either—
>
> (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person …

[37] Mr Chard then filed in the Court of Appeal a perfected notice of grounds of appeal. Two of these grounds, relating to the admissibility of uncorroborated accomplice evidence, had not been alluded to in the Home Secretary's letter of reference. The Court of Appeal declined to consider those two additional grounds. Although the House of Lords upheld that decision, it did so only because those grounds had already been considered and rejected by the Court of Appeal in the original appeal.[38] But there was no question that the Court had *jurisdiction* to consider them.

[38] Speaking for a unanimous (and, it may be noted, strong) panel, Lord Diplock said:[39]

> My Lords, the point of law raised by the certified questions is purely one of statutory construction; and, as I have already indicated, the language of section 17(1)(*a*) is in my opinion capable of bearing one meaning only. If the Home Secretary decides to act under paragraph (*a*), rather than paragraph (*b*), in the case of a particular convicted person, it is the whole case and nothing less than the whole case of that person that the Home Secretary is empowered by the section to refer to the Court of Appeal. Upon receipt of such a reference it then becomes the duty of the Court of Appeal to treat the case so referred *for all purposes* as an appeal to the court by *that* person.

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37 At 288.

38 At 293–294.

39 At 291 (original emphasis). The other members of the panel were Lord Scarman, Lord Roskill, Lord Brandon and Lord Templeman.

As his Lordship noted, the relevant rules of court required notice to be given of proposed grounds of appeal, and no limitation was imposed by them as to the grounds that might be advanced.[40]

[39] Importantly for present purposes, the House of Lords overruled a contrary decision of the Court of Criminal Appeal in *R v Caborn-Waterfield*.[41] The importance of this is that the earlier decision was based on the 1907/1945 legislative formulation which did not have the words "treated for all purposes as an appeal to the court by that person":[42]

> It is not wholly clear from the full passage whether Lord Goddard was saying the court had no jurisdiction to consider any grounds of appeal other than those on which the Home Secretary had referred the case, or that as a matter of practice the court would refuse to do so. If it meant the former, and it has been uniformly treated as having done so, it was in my respectful view wrong, even on the language of section 19(*a*) of the Criminal Appeal Act 1907 as it stood in 1956. By the Administration of Justice Act 1960, however, Parliament itself stepped in and by Schedule 3 amended section 19(*a*) of the Act of 1907 and, among other changes, took the occasion to substitute the more emphatic words that still remain in force as section 17(1)(*a*) of the Criminal Justice Act 1968, with the immaterial difference that the words "that person" in the 1968 consolidating Act were "the person" in the 1960 amendment. It is difficult to think of any other explanation for this part of the 1960 amendment than a parliamentary intention to overrule the effect of the judgment of Lord Goddard in *Caborn-Waterfield*.

[40] Differing from the Crown's submissions before us, we do not consider the decision in *Chard* turns on the 1968 revision at all. We consider the first half of the passage just quoted makes that tolerably clear.

Australia

[41] *Chard* was applied by the High Court of Australia in *Mickelberg v R*.[43] It concerned the Western Australia Criminal Code, which provided for executive reference to the Court of Appeal on the same terms as the 1907/1945 "whole case" formulation in England and Wales and formerly in New Zealand. In due course that

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40 At 291.
41 At 293, citing *R v Caborn-Waterfield* [1956] 2 QB 379 (Crim App).
42 At 292–293.
43 *Mickelberg v R* (1989) 167 CLR 259 at 311 per Toohey and Gaudron JJ.

became s 140(1)(a) of the Sentencing Act 1995 (WA), again replicating the 1907/1945 formulation. In did not include the further 1968 reformulation addressed in *Chard.*

[42] In a judgment joined by Mason CJ and Brennan and Deane JJ, Toohey and Gaudron JJ said: [44]

> The words … so far as they require "the whole case ... [to] be heard and determined", permit of only one meaning. It is the whole case which must be passed upon by the application of legal principles appropriate to criminal appeals. That being so, the power to exclude matters from consideration is properly to be seen as an aspect of the inherent power of a court to control its own proceedings. That power will authorize the exclusion of issues which are frivolous or vexatious … However, subject to an issue being properly excluded as frivolous or vexatious, it is, in our view, the duty of a court to which there has been a reference of the whole case to pronounce upon the whole case as presented.

[43] The same provision was again considered by the High Court in *Mallard v R*.[45] There, Gummow, Hayne, Callinan and Heydon JJ observed:[46]

> Subject only to what we will say later about the words "as if it were an appeal" which appear in s 140(1)(a) of the Act, the explicit reference to "the whole case" … conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words "the whole case" embrace the whole of the evidence properly admissible, whether "new", "fresh" or previously adduced, in the case against, and the case for the appellant. That does not mean that the Court may not, if it think it useful, derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case. The history, as we have already mentioned, points in the same direction. The inhibitory purpose and effect of the words "as if it were an appeal" are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso contained in … the *Criminal Code*.

[44] The reasoning in each case represents an implicit repudiation of the more restricted view taken in *Caborn-Waterfield*, and an affirmation of the broader view taken by the House of Lords in *Chard.* While Ms Laracy relies heavily in her argument on "the whole case" statutory language as underpinning *Mickelberg* and *Mallard*, she candidly acknowledges that the reasons for change here are obscure and we have

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44 At 312.
45 *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125.
46 At [10] (original emphasis).

been unable to discern either a policy imperative or intended linguistic distinction in the 1961 revision.

[45] Notably, the Western Australian legislation was amended in 2004 to permit the executive to specify the grounds of appeal to be considered and determined.[47] That reform — a substantial inroad into the powers of appellate courts to manage their own procedures — would be quite unnecessary in this jurisdiction if the Crown's argument before us is correct.

Precedent in New Zealand

[46] We turn now to our domestic decisions, the first of which is *R v Morgan*.

Morgan

[47] The particular concern in *R v Morgan* was the approach to be taken to the receipt of fresh evidence on appeal.[48] The appeal arose from a prerogative reference made in 1962 under s 406(a),[49] and this Court had something to say about the process. It began by stating that s 406 contemplated either "a general reference under subs. (a) or a particular and limited reference under subs. (b)".[50] The Court went on to say:[51]

> So far as subs. (a) is concerned — and that is the provision invoked here — we think we should state that in our opinion the Court will be greatly assisted by being given information in each case of the considerations which have caused the Executive Council to refer the matter once again generally to the Court of Appeal.

[48] In making that observation, the Court relied specifically on the decision of the Court of Criminal Appeal in *Caborn-Waterfield* which, as we have noted, was subsequently repudiated by the House of Lords in *Chard*.[52] But, more importantly, we note three other points about *Morgan.* First, it acknowledged that s 406(a) gave

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47 See Sentencing Act 1995 (WA), s 140(1a).
48 *R v Morgan*, above n 33.
49 Section 406(a) was amended to become s 406(1)(a) on 5 August 2013. The amendment was a purely transitional one after s 406(2) was inserted by s 77(3) of the Legislation Act 2012.
50 At 595.
51 At 595–596.
52 At 596.

rise to a "general" reference — in distinction to s 406(b).[53] Secondly, and as we noted earlier, it is evident that it was not the executive's practice at the time to refer specific questions to this Court. Thirdly, while this Court in *Morgan* plainly thought reasons was a good idea, and helpful in light of the primary issue before it of resolving an application to adduce fresh evidence, it did not suggest they were either mandatory or defining.

Ellis

[49] The prior decisions of this Court in *Ellis* — one in 1998 and one in 1999[54] — are cited by Ms Laracy as authority for the proposition that s 406(1)(a) restricts this Court's consideration of Mr Watson's case to the specific grounds referred to in the Order in Council. We consider, however, that upon proper examination the reach of the *Ellis* decisions is far narrower.

[50] We start with the first *Ellis* decision, delivered in 1998.[55] Early in its reasoning the Court noted that the Governor-General had selected four grounds out of the various grounds referred to him as "being the grounds requiring consideration by the Court".[56] The Court then made two further observations:[57]

> Pursuant to s 406(a) the Administrator of the Government has referred the question of the 13 convictions for hearing and determination, four grounds being specified and the reasons for the reference being confined to those grounds. Clearly the intention is to confine the question of the convictions, as referred, to the impact of those matters on the convictions. The language, scheme and purpose of s 406(a) neither requires nor entitles the Court to go beyond the matters identified which in effect become the points of appeal.

This passage may be said to be the high point in the two decisions for the Crown.

[51] It is however an essential, but overlooked, feature of the 1998 decision that it arose only upon an application for bail. The observations of the Court as to the potential scope of appeal upon a Governor-General's reference were not essential to the grant or denial of bail and cannot be regarded as generally dispositive of

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53 At 595.
54 *Ellis v R*, above n 8; and *R v Ellis*, above n 9.
55 *Ellis v R*, above n 8.
56 At 557.
57 At 559.

the question. The Court was of course required to consider the apparent strength of the grounds of appeal in a very general and preliminary way. The difficulty presented in that hearing was the desire of counsel for Mr Ellis to undertake a root and branch review of the whole Crown case and advance other but as yet unspecified grounds. However, at the point of the bail hearing, the only settled grounds of appeal were those set out in the Governor-General's reference.[58] Furthermore, objectively they were the best grounds available to Mr Ellis, having generated the reference, but even they were insufficient to compel release.[59] Anything more was of little, if any, significance.

[52] Perhaps apprehending that it might have gone too far, this Court then qualified its earlier reasoning:[60]

> Even if not compelled by the language of section 406(a) we are satisfied that, conformably with the legislative policy underlying the provision and with the course adopted in this country since *Morgan,* as a matter of practice the hearing and determination of references under s 406(a) should be confined to the matters raised in the reference.

Consideration was not however given to the alternative potential pathway by which further grounds might have been advanced: recall of the original appellate judgment, a procedure now given much greater clarity as a consequence of the 2020 decision of the Supreme Court in *Uhrle v R*,[61] which we discuss below.

[53] The second *Ellis* decision was delivered in 1999.[62] That concerned the substantive appeal rather than an application for bail. It is notably less trenchant in its analysis as to jurisdictional scope. As the opening paragraph of the judgment makes clear, the appeal proceeded in fact on the grounds contained in the Governor-General's reference — albeit that a fifth ground was added by a further reference dated 12 May 1999.[63] The appellant did not challenge the circumscription of appellate scope suggested in the 1998 judgment. Whether that was right or wrong did not therefore fall for consideration in this Court's 1999 decision. It follows that

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58 See at 560–561.
59 *R v Ellis*, above n 9, at [95].
60 *Ellis v R*, above n 8, at 559.
61 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286.
62 *R v Ellis*, above n 9.
63 At [1]. Compare *Ellis v R*, above n 8, at 556–557, which sets out the original four grounds contained in the reference dated 4 May 1998.

where the Court repeats certain of its 1998 observations, that is not determinative of the position either.[64]

[54] Rather, what this Court did hold in the 1999 decision was this:[65]

> It is important to approach the reference in accordance with established principle. On a reference by the Governor-General on a question of conviction or sentence, the Court of Appeal is not called upon to re-adjudicate upon any ground of appeal that has already been heard and disposed of on the merits, unless a new matter has come to light which makes a reconsideration of the ground necessary or desirable …

Put in those terms, the passage is entirely unobjectionable and is no more than a repetition of what this Court had said in *Morgan* (without at that point suggesting that the reasoning in the reference wholly defined the appeal).

Haig

[55] In *R v Haig* somewhat prescriptive reasons for reference were contained in the Order in Council.[66] The question of the Court's jurisdictional scope then arose, and was the subject of detailed submissions. As William Young P noted, the jurisprudence on s 406 "[was] not entirely unproblematical".[67] In the end however this Court did not need to explore those issues as the reference remained wide enough to entertain the primary arguments advanced by the appellant. Mr Haig's conviction was quashed, and no retrial was ordered.[68]

Uhrle

[56] As we began to note in [52] above, an appellant who has failed in his or her conviction appeal in this Court has three pathways to challenge that outcome. The first is to seek leave to appeal, whether to the Privy Council or, since 2004, the Supreme Court.[69] The second is to seek exercise of the prerogative of mercy, of which this judgment is largely concerned (or, since 2020, reference by the Criminal

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64 See, for example, at [17].
65 At [13], citing *R v Morgan*, above n 33.
66 *R v Haig* (2006) 22 CRNZ 814 (CA).
67 At [51] per William Young P and Chambers J.
68 At [112] per William Young P and Chambers J, and at [113] per Hammond J.
69 Criminal Procedure Act 2011, s 243.

Cases Review Commission).[70] The third, so far little discussed, is to seek recall of this Court's judgment[71] — normally on the basis of new evidence, but occasionally on the basis that a further, tenable appeal ground ought to have been considered.

[57] The leading judgments on recall are *R v Smith*, *Lyon v R* and *Uhrle v R*.[72] In *Uhrle* the Supreme Court noted that the "reopening" of a spent appeal is properly regarded as a question of recall, and the principles in *Horowhenua County v Nash (No 2)* were applicable even in the case of a criminal appeal.[73] That is to say, the jurisdiction to recall judgment arises where there has been a material subsequent change in the law, where counsel had failed to direct the court's attention to a relevant legal principle, or "where for some other very special reason justice requires that the judgment be recalled".[74] As the Supreme Court noted, it was the latter consideration that was most likely to apply in a criminal appeal. The Court noted, also, that recall of an appellate judgment is an exceptional step, but the court must remain able to respond to the wide variety of circumstances that may necessitate that step in order to avoid injustice.[75]

[58] There remain, however, significant differences between the prerogative and recall pathways, and particular advantages in the prerogative pathway. A reference to this Court under the prerogative requires the Court to reconsider the conviction, and we hold in this decision that, subject to a ground not being frivolous or vexatious or an abuse of process (for example, by running without material differentiation an argument already adjudicated upon), the reference is general in nature. Recall, on the other hand, in effect involves leave, given the process of application and the three narrow gateways established under *Horowhenua County*.

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70 Crimes Act 1961, s 406; and Criminal Cases Review Commission Act, ss 17 and 21.
71 Court of Appeal (Civil) Rules 2005, r 8A.
72 *R v Smith* [2003] 3 NZLR 617 (CA); *Lyon v R* [2019] NZCA 311, [2019] 3 NZLR 421; and *Uhrle v R*, above n 61.
73 *Uhrle v R*, above n 61, at [28]–[29], referring to *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC).
74 *Horowhenua County v Nash (No 2)*, above n 73, at 633.
75 *Uhrle v R*, above n 61, at [29].

Discussion

[59] In light of the foregoing discussion of the legislation and authorities, we can be relatively brief. Four points should be made.

[60] First, we do not accept Ms Laracy's narrow construction of s 406 and consider the broader principles expressed by the House of Lords in *Chard*, and by the High Court of Australia in *Mickelberg* and *Mallard* apply notwithstanding the 1961 legislative revision from "the whole case" to "the question of the conviction or sentence".

[61] Secondly, we hold that the prior decisions of this Court in *Ellis* (1998 and 1999), while suggesting a contrary view, are not determinative of the issue. This Court is seized directly of the jurisdictional question, is free to take a different view, and does so.

[62] Thirdly, as we noted earlier, even if this were not the case, Mr Watson would be free to apply to recall this Court's 2000 judgment on the basis that a credible ground of appeal had not been advanced at that time and that he should now be entitled to do so. In terms of the decision of the Supreme Court in *Uhrle*, we would have considered this to be a case in which the interests of justice requires recall to enable the further proposed ground to be advanced. It follows that this Court, on appeal, would in any event be faced with that additional ground of appeal.

[63] Fourthly and finally, we would observe simply that the interests of justice necessitate this conclusion. If there is one lesson from the history of miscarriage of justice in the context of criminal appeals, it is that no good is done by the procedural suppression of a tenable ground of appeal which has not yet seen the light of day in an appellate court, while other grounds of appeal are nonetheless allowed to proceed. As Lord Atkin once wisely observed, "[f]inality is a good thing, but justice is a better".[76] Adequate procedural safeguards are built into the appellate process already to preclude abuse of the opportunity presented either by recall or by reference.

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[76] *Lal v King-Emperor* (1933) 50 TLR 1 (PC) at 2.

Result

[64] The proposed identification ground may be considered at the appeal.

Solicitors:
Crown Law Office, Wellington for Respondent