IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 21/2022
[2022] NZSC 71

BETWEEN	ALAN RUSSELL HALL Appellant
AND	THE QUEEN Respondent

Hearing:	8 June 2022
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	N P Chisnall and L A Elborough for Appellant M F Laracy and E J Hoskin for Respondent
Oral judgment:	8 June 2022

ORAL JUDGMENT OF THE COURT

A The appeal is allowed.

B The convictions of the appellant are quashed.

C Order under s 385(2) of the Crimes Act 1961 directing that verdicts of acquittal be entered.

REASONS
(Given by Ellen France J)

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Introduction

[1] After a trial by jury in September 1986, Alan Hall was convicted of the murder of Arthur Easton and of intentionally wounding Brendon Easton. He was sentenced to life imprisonment. Maintaining his innocence, Mr Hall sought leave to appeal against conviction to the Court of Appeal.[1] His application was dismissed in 1987.[2] Mr Hall was released on parole in November 1994 and lived in the community for the following 18 years before being recalled to prison on an interim basis in May 2012 for breaching a condition of his parole. Recall became final in June 2012. Mr Hall was again released on parole in February 2022. Mr Hall applied unsuccessfully on three occasions for the exercise of the royal prerogative of mercy.[3] He now appeals, with leave, against conviction to this Court.[4]

[2] The Crown accepts that the appeal should be allowed, the convictions quashed, and verdicts of acquittal entered. It accepts the appellant's characterisation of this case as "a trial gone wrong" and that significant parts of the criminal justice system failed Mr Hall, causing him serious harm.

[3] We now briefly explain why we consider that there has been a substantial miscarriage of justice and that the interests of justice require verdicts of acquittal to be entered.[5] The brevity of these reasons is not intended to downplay the importance of our conclusion to Mr Hall. Rather, it reflects the need for these matters to be addressed without any further delay and also it reflects the clear merits of the appeal.

Factual background

[4] Mr Easton and his teenage sons, Brendon and Kim, were confronted by an intruder in their Papakura home at about 8 pm on 13 October 1985. The intruder wore

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1 A separate judgment will be issued explaining the basis on which the Court has jurisdiction to hear the appeal.

2 *R v Hall* [1987] 1 NZLR 616 (CA) [CA judgment].

3 Twice in 1988 and once in 1993.

4 *Hall v R* [2022] NZSC 51.

5 These proceedings were commenced before the commencement date of the Criminal Procedure Act 2011 so the appeal is determined under Part 13 of the Crimes Act 1961: Criminal Procedure Act, s 397. Counsel for Mr Hall and for the Crown agreed in writing to the bringing of the appeal to this Court rather than to the Judicial Committee of the Privy Council: Supreme Court Act 2003, ss 50(2)(b) and 51(2)(d); and Senior Courts Act 2016, sch 5 cls 3(2)(b) and 4(2)(d).

a woollen hat and was armed with a military-style bayonet. There was an initial brief struggle between Brendon and the intruder. Mr Easton, and subsequently Kim, then came to the assistance of Brendon and fought with the intruder near the back door. Kim punched the intruder before, having by then obtained a squash racquet, striking the intruder three times on the top forehead area. The intruder became more violent. He fatally stabbed Mr Easton before managing to escape through the back of the property, leaving behind the bayonet and the woollen hat he had been wearing.

[5] An examination of the scene revealed a partial shoeprint in a gap in a hedge through which the assailant had fled, and blue fibres caught on the hedge.

[6] In terms of the investigations which followed, the Court of Appeal said:[6]

> The Easton brothers could not give a description of the face of the intruder but described him as being a Maori about six feet in height. An identikit picture was compiled using information from a motorist who had seen a man running some 300 yards or so from the scene of the crime at the relevant time. It was not until 11 December 1985 that the appellant was interviewed by the police as a result of their inquiries which were directed in particular to tracing the ownership or possession of the hat and bayonet left at the scene by the intruder. When interviewed the appellant admitted that he had owned the bayonet and had been in possession of the hat, which belonged to his brother, but while at all times asserting his innocence, he gave various explanations why he did not have the bayonet and hat on the night of the murder.

[7] At trial, the Crown case placed considerable weight on three aspects of Mr Hall's subsequent statements to police: he admitted he had previously owned a bayonet and possessed a woollen hat that fitted the descriptions of those left at the scene; his explanations as to why the items did not implicate him in Mr Easton's death were inconsistent and lacked credibility; and he admitted he had been in the vicinity of the Easton home at about the time of the murder.[7] Although these statements were very important, a further and critical part of the Crown's case was the identity evidence given by Mr Turner of having seen a man running away from the scene of the crime at the relevant time.

[8] Mr Hall did not give evidence but the defence called evidence from a number of witnesses. This evidence addressed, amongst other matters, the clothing Mr Hall

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6 CA judgment, above n 2, at 619.
7 At 619.

wore on the evening of the murder and his later purchase of a blue sweatshirt, Mr Hall's intellectual and physical attributes, and the absence of any sign of injuries on Mr Hall as might have been expected if he had been the man struck on the forehead by Kim Easton with the squash racquet.

[9] The defence also highlighted a number of weaknesses in the Crown case.[8] Relevantly, for present purposes, we need only note the following matters referred to by the defence:

(a) the lack of any forensic evidence and the absence of any link between Mr Hall and the blue fibres and the partial shoeprint found at the gap in the hedge through which the intruder escaped;

(b) the inconsistent statements made to the police over the course of lengthy interviews could be accounted for by limited intellectual abilities and fears of reprisal if Mr Hall had assisted the police in identifying the intruder;

(c) the initial descriptions of the intruder by Brendon and Kim Easton of a Māori person about six feet tall did not match the appellant, who was about five feet seven inches tall and Pākehā;

(d) that neither Brendon nor Kim Easton at any stage identified Mr Hall as being the intruder;

(e) Mr Turner had described the person he saw running from the scene at the relevant time as wearing a dark blue sweatshirt with a hood which did not fit with other evidence including the account given by Mr Hall's sister, namely, that he was wearing a red sweatshirt that night; and

(f) finally, even though the appellant may have succumbed under pressure in his interviews with police to giving "facile explanations approaching even fantasy-like explanations", he in fact was not swayed from his

[8] These matters are also discussed in the CA judgment, above n 2, at 619.

protestations of innocence nor from his account that he was not in possession of the bayonet and hat on the day of the homicide.

[10] Three grounds of appeal were advanced and dismissed in the Court of Appeal. Those grounds were that the prosecutor's closing address was unfair; the summing up was unbalanced; and the Crown had not met its disclosure obligations. As will become apparent, we need not say any more about the first two grounds but will address an aspect of the decision on disclosure.

[11] In this Court, Mr Hall raises three grounds of appeal. We deal with each in turn.

Mr Turner's evidence

[12] Two aspects of Mr Turner's evidence relating to the man he saw leaving the scene require consideration. The first concerns the ethnicity of the man Mr Turner described. The second relates to a reference in Mr Turner's statement to a blue sweatshirt. In explaining how these two matters arise it is relevant to note that Mr Turner did not give evidence in person at the trial, rather, his written statement was read to the jury.

[13] Mr Turner rang the police on the night of the murder. He was subsequently interviewed by police on 14 October 1985, the day after the fatality. In his telephone call to the police and in his statement of 14 October 1985, he described the man he saw running from the scene as a "male Māori". In this statement he added "[w]hen he turned around I could see that he was definetly [sic] dark skinned, he was not white".

[14] After Mr Hall became the focus of police inquiries, Mr Turner was interviewed again on 19 February 1986. The police challenged Mr Turner's description of the offender as Māori. Mr Turner remained unmoved. He said: "I am 100% sure he was a Māori. That was my immediate impression. I do not feel he was a Pākehā, not even a dark skinned one."

[15] Nonetheless, when police prepared a written statement for him to sign on 24 June 1986 it made no mention of the ethnicity of the man he saw. That was the

version of the statement read to the jury. Mr Turner's unchallenged affidavit evidence is that when he signed the statement he did not notice the description of the ethnicity of the man had been omitted from the statement. That was the version of the statement provided to defence counsel as well as to the Court. Nor were Mr Turner's earlier statements to the police provided to defence counsel until March 1988, that is, some seven months after the appeal to the Court of Appeal. As a result, the trial, the appeal to the Court of Appeal in July 1987, and Mr Hall's first application for the exercise of the prerogative of mercy, were all undertaken without counsel for Mr Hall being aware that Mr Turner had described a man leaving the scene of the crime who could not have been Mr Hall, a Pākehā male.[9]

[16] In terms of the second aspect of concern in relation to this evidence, Mr Turner's 24 June 1986 statement said the man "was wearing a dark blue sweatshirt with a hood. (Refer Exhibit '31')." Exhibit 31 was Mr Hall's blue sweatshirt, seized later by the police. There is however no reference of Mr Turner ever being shown that sweatshirt or purporting to identify it as similar to the one he said he saw. As noted above, there was evidence at trial that Mr Hall only bought the blue sweatshirt in December 1985, that is, after the homicide.

[17] Dealing with the latter aspect first, the Crown accepts that the statement should not have referred to the exhibit and his statement as read to the Court should not have suggested, as it did, that Mr Turner had identified the sweatshirt in the exhibit.

[18] Dealing with the former aspect, the Crown also accepts that Mr Turner's statement should have included the description of the man as given by Mr Turner in full and, moreover, that there was no basis for removing the word "Māori" from the statement, and that without this description the statement should not have been read to the jury.

[19] In addition, the earlier statements should have been disclosed to the defence. Not surprisingly, in the context of discussing differences in the descriptions of the

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9 This difference did feature in the second and third applications for the exercise of the prerogative of mercy. The Crown accepts that to the extent that those decisions indicated doubt or ambivalence about the disclosure obligations of the prosecution or an assessment that the difference between Mr Turner's statements and the evidence at trial was not material, those decisions were wrong.

intruder initially given to police by Brendon and Kim Easton,[10] Pritchard J in the summing up to the jury made the point that "[i]n criminal cases where identification is in issue the defence is always given access to the description first given by the witness to the police".[11] That observation neatly makes the point that although the trial predated the enactment of the Criminal Disclosure Act 2008, the Crown (as it accepts) did not meet its disclosure obligations. But in the context of the trial, it would have been received as weighing in favour of the prosecution, as it tended to explain away why Brendon and Kim Easton had initially described a Māori male, but then were uncertain — it gave the jury a pathway to accepting that Mr Hall was the offender.

[20] Undoubtedly, as is also accepted by the Crown, Mr Turner's 24 June 1986 statement was important in the context of the trial — it appeared to link Mr Hall directly to the scene of the crime and so confirmed that there could be only one reason Mr Hall's hat and bayonet were found at the scene. In his summing up, the Judge re-read the statement, in full, to the jury, explaining that he did so because it was both important and because "it has quite a bearing here". The Judge added after he had read the statement, that it was "a pretty important piece of evidence really".

[21] Mr Turner in his affidavit dated 22 August 1988 which, as we have said, is not challenged, said that he still believed that the person he saw was a Māori person and if called to give evidence that is what he would have said.

[22] With the passage of years it is not possible for us to determine how this statement, which in two material respects was not the evidence of Mr Turner, came to be produced as his evidence. The officer in charge admits having made the change to remove the word "Maori" from the statement. On the evidence before us, we cannot resolve the question of why that change was made. We interpolate here that there was apparently a police "sighting" experiment conducted at the scene where Mr Turner described the man he saw. It seems that this exercise may have had some influence on the police decision to edit Mr Turner's statement. We do not have evidence as to

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[10] Both Brendon and Kim Easton initially described the intruder as a Māori male about their own height, both being about six feet tall.

[11] Pritchard J also told the jury that the reason for this was that the initial statement was "more likely to be accurate than later recollections".

how the statement came to include the false assertion that Mr Turner had identified a blue sweatshirt seized from Mr Hall's home as the sweatshirt worn by the man he described in the area on the night.

[23] The Crown acknowledges that this key evidence at trial was unjustifiably altered in a material way, and that fundamental disclosure obligations in respect of Mr Turner's earlier statements were not met.

[24] The Crown accepts that, if the statement had not been inappropriately and deliberately altered in the way it was then the jury would have heard evidence that a man who, on Mr Turner's evidence could not have been Mr Hall, was seen leaving the location of the fatality at the relevant time. Moreover the statement would not have linked Mr Hall to the scene through the identification of a sweatshirt seized from Mr Hall's home as the sweatshirt worn by the man fleeing the scene. Instead, the evidence that was before the jury misleadingly conformed with the Crown case. A substantial miscarriage of justice has resulted on this ground alone and there is no possibility, as is conceded, that any resort could be made to the proviso to s 385(1) of the Crimes Act 1961 or to other evidence at trial to remedy the omission.

Non-disclosure

[25] There is some dispute between the parties about the extent of non-disclosure of material by the Crown prior to trial. We do not see these differences as requiring resolution here. That is because it is plain the Crown did not meet its disclosure obligations and that the failures were material. The Crown accepts that in 1986, just as now, the Crown was obliged to disclose where there was any material conflict between the (anticipated) evidence of a Crown witness and any prior statement made by them and known to the prosecution,[12] and also to disclose any evidence which

[12] *R v Wickliffe* [1986] 1 NZLR 4 (CA) [*Wickliffe* 1986] at 9; and the subsequent decision *R v Wickliffe* [1987] 1 NZLR 55 (CA) at 58–59.

tended to show that the defendant might be innocent.[13] In particular the judgment in the high-profile case of *R v Wickliffe*, delivered nine months before Mr Hall's trial, made clear the police disclosure obligations.[14] The Crown made the important point that the non-disclosure in *Wickliffe* was less serious than that here.

[26] The documentation which was not disclosed falls broadly into two camps. The first category of material relates to the identification evidence. It follows from our discussion above that there is no issue that this material should have been disclosed, as is accepted. The non-disclosure of Mr Turner's statements falls into this category.

[27] In addition, there was associated documentation about the police "sighting" experiment relating to Mr Turner's evidence. The Crown also accepts there was non-disclosure of some of the statements made by Brendon and Kim Easton to the police identifying the assailant as Māori and taller than Mr Hall.[15] There was non-disclosure of a statement made by the ambulance officer who spoke with Brendon and Kim Easton when attending at the house on the night of the fatality.[16] This statement in context supported the view that Brendon and Kim Easton had identified a dark-skinned assailant. The Court of Appeal noted that the possibility of the assailant being Māori was before the jury but it is clear that without the ability to utilise this material, overall, the defence's narrative was weakened.[17]

[28] The Crown says it is less clear that material relating to a "reconstruction" exercise undertaken with Brendon and Kim Easton in late January 1986 was not disclosed. The lack of clarity results from the fact that while there is no record of disclosure prior to trial, the reconstruction exercise did feature in evidence at trial. We

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13 *R v Mason* [1975] 2 NZLR 289 (SC); aff'd [1976] 2 NZLR 122 (CA). The legal position in New Zealand as at December 1986 was discussed in Criminal Law Reform Committee *Report on Discovery in Criminal Cases* (December 1986). The Report described the Supreme Court decision in *Mason* as the leading New Zealand case: at [16]. The Report also noted the requirement in s 344C of the Crimes Act for the prosecution to supply on request various material about any identification witness including a statement of any description of the offender given by the witness: at [20]. The Report said there was no general rule requiring the prosecution to supply defence counsel with copies of all statements made by witnesses but there were exceptions to that including a requirement to disclose statements "seriously at variance" with the intended trial testimony: at [22].

14 *Wickliffe* 1986, above n 12.

15 There was nonetheless some reference to these statements at trial.

16 The officer said they were heard to describe the intruder as "black".

17 Particularly in combination with the comments in summing up on the point.

interpolate here that the Crown also says there is a lack of clarity about whether job sheets dated 15 and 16 October 1985 recording police briefing notes were disclosed. These job sheets recorded Brendon Easton's statements that he was certain that the offender was right-handed. The importance of these notes is that there was evidence at trial that Mr Hall was left-handed. These notes were not the subject of cross-examination at trial but the record is not clear as to whether or not they were disclosed. It is accepted that the job sheets were relevant and disclosable.[18]

[29] The Crown also accepts that the evidence of the reconstruction would have been a powerful tool for the defence in explaining why the evidence of Brendon and Kim Easton as to identification had softened at trial.

[30] The second category of material relates to another suspect who had been the subject of police investigations. As we have foreshadowed, there was an issue about non-disclosure raised in the Court of Appeal. This ground of appeal related to non-disclosure of material identifying another suspect — the ground being advanced on the basis that the police should have disclosed evidence which tended to implicate the other suspect. The defence had been made aware of the existence of this suspect but had not been provided with all of the available information, including what led police to treat him as a suspect in the first place.

[31] In rejecting this ground of appeal, the Court of Appeal proceeded on the basis that this suspect had been definitively excluded from inquiries because police were satisfied with his alibi.[19] The Court said that in that circumstance there was no basis for the Crown to go behind the alibi and disclose that which had originally raised suspicion and been rejected, unless specifically requested to do so by the defence.[20]

[32] The Crown accepts that the representation that the other suspect had been definitively excluded, "oversimplified and overstated the position, and that more information could, and should, have been disclosed". That additional information would have allowed the defence to test, through inquiry, and in evidence before the

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18 *Wickliffe* 1986, above n 12, at 9 confirms that this material would have been disclosable at the time.

19 CA judgment, above n 2, at 627–628.

20 At 628.

jury, whether the other suspect had been satisfactorily excluded, and also the significance of the evidence that led police to treat him as a suspect in the first place. These omissions were obviously important in the context of what was largely a circumstantial case and, given they were not apparent on the earlier appeal, accordingly also provide a basis for differing from the position adopted in the Court of Appeal. Again, on the basis of this ground alone, we are satisfied that a substantial miscarriage of justice has occurred.

Mr Hall's statements in interviews with police

[33] Mr Hall was interviewed by police for eight hours on 11 December 1985 and for 15 hours on 16 December 1985. In addition, while being transported to the police station from his place of work by police on 11 December 1985 he was immediately questioned, without a caution, about the hat and the bayonet.[21] He said he knew about the hat but it had gone missing and he thought that it must have been stolen. He also said he owned a bayonet like the one that the police were looking for but had wrapped it up and put it in the rubbish along with his two other bayonets. As the excerpt we have given above from the Court of Appeal judgment indicates, over the period of his interviews, while maintaining his innocence, Mr Hall gave varying explanations as to why he did not have the hat or the bayonet on the night of the murder.

[34] In the Court of Appeal, in the context of the challenge against conviction based on the summing up, counsel for Mr Hall was critical of the Judge's failure to remind the jury that Mr Hall "was an intellectually deprived person who had been subjected to over 20 hours of determined police interrogation" and had told the police of his concerns for the safety of himself and his family if it was known he was cooperating with police in identifying the offender.[22]

[35] Counsel for Mr Hall in this Court points to various aspects of the statements made by Mr Hall which it is said illustrate the unfairness of the interviews. The submission is that there were breaches of the guidelines for acceptable police questioning in place at the time which were found in the Judges' Rules 1912.

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21 He was given a warning before signing a formal written statement at the end of that day.
22 CA judgment, above n 2, at 621.

The Rules contained requirements relating to questioning, the giving of a caution, and prohibited cross-examination of persons giving a statement voluntarily.[23] In addition, expert evidence has been produced showing that Mr Hall has autism spectrum disorder and as to the impact of this on the way Mr Hall answered questions. For example, Dr Allely highlighted issues about Mr Hall's ability to cope with the type of questions, the length of the interviews, and about his ability to appropriately respond.

[36] The Crown accepts that on the face of the interviews there is "a reasonable foundation for the proposition that much of the content of Mr Hall's police statements was unfairly obtained". Rule 7 of the Judges' Rules applied because Mr Hall was giving a voluntary statement. It is accepted that there was cross-examination in breach of that rule. The Crown also accepts that there was a point where it is likely that the interviews became unfair and oppressive and that, appropriately, Mr Hall's intellectual abilities are part of this equation.[24]

[37] On the basis of what we now know, we consider the evidence should have been excluded. The concerning features of the interviews with Mr Hall include the following: their lengthy nature; the fact that they were conducted by multiple interviewing officers in the absence of a lawyer or support person and initially absent any caution; on at least one occasion a senior police officer was present for a period during which no record was kept of the interaction with Mr Hall; the questions asked about the identikit picture prepared as a result of interviews with a witness were misleading; and questions were asked and observations and opinions advanced which would certainly not now be permissible, for example, comment was made in various ways that Mr Hall was lying. We add that, with present day knowledge, Mr Hall's significant disadvantages are readily apparent on even a fairly cursory consideration of the statements. The Crown accepts that even at the time it was apparent he was a vulnerable person. In any event, the Crown concession as to the unfairness of the interviews is made despite differences in standards applicable to police interviews in the 1980s. We see that concession as entirely appropriate in the circumstances.

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23 Rules 2, 3 and 7.

24 See the discussion in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [27] per William Young, Glazebrook, Arnold and O'Regan JJ, albeit in the context of the Evidence Act 2006 and the *Practice Note — Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

[38] We note the Crown says that Mr Hall was not cross-examined whilst in the car prior to the first interview so there was no breach of the Judges' Rules at that point. That may well be so although we do nonetheless have concerns about Mr Hall's cognitive vulnerability and the impact that had on his statements.

[39] There can be no question about the importance of the statements made by Mr Hall in the context of the trial and, undoubtedly, in the Court of Appeal. While the Crown was not able to show that the bayonet was Mr Hall's, his acceptance it was his and his statement he was in the area at the relevant time were key planks in the Crown case. Reliance was also placed on the inconsistencies in the explanations given. We consider Mr Hall succeeds on this ground of appeal as well.

Conclusion

[40] It is clear that justice has seriously miscarried in this case. As to why that is so, the Crown accepts that such departures from accepted standards must either be the result of extreme incompetence or of a deliberate and wrongful strategy to secure conviction. The Crown also acknowledges that without these departures there was insufficient evidence either to charge or to convict Mr Hall.

[41] The Crown submissions appropriately acknowledge the attempts by Mr Hall, his family, advocates, and supporters over a long period of time to obtain justice. The effect of the passage of time on the availability of records and persons with knowledge of what went on at the time together with the importance of determining this appeal without any further delays means we are not in a position to determine exactly what happened in relation to some of the matters raised. But we can confirm the lamentable fact, as the Crown accepts, that significant parts of the criminal justice process have failed Mr Hall with seriously adverse consequences for him. In these circumstances, where evidence before the jury omitted a critical fact, disclosure obligations were not met, and key statements made by Mr Hall should not have been before the jury, it is in the interests of justice to direct verdicts of acquittal.

[42] We cannot end this judgment without acknowledging that, just as the criminal justice system has failed Mr Hall, so too has it failed the Easton family.

Result

[43] For these reasons, the appeal is allowed. Mr Hall's convictions are quashed. We make an order under s 385(2) of the Crimes Act directing that verdicts of acquittal be entered.

Solicitors:
Crown Law Office, Wellington for Respondent