IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 116/2021
[2023] NZSC 104

BETWEEN	CHEYMAN LEE MITCHELL Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	10 May 2022
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	K H Cook, P C McDonnell and S J Bird for Appellant F R J Sinclair and Z A Fuhr for Respondent
Judgment:	11 August 2023

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
Winkelmann CJ, O'Regan, Williams and Kós JJ	[1]
Ellen France J	[71]

WINKELMANN CJ, O'REGAN, WILLIAMS AND KÓS JJ
(Given by Kós J)

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[1] It is a fundamental principle of law that a person not be tried or punished again for an offence on which they have been acquitted or convicted, a right now affirmed in s 26(2) of the New Zealand Bill of Rights Act 1990. Section 46(1) of the Criminal Procedure Act 2011 (the CPA) provides a special plea of "previous conviction" where a defendant has been convicted of the same offence as the offence currently charged, arising from the same facts, or any other offence arising from those facts. Section 47 of the CPA creates a further special plea—of previous acquittal—but it is s 46 we are concerned with in this appeal.

[2] The question here is whether that plea applies to Mr Mitchell. His failure of an evidential breath test gave rise to two charges: driving with a breath alcohol level exceeding 400 micrograms per litre of breath, and driving contrary to a zero alcohol licence. He pleaded guilty to the first charge. Does s 46(1) now apply to the second?

Background

[3] On 18 December 2017, Mr Mitchell received his second conviction for driving with a breath alcohol level over 400 micrograms per litre of breath.[1] He was disqualified from driving for seven months, fined $400 and an order was made for the confiscation of his vehicle. After the disqualification period lapsed, Mr Mitchell obtained a zero alcohol licence, which permitted him to drive on the condition that neither his breath nor his blood contained alcohol.

[4] On the evening of 18 September 2019, Mr Mitchell consumed alcohol at a friend's address. He decided to drive home, and at 2.47 am the next morning he was pulled over by the police on Brougham Street, Christchurch. An evidential breath test showed a sample of his breath contained 649 micrograms of alcohol per litre of breath.

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1 His first such conviction occurred on 17 June 2014.

[5] On 3 November 2019, Mr Mitchell was charged under ss 32(1)(b) and 56(1) of the Land Transport Act 1998 (the LTA). The s 32(1)(b) charge was that he drove contrary to a zero alcohol licence. The s 56(1) charge was that he drove with a breath alcohol level that exceeded 400 micrograms of alcohol per litre of breath.

[6] Later that month, on 28 November, Mr Mitchell attempted to plead guilty to both charges in the District Court. Judge Neave however invited his counsel to enter a guilty plea to only one of the charges. A conviction was entered on the s 56(1) charge, and a special plea of "previous conviction" was then entered on his behalf on the remaining s 32(1)(b) charge, pursuant to s 46(1)(b) of the CPA. This triggered the need for a judge to then determine the availability of that special plea.[2]

[7] On 10 February 2020, Judge O'Driscoll held that the plea of "previous conviction" applied to the s 32(1)(b) charge.[3] On 21 February, the Judge dismissed the s 32(1)(b) charge and sentenced Mr Mitchell on the s 56(1) charge.[4] He received 100 hours community work and a supervision sentence of 12 months, with a special condition that he attend and complete any recommended intervention for alcohol and drug use to the satisfaction of a probation officer. The Judge also disqualified Mr Mitchell from driving for 12 months and one day and ordered that, at the appropriate time, Mr Mitchell could again apply for a zero alcohol licence.

[8] On 6 March 2020, the Crown applied for leave to appeal Judge O'Driscoll's substantive judgment.[5] Osborne J granted leave to appeal and allowed the appeal, concluding that the Judge erred in finding that the plea of "previous conviction" applied to the s 32(1)(b) charge.[6] Mr Mitchell obtained leave to appeal to the Court of Appeal,[7] but his appeal was dismissed.[8] He was then granted leave to appeal by this Court.[9]

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2 Criminal Procedure Act 2011 [CPA], s 49.
3 *New Zealand Police v Mitchell* [2020] NZDC 1999 [DC substantive judgment].
4 *New Zealand Police v Mitchell* [2020] NZDC 3276.
5 See CPA, s 296.
6 *New Zealand Police v Mitchell* [2020] NZHC 1143 [HC judgment].
7 See CPA, s 303.
8 *Mitchell v New Zealand Police* [2021] NZCA 417 (Brown, Clifford and Goddard JJ) [CA judgment].
9 *Mitchell v New Zealand Police* [2021] NZSC 180.

Essential statutory context

[9] We set out here the essential statutory context needed to understand the course this case has followed. At this point we canvass just the four provisions already referred to.

[10] First, Mr Mitchell was convicted under s 56(1) of the LTA. It creates an offence:

> … if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's breath, as ascertained by an evidential breath test subsequently undergone by the person … exceeds 400 micrograms of alcohol per litre of breath.

The relevant elements of the charge are, therefore, two:

(a) driving (or attempting to drive) a motor vehicle on a road;

(b) with breath alcohol exceeding 400 micrograms of alcohol per litre of breath.

The maximum sentence on a third conviction under a s 56 charge is two years' imprisonment or a fine not exceeding $6,000.[10]

[11] Secondly, the other charge was under s 32(1)(b), which creates an offence "if the person drives a motor vehicle on a road … contrary to [a] … zero alcohol licence". Unsurprisingly, it was a condition of Mr Mitchell's zero alcohol licence that his breath not contain alcohol while driving.[11] The relevant elements of the s 32(1)(b) charge were therefore:

(a) driving a motor vehicle on a road;

(b) with breath containing alcohol; and

(c) while subject to a zero alcohol licence.

The maximum sentence on a first or second conviction under s 32(1) is three months' imprisonment or a fine not exceeding $4,500.[12]

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10 Land Transport Act 1998 [LTA], s 56(4)(a). The court must also order the person to be disqualified from holding or obtaining a driver licence for more than one year: s 56(4)(b).

11 Section 11(d).

12 Section 32(3)(a). The court must also order the person to be disqualified from holding or obtaining a driver licence for six months or more: s 32(3)(b).

[12] Thirdly, s 46 of the CPA provides for a special plea in the case of previous conviction:

> **46 Previous conviction**
>
> (1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—
>
> (a) the same offence as the offence currently charged, arising from the same facts; or
>
> (b) any other offence arising from those facts.
>
> (2) Subsection (1) does not apply if—
>
> (a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and
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> (b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

Subsection (2) might apply, for instance, where the victim of an assault (for which a conviction had been entered) later died, elevating the assault to the more serious offence of murder or manslaughter. Section 47 is in the same terms as s 46, for a "previous acquittal", but it does not have an equivalent to subs (2). Later in this judgment we discuss the juridical and legislative path leading to s 46.

[13] Fourthly, there is s 26(2) of the Bill of Rights Act:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

We return to this provision later in this judgment.[13]

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[13] See [60]–[61] below.

Lower Court judgments

District Court judgment

[14] Judge O'Driscoll framed the issue as whether "the s 32 charge arises from the same facts as the s 56 charge".[14] To determine the availability of the special plea, he traversed the historic approach to double jeopardy in New Zealand. He looked particularly at the introduction of ss 46 and 47 and the case law under those provisions, with a focus on cases involving charges of driving with excess blood alcohol and contrary to a zero alcohol licence. In particular, he compared conflicting authorities in the District Court: *New Zealand Police v Tindall* and *New Zealand Police v Smith*.[15]

[15] In *Tindall*, Judge Neave determined that the defendant, having pleaded guilty to charges under s 56 of the LTA, was entitled to rely on the special plea under s 46 of the CPA for charges under s 32 of the LTA. There was a common punishable act: the defendant driving with alcohol in his system.[16] On the other hand, in *Smith*, Judge Sainsbury held that s 46 did not apply to charges under ss 32 and 56 arising from the same incident. The core punishable acts were different. In the s 56 charge, it was driving on a road with a breath alcohol level over 400 micrograms per litre of breath. For the s 32 charge, it was driving with alcohol in one's system while subject to a zero alcohol licence.[17]

[16] In the present case Judge O'Driscoll endorsed Judge Neave's approach, holding that "the common punishable act is the defendant driving on a road having alcohol in his system and having drunk alcohol before driving".[18] Mr Mitchell's breath alcohol level was "factually the same for each offence regardless of what is required to meet the offence".[19] To "extend the act of driving to read 'whilst subject to a zero-alcohol licence'" would "artificially import an element of the offence into the act of driving".[20] The Judge acknowledged that there were clear countervailing policy

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14 DC substantive judgment, above n 3, at [27].

15 *New Zealand Police v Tindall* [2018] NZDC 22252; and *New Zealand Police v Smith* [2018] NZDC 9057. In *Smith*, the charges listed were ss 56(1) and 57AA(4) of the LTA but the Judge's reasoning compares ss 32 and 56.

16 *Tindall*, above n 15, at [28].

17 *Smith*, above n 15, at [22]–[23].

18 DC substantive judgment, above n 3, at [91]. See also at [107].

19 At [85].

20 At [92].

factors supporting the *Smith* approach and that this was something the High Court could "consider if they were to review the approach".[21]

High Court judgment

[17] On appeal, Osborne J held the District Court had erred by finding the plea of previous conviction applied to the s 32 charge. He began his analysis by canvassing the case law under ss 46 and 47 of the CPA, with a focus on the judgments of Katz J (in the High Court) and Randerson J (in the Court of Appeal) in *Rangitonga v Parker*.[22] We discuss this case later, but in essence it held that s 47 applied "where there is a common punishable act [or omission] central to both the previous and new charge".[23] The Court of Appeal went on to say that this approach "focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison of each element of the charges".[24]

[18] Osborne J examined the application of *Rangitonga* in subsequent District Court judgments, including *Tindall* and *Smith*. He also looked at further appellate consideration of the issue in *Filitonga v R* and *O'Reilly v Chief Executive of the Department of Corrections*.[25] These authorities are explored later in this judgment, but we note that in *Filitonga* the Court of Appeal recorded that the analysis in *Rangitonga* applies equally to s 46.[26] The Judge went on to hold that:

> [82] Applying the statutory test, in accordance with the Court of Appeal's explanation and formulations of it, I am satisfied that the two offences with which Mr Mitchell was charged do not arise from the same facts as required for a special plea.

[19] In his view, analysis focusing on the commonalities in the actions required for each offence—driving, on a road, with alcohol in one's system—ignored "the very elements which make the conduct punishable".[27] A key requirement for the s 56(1)

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21 At [109]. See also at [93].

22 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 [*Rangitonga* HC]; and *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796 [*Rangitonga* CA]—discussed at [53]–[56] below.

23 *Rangitonga* CA, above n 22, at [41].

24 At [41].

25 *Filitonga v R* [2017] NZCA 492, [2017] NZAR 1667; and *O'Reilly v Chief Executive of the Department of Corrections* [2018] NZCA 313, [2018] NZAR 1327 [*O'Reilly* CA].

26 *Filitonga*, above n 25, at [16].

27 HC judgment, above n 6, at [83].

charge was that Mr Mitchell's breath alcohol level was excessive, whereas a key element of the s 32(1)(b) charge was that he was driving in breach of his zero alcohol licence.[28] Moreover, the charges had "appreciably different" points of focus; one concerned prohibiting driving with excess blood alcohol and the other was concerned with driving within the requirements of a licence.[29]

Court of Appeal judgment

[20] On appeal, the Court of Appeal analysed the protection against double jeopardy historically offered in the common law and in statute in New Zealand. It then looked at the introduction of ss 46 and 47 of the CPA and the Court of Appeal's interpretation of the provisions in *Rangitonga* and *Filitonga*. The Court agreed with Mr Sinclair, counsel for the police, that if:[30]

> … different punishable acts merely engage a common fact, the offences do not arise from the "same facts" as prescribed in s 46(1). To say that offences share a common fact or facts is not the same thing as saying they involve "common punishable acts".

[21] The Court then appeared to approve Osborne J's reasoning:[31]

> [26] This point was developed by Osborne J in his identification of the different key elements in the two offences in question: the excessive alcohol level in the s 56 charge, and for the s 32 charge the possession of a zero alcohol licence (without which the act of driving on the road with merely some level of breath alcohol would not have been punishable). …

[22] A range of examples were then explored, using Venn diagrams. The Court agreed with a submission made for the police:[32]

> … that where a person is both subject to a zero licence and exceeds the breath/blood alcohol level in s 56, the presence of an overlapping fact — driving with alcohol — does not change the *O'Reilly* conclusion [that (the hypothetical example of) driving without a warrant of fitness while not registered involves two punishable acts]. No particular level is required in one parcel of conduct whereas a person's licence status forms no part of the other parcel of conduct. Neither subsumes the other.

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28 At [84]–[85].
29 At [88].
30 CA judgment, above n 8, at [25].
31 Footnote omitted.
32 At [30].

[23] The Court agreed that "the manner of proof of a common fact does not impact the distinction between the core punishable acts".[33] It also agreed that:[34]

> … the rationale adopted in *Hughes* [*v R*[35]—that the offences of driving while disqualified and driving with excess breath alcohol were different in kind] is also applicable on the present appeal. Mr Mitchell imperilled the safety of other road users by driving with excess breath alcohol and he defied a Court-imposed licence condition. Dual convictions not only fairly capture, but also appropriately label, his offending.

[24] The Court also noted the potential implications of s 57AA of the LTA. That provision concerns the contravention of specified breath or blood alcohol limits by the holder of an alcohol interlock licence or a zero alcohol licence. The Court observed:

> [47] In our view the most that can be said is that several provisions now co-exist in the legislation, and the choice of charges necessarily remains a matter of discretion for the prosecutor. However, for the reasons advanced by [Crown counsel] we recognise that it may not always be appropriate for excess breath alcohol in combination with breach of zero licence to be charged simply under s 57AA.

Submissions

Mr Mitchell's submissions

[25] Mr Cook submitted for Mr Mitchell that the Court of Appeal's analysis wrongly devolved into a fine-grained comparison between the elements of the offences (such as comparing the alcohol level required for each offence). The s 46(1)(a) inquiry is elemental whereas the s 46(1)(b) inquiry is factual. The Court's approach left no room for s 46(1)(b) to operate.

[26] Mr Cook suggested the appropriate approach is that a defendant cannot be prosecuted for an offence where "those facts" (namely the defendant's acts and/or omissions) said to constitute that offence are the same facts (the defendant's acts and/or omissions) which constituted an offence for which the defendant was previously convicted or acquitted. It is inherent that any subsequent charge which arises from "those facts" will have different elements from the original offence

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33 At [31].
34 At [36].
35 *Hughes v R* [2012] NZCA 388.

(barring unusual circumstances). Under an elemental approach, only subsumed or identical offences can qualify.

[27] At the hearing, Mr Cook contended that s 46(1)(b) codified the common law doctrines of autrefois convict and abuse of process. While special pleas are "black and white", and abuse of process has historically been an evaluative doctrine, he submitted that there is still discretion in determining whether the same facts are at play for each offence. Mr Cook acknowledged that this approach does not provide a bright line and that a judgment on the facts of each case will be required.

[28] Mr Cook submitted that, on the facts here, Mr Mitchell's acts in breach of s 56(1) were to drive with 649 micrograms of alcohol per litre of breath. Those acts were the facts which also rendered him liable for the s 32(1)(b) offence. His status as a person subject to a special licence was a background fact. The Court of Appeal erred in isolating that fact, which was peculiar to the s 32 charge, and regarding its existence as dispositive or highly instructive about whether the two offences arose from different facts.

[29] It was also submitted that the Court of Appeal wrongly relied on several further considerations—such as fair labelling and sentencing options—extraneous to the mandated analysis of the facts constituting each offence.

[30] Ultimately, Mr Cook argued that dual conviction would constitute unnecessary duplication and would waste resources and time. The provisions address the same social evil. That Mr Mitchell also had a zero alcohol licence can be taken into account at sentencing.

Police submissions

[31] Mr Sinclair submitted that the Court of Appeal correctly assessed the role of s 46 in a case of this nature. Sections 46 and 47 create a straightforward, mandatory set of rules for the special pleas, and the more flexible abuse of process doctrine patrols their boundaries to avoid oppressive charging.

[32] Section 46(1)(a) addresses the narrow, uncontroversial situation in which a special plea has always been available (and which is unlikely to arise in practice)—when the same offence is charged on the same facts. Section 46(1)(b) deals with the more common situation where a different offence is charged but it is, in effect, the same offence, or the offence is subsumed by the other offence. The elements of an offence remain the touchstone and that is unavoidable. One cannot conduct the factual comparison in s 46(1)(b) without considering the ingredients of the two offences.

[33] Here, Mr Sinclair submitted, the presence of distinguishing, additional elements in ss 32(1)(b) and 56(1) necessarily means that different offences, which cannot arise from the same facts, are in play. Mr Mitchell's conduct involves two distinct punishable acts. There is an additional fact at work in the s 32 offence—Mr Mitchell being subject to a zero alcohol licence. An adult who drives with alcohol in their system does not commit an offence per se.[36] But they do commit an offence if they did so while subject to a zero alcohol licence. There is likewise a distinct excessive breath alcohol threshold in s 56(1). A person who drives after drinking does not commit that offence for that reason alone. But they do commit an offence if their breath alcohol level is over 400 micrograms per litre of breath.

[34] The LTA contemplates multiple convictions arising from the same episode of driving. Notwithstanding s 57AA's existence, there remain sound policy reasons for seeking separate convictions under ss 32 and 56. The two offences concern distinct wrongs and rest on different facts. Section 32 addresses a breach of discipline and not the impairment as such. Section 56 is a drink-driving offence. It was submitted that dual conviction was appropriate.

Issue

[35] The two charges faced by Mr Mitchell arose from the same evidential breath test result. The issue is whether, having been convicted of the s 56(1) charge, s 46(1)(b) of the CPA precludes Mr Mitchell's conviction on the second (s 32(1)(b)) charge.

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[36] Leaving aside the zero alcohol restriction on drivers under 20 years old.

[36] Before addressing that issue, we look first at how we got to s 46(1)(b).

How we got to s 46(1)(b)

[37] The rule against double jeopardy has existed from the "very beginnings of the common law" and was, as Mr Cook submitted, forged in harsher times.[37] In *Green v United States*, Black J said that:[38]

> … the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

As that passage makes clear, it is not only repeated trial and punishment that are proscribed, but repetitive prosecution for what is substantially the same offence.

[38] The Law Commission (England and Wales) saw in the rule a "wider social value achieved by delineating the proper ambit of the power of the state".[39] Finality of prosecution and consequent conviction (or acquittal) represent "an enduring and resounding acknowledgment by the state that it respects the principle of limited government and the liberty of the subject".[40] Moreover:[41]

> In a liberal democracy, it is a fundamental and political and social objective to allow individuals as much personal autonomy as possible, to allow people the space to live their own lives and pursue their own visions of the good life. Lack of finality in criminal proceedings impinges on this to a significant degree, in that the individual, though acquitted of a crime, is not free thereafter to plan his or her life, enter into engagements with others and so on, if required constantly to have in mind the danger of being once more subject to criminal prosecution for the same alleged crime.

[39] Finality is an integral element of the robust and responsible administration of criminal justice and a keep-safe in achieving ultimate rehabilitation of a person charged and duly processed by that system. Those properly prosecuted have an interest, and under s 26(2) of the Bill of Rights Act and ss 46 and 47 of the CPA, a

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37 Jill Hunter "The Development of the Rule Against Double Jeopardy" (1984) 5 J Legal Hist 3 at 3–4. See also Martin L Friedland *Double Jeopardy* (Clarendon Press, Oxford, 1969) at 3.

38 *Green v United States* 355 US 184 (1957) at 187–188.

39 Law Commission (England and Wales) *Double Jeopardy and Prosecution Appeals* (Law Com No 267, 2001) at [4.17].

40 At [4.17].

41 At [4.12].

right, not to be subjected to successive prosecution, conviction and punishment for the same offence or a similar offence arising from the same facts.

[40] Until the nineteenth century, a double jeopardy plea typically involved a "second prosecution for *precisely* the same offence".[42] There were fewer offences in those days and "therefore fewer opportunities for a particular fact situation to give rise to multiple offences".[43] As the number of statutory offences proliferated, "broader principles" were required to adequately protect an accused when subsequently charged with a different offence arising out of the same episode as the first charge.[44] A range of different common law tests were implemented and trialled, including the unsatisfactory "same evidence" and "in peril" tests.[45]

[41] New Zealand's first criminal code—the Criminal Code 1893—codified the special pleas, based on a code prepared by James Fitzjames Stephen.[46] The relevant provisions of the 1893 Code—ss 379 and 380—are close precursors to ss 358 and 359 of the Crimes Act 1961.[47] Now repealed, s 358 provided that:

> (1) On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count.

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42 Friedland, above n 37, at 14 (emphasis in original).

43 At 14. See, for example, *Turner* (1664) Kely 30, 84 ER 1068 (KB) at 1068.

44 Friedland, above n 37, at 14–15. See also Jay A Sigler *Double Jeopardy: The Development of a Legal and Social Policy* (Cornell University Press, Ithaca, New York, 1969) at 9–10.

45 See *R v Vandercomb* (1796) 2 Leach 708, 168 ER 455 (on the "same evidence" test); and *R v Barron* [1914] 2 KB 570 (Crim App) at 574 (on the "in peril" test). Some of these tests (or variations of them) existed before the proliferation of the number of statutory offences in England.

46 Criminal Code Act 1893.

47 The drafting changes made were stylistic or reflected the expansion of the plea to summary offences effected by ss 3(1)(h) and 8(2) of the Summary Proceedings Act 1957 (both now repealed). The explanatory note to the 1957 Crimes Bill described its effect as re-enacting the prior special plea provisions: Crimes Bill 1957 (135-1) (explanatory note) at xxviii.

> (2) If it appears that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count to which that plea is pleaded, but that he may be convicted on that count of some offence of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on that count of any offence of which he might have been convicted on the former trial, but that he shall plead over as to any other offence charged.

[42] Section 359 read:

> (1) Where an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to the indictment.
>
> …

The balance of s 359 dealt with homicide offences and need not be considered further here.

[43] These provisions governed special pleas in New Zealand until 1 July 2013, when the operation of ss 46 and 47 of the CPA commenced. Also relevant is s 10 of the Crimes Act, which remains in force. It provides:

> (1) Where an act or omission constitutes an offence under this Act and under any other Act, the offender may be prosecuted and punished either under this Act or under that other Act.
>
> …
>
> (4) No one is liable to be punished twice in respect of the same offence.

[44] The Crimes Act provisions were much-criticised. One commentator labelled them the most incomprehensible in perhaps the whole of criminal law.[48]

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[48] Ian Murray *A Practical Guide to Criminal Procedure in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 53.

Professor Richard Mahoney has described the authorities as bewildering.[49] Two broad qualifying principles, however, emerge. One is about content; the other, timing.

[45] The first Crimes Act qualifying principle required the subsequent charge to be identical to (or at least subsumed by) the earlier charge. This approach "robbed the special pleas of any real effect".[50] Section 358(1) also required the possibility of conviction at the first trial on what became the subsequent charge, assuming due amendment, if needed. This limb was effectively a "restatement of the common law 'in peril of conviction' test".[51] If a court was able to find a "subtle difference" between the elements of the two offences at issue, the plea would not apply.[52] It will suffice to refer to two cases.

[46] *Smith v Hickson* involved a publican charged with three offences under s 190 of the Licensing Act 1908.[53] The charges were (a) selling liquor in licensed premises when such premises were directed to be closed; (b) exposing liquor for sale in such premises during such a period; and (c) opening such premises for the sale of liquor during such a period. The accused pleaded guilty to (a) and raised the plea of autrefois convict to the other two charges, which the Magistrate sustained. The Supreme Court (now the High Court) sat as a Full Court and was satisfied that the offences were separate and distinct;[54] they were not "the same offence, or substantially the same offence".[55] Professor Mahoney suggests that *Hickson* left "the special pleas

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49 Richard Mahoney "Previous Acquittal and Previous Conviction in New Zealand: Another Kick at the Cheshire Cat" (1990) 7 Otago L R 222 at 230. See also Richard Mahoney "From 'The Same Offence' to 'The Same Facts' — The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal" [2013] NZ L Rev 171.

50 Mahoney "From 'The Same Offence' to 'The Same Facts'", above n 49, at 176–177.

51 Mahoney "Previous Acquittal and Previous Conviction in New Zealand", above n 49, at 243.

52 Mahoney "From 'The Same Offence' to 'The Same Facts'", above n 49, at 181–182.

53 *Smith v Hickson* [1930] 1 NZLR 43 (SC).

54 At 48 per Myers CJ, 50 per Herdman J and 57 per Ostler J. The case involved summary proceedings, and, at the time, the common law governed summary proceedings. *Hickson* nonetheless remains authoritative because the special plea provisions in the Crimes Act 1908 were very similar to the common law position.

55 At 50 per Herdman J.

virtually interpreted out of existence".[56] Only identical or subsumed offences could attract the pleas' protection.

[47] *R v Brightwell*, a Court of Appeal decision from 1995, involved an accused convicted of presenting a firearm without lawful and sufficient purpose.[57] He was then charged with threatening to do grievous bodily harm. He pleaded autrefois convict. The District Court Judge rejected the plea. Delivering the Court of Appeal's judgment, Henry J observed that ss "358 and 359 are said to be declaratory of or appear to state the common law".[58] He continued:[59]

> In the present case two distinct and separate offences were committed although they both comprised the one series of actions. The Arms Act 1983 is concerned with the promotion of the safe use and the control of firearms. Section 52(1), which carries a maximum penalty of three months' imprisonment and a fine of $1000, makes it an offence to present a firearm at another person without lawful and sufficient purpose. It is not an element of it that the offender in the course of doing such an act either commits an assault or has any specific intention. Section 202C(a) of the Crimes Act 1961 by contrast requires there to be an actual assault, but with the aggravating feature of the use of a weapon. The two offences are separate and distinct and can properly stand together.

[48] The second qualifying principle was that double jeopardy in its Crimes Act incarnation was concerned with *subsequent*, not simultaneous, *convictions*.[60] As Professor Mahoney suggests, s 358 might more sensibly have been construed as concerned only with subsequent *charges* (charges "laid after the termination of the prosecution of the original charge"), rather than convictions.[61] That is because s 358(1) referred to "the matter on which the accused was formerly charged"; s 359(1) to "substantially the same offence as … formerly charged"; and s 359(3) to "the offence previously charged".

[49] But the case law did not follow that course, which meant that, under the Crimes Act provisions, *simultaneous charges* might then give rise to separate and *subsequent convictions*, the earlier of which might be a bar to those coming later. If

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56 Mahoney "Previous Acquittal and Previous Conviction in New Zealand", above n 49, at 239.
57 *R v Brightwell* [1995] 2 NZLR 435 (CA).
58 At 437.
59 At 438–439.
60 See *R v Lee* [1973] 1 NZLR 13 (CA); *R v Moore* [1974] 1 NZLR 417 (CA); and *R v Kerr (No 2)* (1988) 4 CRNZ 91 (HC).
61 Mahoney "From 'The Same Offence' to 'The Same Facts'", above n 49, at 191.

convictions or acquittals were entered on some but not all the (simultaneously laid) charges faced, the plea might be advanced against the remainder to preclude subsequent conviction.[62] That might arise via a variety of procedural events. First, a split plea being made to multiple charges (guilty to some; not guilty to others), with convictions entered on the former (rather than being reserved until all charges are resolved). Secondly, the trial being split, with convictions or acquittals entered on some charges at the first trial. Thirdly, convictions being entered post-trial, but re-trial then being ordered on some of the charges, but not all, either because of jury disagreement or a successful conviction appeal.

[50] We note briefly one final, general point. Long before the enactment of the CPA, there was an abundance of authorities establishing that the courts' inherent jurisdiction to correct abuse of process existed separately from the codified special pleas.[63] The Crimes Act pleas did not displace that inherent jurisdiction, and nor—we conclude—did the CPA.

Legislative redevelopment of the special pleas

[51] Legislative redevelopment of the special pleas came in two stages. One was restrictive; the other clarifying in nature. We can pass over the first (restrictive) changes—made to the Crimes Act in 2008.[64] These deal with tainted acquittals in serious cases, becoming ss 378A and 378D of the Crimes Act, and subsequently ss 151 and 154 of the CPA.

[52] The second (clarifying) set of changes came in 2011 and involve the CPA provisions at the heart of this appeal. The background to these was sketched in some detail by Katz J in *Rangitonga v Parker*.[65] Initially, the Criminal Procedure (Reform and Modernisation) Bill 2010 provided that the later charge must arise from

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62 See, for example, *Hickson*, above n 53.

63 In *Rangitonga* HC, above n 22, at [41], Katz J observed that the "case law is replete with examples of subsequent prosecutions that have been stayed where the Court has taken the view that the principles underpinning the rule against double jeopardy have been infringed, despite a plea of previous conviction or acquittal not being available". See, for example, *Moore,* above n 60; *R v Clarke* [1982] 1 NZLR 654 (CA); *Ferris v Police* [1985] 1 NZLR 314 (HC); *R v McLeay* CA349/96, 14 April 1997; *Turipa v R* [2004] 2 NZLR 706 (HC); *R v Morgan* [2005] 1 NZLR 791 (CA); and *R v Taylor* [2008] NZCA 558, [2009] 1 NZLR 654.

64 Crimes Amendment Act (No 2) 2008.

65 *Rangitonga* HC, above n 22; affirmed in *Rangitonga* CA, above n 22.

"the same factual circumstances" as the earlier one.[66] However, in Select Committee the test was changed from "the same factual circumstances" to "the same facts". The circumstances in which this occurred are explained in Katz J's judgment in *Rangitonga* and need not be repeated here.[67] The change was said by the Committee to be "for the sake of precision and clarity".[68] We agree with the conclusion reached in *Adams on Criminal Law* that the change suggests a narrower approach than the original drafts.[69]

Does s 46(1) preclude Mr Mitchell's conviction on the second charge?

[53] We turn now to the issue identified at [35] above. The leading authority to date is *Rangitonga.*[70] In the present appeal, it was followed by both Osborne J and the Court of Appeal. Mr Cook did not suggest it was wrong; merely that it should be given liberal application, focusing on the facts rather than the elements of the offences. Mr Rangitonga had been arrested and charged with sexual violation by rape, and wounding with intent to cause grievous bodily harm. The wounding charge was withdrawn, and the defendant was then acquitted of the rape charge. Subsequently a private prosecutor was granted leave to bring a new charge of injuring with intent arising from the same incident and complainant. The defendant pleaded autrefois acquit, under s 47. That plea was rejected in the District Court, High Court and Court of Appeal.

[54] Katz J in the High Court was not persuaded that Parliament had intended any radical extension in the scope of the special pleas, although *some* change from the Crimes Act had been intended.[71] The analysis the Judge undertook was that s 47 required identification of the "core facts" of the original offence and the subsequent charge.[72] The Judge then noted that:[73]

> Difficult issues will no doubt arise as to what degree of common facts is necessary in order to found a special plea. It seems unlikely that it would be

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66 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1), cl 43.
67 *Rangitonga* HC above n 22, at [54]–[61].
68 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 7.
69 Bruce Robertson (ed) *Adams on Criminal Law – Criminal Procedure* (looseleaf ed, Thomson Reuters) at [CPA45.02].
70 *Rangitonga* HC, above n 22 and *Rangitonga* CA, above n 22.
71 *Rangitonga* HC, above n 22, at [65] and [78].
72 At [79]–[80].
73 At [80].

> necessary to establish that all of the core facts are the same, as this would essentially mean that only an identical offence would be barred.

It was the Judge's view that "where a common punishable act is central to both offences, they will usually both arise out of the same facts".[74]

[55] The Court of Appeal approved generally the approach taken by Katz J. Section 47 was intended to apply to cases "where there is a common punishable act [or omission] central to both the previous and new charge".[75] The Court continued: "The new section focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison on each element of the charges."[76] Applying that approach, the central punishable act for the original rape charge was sexual connection without consent; that for the new injuring charge was punching and attempting to strangle the complainant.[77] The difference meant the plea of autrefois acquit was not available.

[56] The Court of Appeal reasoned that an expansive approach to s 47 would not sit well with the 2008 amendments noted above, establishing very limited circumstances in which previously-acquitted persons might be re-tried. Clarity and certainty were the objectives. The approach taken of looking for the central punishable act of each charge should be relatively straightforward, identifying those acts (or omissions) "by reference to the essential elements of the offences".[78] That would avoid "an unduly technical approach to the availability of the special plea".[79]

[57] We may touch on two other decisions rather more briefly. In *Filitonga v R*, the special plea ultimately succeeded.[80] The appellant had been convicted of (1) causing grievous bodily harm to the complainant with reckless disregard for his safety, arising from having unprotected sex with the complainant while knowingly having HIV (and without disclosing that fact) and (2) criminal nuisance by having unprotected sex with the complainant knowing that this would endanger the complainant's life, safety or

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74 At [82].
75 *Rangitonga* CA, above n 22, at [41].
76 At [41].
77 At [42].
78 At [43(b)].
79 At [43(c)].
80 *Filitonga*, above n 25.

health. These charges were not laid in the alternative. The Court of Appeal applied the formulation in *Rangitonga*: if the jury had concluded that both charges arose from the same act of unprotected sex, a conviction on one of the offences would preclude conviction on the other, given the common punishable act for each charge—which the Court described as "having unprotected sex, while knowingly HIV-positive, being reckless as to the consequences".[81]

[58] In *O'Reilly v Chief Executive of the Department of Corrections*, Mr O'Reilly was subject to an extended supervision order following conviction in 2005 of an indecent assault on a 12-year-old boy.[82] The order included two relevant conditions: to not engage in new employment, and to not move address, without the prior written approval of his probation officer. Breach of either condition constituted a criminal offence under the Parole Act 2002. Mr O'Reilly was also a registered offender under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. That required him to report any change in employment and residential address to the Commissioner of Police, the breach of which was also a criminal offence under that Act. Mr O'Reilly moved residence and took up new employment, without the approval of his probation officer, and without reporting the changes to the police. Mr O'Reilly faced charges under both Acts for breaching the conditions of the order and the reporting requirements. He pleaded guilty to the charges under the Child Protection Act of failing to comply with his reporting obligations. He sought to enter a plea of autrefois convict under s 46 of the CPA on the remaining charges under the Parole Act. This plea failed in all three courts. In the High Court, Woolford J said, when discussing Mr O'Reilly's employment:[83]

> [28] The central punishable act for the charge under the Parole Act was commencing employment without prior written approval, while the central punishable act for the charge under the Child Protection Act was failing to report to the Police within 72 hours after commencing employment. There was, therefore, a space of three days between the dates on which the offences were committed.

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81 At [17].
82 *O'Reilly* CA, above n 25.
83 *O'Reilly v Department of Corrections* [2018] NZHC 469.

[59] That analysis was affirmed in the Court of Appeal, which noted that each set of charges required proof of different omissions:[84]

> The charges alleging breaches of the ESO require proof beyond reasonable doubt of omissions to gain prior approval. The charges alleging breach of the Child Protection Act required the police to prove beyond reasonable doubt omissions to report, after the events, the change of employment and the absences from the address. The change of employment and being absent from his address were not common punishable acts. The omissions were the punishable acts, and they were different.

Our assessment

[60] Our task is to construe s 46 of the CPA in light of its purpose and context—which necessarily includes s 26(2) of the Bill of Rights Act.[85] We draw a number of inferences from the contextual account of motivating policy and legislative reform outlined above.

[61] We consider the motivating policy underlying ss 46 and 47 remains that indicated at [37]–[39] above. As Black J observed in *Green v United States*, the rule against double jeopardy is a rule directed at repeated attempts made to prosecute, convict and punish for particular (or closely related) offending.[86] That policy lies behind the Bill of Rights Act's s 26(2) broad proscription against retrial (and punishment) for the same offence, which "merely requires that there be a substantial similarity between the original and the current offence".[87] A focus on the identity of charges (or whether one is subsumed by another) does not meet that policy fully. We observe, also, that there is no suggestion in the legislative record that the CPA was intended to annex or displace the inherent jurisdiction to correct abuses of process, described at [50] above, particularly where there is duplicity (overcharging in relation to a single actus reus) and multiplicity (overcharging more generally).

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84 *O'Reilly* CA, above n 25, at [15].

85 See above at [13].

86 *Green*, above n 38, at 187–188.

87 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015), at [24.3.18]. In *G v The District Court at Auckland*, the Court of Appeal observed that s 26(2) was essentially declaratory of the existing law, and should be seen "as requiring only that the original and the current offences be 'substantially the same'": *G v The District Court at Auckland* CA199/03, 1 December 2004 at [50]–[51].

[62] The major change effected by the CPA is to liberate the restriction represented by the first Crimes Act principle (subsequent charge identical or subsumed: see [45] above).[88] That arises from two drafting choices: first and fundamentally, the inclusion of "any other offence" in s 46(1)(b); and secondly, the more liberal "arising from the same facts" requirement in s 46(1)(a). The very narrow approach taken under the Crimes Act provisions in *Hickson* and its satellite authorities has been reformed by the CPA.

[63] There is some opacity in the drafting of s 46(1): "arising from the same facts" is not an easy test. It is not, for instance, as easy to apply as one based on legal elements. But Parliament was deliberately departing from the elemental test that held sway under the Crimes Act. The underlying principle developed in *Rangitonga* of a common punishable act offers a workable entry threshold based on substantial factual, rather than legal, identity between the two charges being assessed. *Rangitonga* was delivered in 2016; the CPA has been amended on a number of occasions since then without Parliament seeing fit to further revise ss 46 and 47.

[64] What s 46(1)(b) of the CPA requires is an examination as to whether the facts that make the second charge punishable are substantially the same as for the first. Of course the elements of the charges may in one sense be expressed as "facts" constituting the common punishable act. But that is not the focus under the CPA. The focus is whether the physical acts committed (or omitted) by the defendant, which render them liable to punishment under each charge, are substantially the same.[89] At its simplest, dates may differ and there may be wholly separate acts in time. But acts obviously can occur simultaneously and give rise to unobjectionably different charges,

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88 Mahoney "From 'The Same Offence' to 'The Same Facts'", above n 49, at 192.

89 It is unnecessary to decide the point in this appeal, but we consider the approach taken in *Rangitonga*, focusing on the *physical* acts (rather than mental elements) comprising the two charges, is correct. To require commonality also of facts which are mental elements would be to under-protect defendants from double punishment. Mental elements may still serve some relevance, as *Filitonga* demonstrates: see [57] above. In that case both knowledge and recklessness were common to the two charges, and their commonality served to reinforce the conclusion that the two charges involved a common punishable act—having sex with the victim while being HIV-positive. In other cases, such as murder vs manslaughter, or injuring with intent to injure vs intent to cause grievous bodily harm, the mental elements differ only in degree and a conviction may be entered on one charge only where the physical acts are the same. See, as to that, *Lee*, above n 60, at 17.

as the obiter example given in *O'Reilly*—of an act of driving infringing both warrant and registration requirements—shows.[90]

[65] Two things follow. First, that care must be taken (as *Filitonga* shows) in ensuring truly overlapping charges are laid in the alternative (or put to the trier of fact in that way). Secondly, where the facts underlying each charge differ substantially, the CPA special pleas will be displaced and any remaining relief must come either via the courts' inherent jurisdiction (abuse of process) or in the sentencing process.

[66] Turning now to the present case, we are satisfied that there is sufficient difference between the common punishable acts of the two charges so that the special pleas are here clearly displaced, despite the fact the acts occurred simultaneously.

[67] As demonstrated above at [10]–[11], the common facts here were that (1) Mr Mitchell was driving a motor vehicle on a road, and (2) he did so with breath containing alcohol.

[68] The difference lies in the remaining facts making him liable to punishment on either (but not both) the ss 56(1) and 32(1)(b) LTA charges: (3) that his breath alcohol level specifically exceeded 400 micrograms per litre of breath (not a material fact for the s 32(1)(b) licence charge); and (4) his holding a zero alcohol licence at the time he drove with breath containing alcohol (not a material fact for the s 56(1) breath alcohol charge).

[69] These factual differences are fundamental. They lie at the core of the two charges, making them substantially different in character from each other. As Mr Sinclair submitted, one addresses a breach of discipline (the violation of licence conditions), whereas the other is a drink-driving offence (being concerned with impaired driving).[91] The charges do not arise from the same facts. There is nothing unlawful in Mr Mitchell being convicted of both, and then being sentenced in a way

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90 *O'Reilly* CA, above n 25, at [18]. Likewise, for instance, deliberate detonation of an explosive device that kills two people simultaneously gives rise to two convictions for murder, the factual difference lying in the identity of the victim in each charge.

91 See above at [34].

that meets the requirement in s 85 of the Sentencing Act 2002 that the totality of the combined offending be considered.

Result

[70] The appeal is dismissed.

ELLEN FRANCE J

[71] I, too, would dismiss the appeal. I agree that the factual differences between the two charges here are material so that the special plea is displaced. I write separately to explain where my reasoning differs from that in the reasons delivered by Kós J.

[72] For ease of reference, I repeat the text of s 46 of the Criminal Procedure Act 2011. The section reads as follows:

> **46 Previous conviction**
>
> (1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—
>
> (a) the same offence as the offence currently charged, arising from the same facts; or
>
> (b) any other offence arising from those facts.
>
> (2) Subsection (1) does not apply if—
>
> (a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and
>
> (b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

[73] I also repeat the terms of s 26(2) of the New Zealand Bill of Rights Act 1990, namely, that "[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again".

[74] The first point I would emphasise is that under s 46 it is clear that the special plea may be made where the defendant "has been convicted". As the respondent

submits, the use of the words "the offence currently charged" in s 46(1)(a) also envisages the need for a temporal gap between the "previous conviction" and a later charge. Accordingly, in the present case, it is doubtful whether there would have been any issue in terms of s 46 if, instead of what transpired, the District Court Judge had taken the proffered pleas and entered convictions simultaneously. Where the charges are dealt with simultaneously, that meets the concern underlying s 46 that there should be no repeated trial or punishment because all matters of culpability can be addressed together at sentencing.

[75] Further, the potential for prejudice can be addressed by abuse of process which is a sufficiently flexible mechanism for delineating between a case such as the present one and more problematic cases. I add that s 10(3) of the Crimes Act 1961 will also be relevant where the act or omission is an offence under two or more provisions of that Act or of any other Act. In that situation, s 10(3) provides that "the offender may be prosecuted and punished under any one of those provisions".

[76] Second, the consideration required under s 46(1)(b), that is, whether the facts in issue are the "same", does require some assessment of their materiality. In terms of that assessment, in agreement with the reasons delivered by Kós J, I accept s 46 signals a move away from the previous focus under the Crimes Act provisions on what the Court of Appeal in *Rangitonga v Parker* described as a comparison of "all the legal elements of the previous and new charges".[92] But, as the Court of Appeal also said in *Rangitonga*, in respect of the new special pleas there is nothing to suggest an intention to bring about a "radical" change in substance.[93] Against that background, I agree with the submission for the respondent that it is questionable whether the words of s 46 necessarily confer a controlling role upon the facts, operating independently from the elements. Rather, in most cases the elements of the offence will at least provide a

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92 *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796 at [29].
93 At [43(a)] and [46].

helpful starting point, or as the respondent put it, a gauge, in defining the necessary facts for the purposes of s 46.[94]

[77] The use of the concept of the "common punishable act" appears then to add an unnecessary gloss on the statutory language. That said, I accept that the concept has provided a practical means of approaching the provision which appears to be working well, and there is no need for me to develop the point in the present case.

[78] Finally, I have some reservations about an approach that would largely ignore facts which are mental elements and focus instead on whether the physical acts committed or omitted rendering the person liable to punishment under each charge are substantially the same. By way of example, in the context of manslaughter, it is possible for a defendant to be in breach of two different duties applying to the same person resulting in the same death. It is not clear to me whether a focus on the physical acts would lead to an appropriate outcome in policy terms in situations like that. However, I accept that it would be preferable to resolve this question in a situation where the question is truly in issue.

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Crown Law Office, Wellington for Respondent

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94 I say most cases because, on the authorities, this would not always be the case. See, for example, *R v Clarke* [1982] 1 NZLR 654 (CA) (manslaughter—killing by an unlawful act, namely, reckless driving and causing death of passenger—driving with excess blood alcohol); *R v Brightwell* [1995] 2 NZLR 435 (CA) (presenting firearm without lawful and sufficient purpose—Arms Act 1983—and threatening to do grievous bodily harm); and *R v Lee* [1973] 1 NZLR 13 (CA) (possession of LSD and possession of LSD for sale).