IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 12/2023
[2023] NZSC 151

IN THE MATTER OF	SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2023) FROM CA636/2021 ([2022] NZCA 504) Referrer
Hearing:	16 August 2023
Court:	Winkelmann CJ, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	E J Hoskin and T C Didsbury for Referrer F E Guy Kidd KC and K H Cook as counsel assisting the Court
Judgment:	17 November 2023

JUDGMENT OF THE COURT

The question of law (arising from *Darling v R* [2022] NZCA 504) referred to this Court being whether Mr Anderson's acquittal meant that Mr Darling could not, in law, have been convicted of the offence with which he was charged, despite his guilty plea, is answered "No".

REASONS
(Given by Ellen France J)

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Introduction

[1] Under s 317 of the Criminal Procedure Act 2011, the Solicitor-General may apply for leave to refer a question of law to the Supreme Court. The Reference allows an issue of law to be raised without impacting the outcome of the original case. With leave given, this referral addresses a question of law arising from the decision of the Court of Appeal to allow an appeal against conviction for aggravated robbery by Mr Darling.[1]

[2] The background to the Court of Appeal judgment is as follows. Mr Darling pleaded guilty to a charge of aggravated robbery under s 235(b) of the Crimes Act 1961 and to possession of an offensive weapon. The offending arose out of a fight in a car near a Nelson beach on 16 November 2018. On 18 February 2020, following a sentence indication,[2] Mr Darling was sentenced to four months' community detention and nine months' supervision.[3]

[3] Under s 235 aggravated robbery may take different forms. Relevantly, it is an offence where a person does any one of the following:

> (a) robs any person and, at the time of, or immediately before or immediately after, the robbery, causes grievous bodily harm to any person; or
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> (b) being together with any other person or persons, robs any person; or
>
> …

[4] As will be seen from the wording of (b), a charge under that subsection involves more than one person. The other person in this case was said to be Mr Anderson. Mr Anderson pleaded not guilty to a charge of aggravated robbery pursuant to s 235(a), being a different offence to Mr Darling's. Following a jury trial

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1 *Darling v R* [2022] NZCA 504 (Collins, Duffy and Edwards JJ) [CA judgment].
2 *R v Darling* DC Blenheim CRI-2018-042-2038, 3 December 2019 (Judge Ruth).
3 *R v Darling* [2021] NZDC 22182 (Judge Ruth).

later in 2020, Mr Anderson was acquitted of that charge and others he faced at the time.

[5] Mr Darling appealed his conviction on the aggravated robbery charge on the basis a miscarriage of justice arose because there was no reasonable basis for the conviction given Mr Anderson's acquittal. In allowing the appeal, the Court of Appeal accepted that argument. The Court concluded that Mr Anderson's acquittal meant that Mr Darling could not, in law, have been convicted of an offence under s 235(b). The Court considered that the circumstances in which Mr Darling entered the guilty plea, essentially, the pressures he was under at the time, added weight to that conclusion. As Mr Darling had served his sentence, there was no order for a retrial.

[6] The Solicitor-General then sought leave of the Court to refer a question of law to this Court. Leave was granted on the question of whether:[4]

> On the facts as set out in the Court of Appeal decision and the relevant documents on which guilty pleas were entered, did Mr Anderson's acquittal mean that Mr Darling could not, in law, have been convicted of the offence with which he was charged, despite his guilty plea?

[7] The question requires us to consider the correctness of the Court of Appeal's analysis that Mr Darling's conviction could not stand in light of the subsequent acquittal of the "other person", for the purposes of s 235(b). We interpolate here that our determination of this question does not affect the quashing of Mr Darling's conviction by the Court of Appeal.[5] We address the question posed after describing the factual narrative and the decision of the Court of Appeal in more detail.

[8] As required by s 318(3)(a) of the Criminal Procedure Act when dealing with a Solicitor-General's Reference under s 317, the Court appointed counsel to assist the Court. The requirement reflects the fact there is no respondent at the hearing of the Reference.

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4 *Solicitor-General's Reference (No 1 of 2023)* [2023] NZSC 30.
5 Criminal Procedure Act 2011, s 318(5).

History of the case

An altercation

[9] The incident giving rise to the offending to which Mr Darling pleaded guilty is set out in the judgment of the Court of Appeal.[6] We largely adopt that account. Except where we indicate otherwise, this account is taken from the summary of facts prepared for the purposes of a sentencing indication and to which Mr Darling pleaded.

[10] The two complainants had travelled to Nelson on 15 November 2018 and arranged to meet up with Mr Anderson there. Mr Darling's involvement began when he met with Mr Anderson and the two complainants later that day and drove them around in his vehicle. The group visited a local hotel in the early hours of 16 November 2018 before going their separate ways. They met again at Tāhunanui Back Beach later that day.

[11] The complainants got into Mr Darling's vehicle. He was driving and Mr Anderson was in the rear seat behind him. The male complainant was in the front passenger seat and the female complainant seated behind him.

[12] At some point, Mr Anderson became angry, leant forward and attacked the male complainant, punching him.[7] Mr Darling joined in with Mr Anderson and started punching the male complainant as well. As these events were occurring, Mr Anderson was yelling at the complainants to hand over their phones and bags.[8]

[13] Mr Darling slowed the vehicle. The male complainant then dived out to try to avoid further assault. When the complainant saw that the female complainant was still in the car he chased after the vehicle on foot. The female complainant was unable to get out of the car. Further down the road the car slowed and that allowed the male complainant to catch up with it. He got back into the moving vehicle in an attempt to get to the female complainant. At that point Mr Anderson produced a knife, leaned

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6 CA judgment, above n 1, at [5]–[16].

7 It had emerged that an intended drug deal between the male complainant and Mr Anderson could not go ahead as the male complainant had not brought the correct quantity with him.

8 The sentencing indication proceeded on the basis that Mr Darling was also yelling at the complainants to hand over the phones.

forward from his seat and stabbed the male complainant repeatedly. (It was accepted in the summary of facts that Mr Darling was not aware of the knife or that Mr Anderson would produce or use a weapon.)

[14] When the car came to a stop, the female complainant gave Mr Anderson her phone and bag as had been demanded. She was able to get out of the car. The male complainant also managed to escape and ran after her.

[15] Members of the public who saw what had occurred called the police who located the two complainants hiding in a nearby building. Mr Darling and Mr Anderson were located soon after by a police patrol. The car had been put through a car wash. Property belonging to the complainants was found in the boot of the car. Mr Darling had a set of knuckledusters in his pocket.

[16] The record of the sentencing indication further notes that a broken knife blade with blood on it was recovered from the car and, when found by the police, Mr Anderson had a backpack which contained a black-handled knife with part of the blade broken off. As a result of the attack, the male complainant was hospitalised and had several deep cuts to his head, neck, face and right side which required stitches.

The entry of a guilty plea

[17] As the Court of Appeal explained, Mr Darling was originally charged with aggravated robbery causing grievous bodily harm under s 235(a) as a party under s 66(1) of the Crimes Act. He also faced charges of kidnapping, conspiracy to supply methamphetamine and possession of an offensive weapon, the knuckledusters. He was charged jointly with Mr Anderson for the first three of these charges.

[18] While initially remanded in custody, Mr Darling was then granted electronically monitored (EM) bail on 18 March 2019. Having breached that bail on several occasions, he was remanded in custody for periods of time for other suitable addresses to be found.

[19] The District Court file records a sentence indication being given on 18 April 2019. Correspondence on the file indicates that the basis of the sentence

indication was that Mr Darling would be charged: as an accessory after the fact to the aggravated robbery by Mr Anderson; with conspiracy with Mr Anderson to supply methamphetamine; and with possession of knuckledusters. However, the charges were not resolved at that point.

[20] In July 2019 a lawyer was assigned to Mr Darling. He took instructions from Mr Darling on a proposal made by the Crown to resolve the charges. The proposal was that Mr Darling would plead guilty to aggravated robbery under s 235(b) (robbery together with another person), rather than s 235(a) of the Crimes Act (robbery accompanied by the causing of grievous bodily harm), and to charges of possession of an offensive weapon and conspiracy to supply methamphetamine. The kidnapping charge would be withdrawn.

[21] At this point in time Mr Darling was on bail. He was clear he did not want a sentence indication on the offer and wanted to go to trial. He provided an account to his lawyer which was exculpatory. He acknowledged being the driver but denied any assaults, denied any knowledge of the knife or of Mr Anderson's intentions at the relevant time. On Mr Darling's account, the male complainant was the aggressor and there was no robbery or detainment.

[22] The prospect of seeking a sentence indication was raised again by Mr Darling's lawyer on 31 October 2019. Again, Mr Darling wanted the matter to proceed to trial. However, he altered his position when it became apparent that there were no trial dates available for the rest of the year. There was a risk that a delay before trial could mean he would end up serving more time on remand than any ultimate sentence. On this basis, his lawyer advised seeking a sentence indication and Mr Darling agreed.

[23] The sentence indication was set down for 3 December 2019. Bail had by then been revoked and Mr Darling was remanded in custody. A further application for EM bail to a different address was listed for hearing on the same day as the sentence indication. The EM bail report prepared for that application noted opposition to EM bail because of a young relative living at the address.

[24] The sentence indication was given on 3 December 2019. This was on the basis that Mr Darling would plead guilty to aggravated robbery under s 235(b) and possession of an offensive weapon. The other charges would be withdrawn.

[25] After discussion with his lawyer about his various options, Mr Darling agreed to accept the sentence indication. In an affidavit he filed for the appeal, Mr Darling said he had made that decision because he was desperate to be released from custody. In evidence in the Court of Appeal he said he understood that if he did not accept the sentence indication, he would be unlikely to be bailed before sentencing. That would mean remaining in prison over the Christmas period and for a few months afterwards. He was finding prison particularly difficult, saying he was subjected to abuse by those who had discovered he was gay. He also had some mental health issues for which he was receiving medication.

[26] As noted above, Mr Darling was sentenced on 18 February 2020.

Mr Anderson's trial

[27] Mr Anderson faced trial on charges of aggravated robbery causing grievous bodily harm together with Mr Darling (ss 235(a) and 66(1)) and an alternative charge of wounding with intent to cause grievous bodily harm (s 188(1)). He was also charged with kidnapping. Prior to trial Mr Anderson pleaded guilty to a charge of conspiring with Mr Darling to supply methamphetamine, and to a charge of offering to supply methamphetamine.

[28] As the Court of Appeal said, the Crown opened its case on 1 September 2020 in a manner consistent with the summary of facts. Reference was made to Mr Darling joining in on the attack and that this was a robbery carried out by two or more persons.

[29] The defence case was that it was the male complainant who was the aggressor. He brought the knife to the car and he was the one who had assaulted Mr Darling. The various injuries the male complainant sustained were said to have taken place during a struggle over the knife in the car. The defence said that Mr Anderson, who gave evidence, did not intentionally apply or use the knife to cause the injuries that the male complainant suffered.

[30] The defence also relied on the evidence of a Crown witness, Ms Edmonds, who was taking her dog for a walk in the area at the time. She said she saw a man standing near the slow-moving car and that he got in and attacked the driver. The defence argued this was consistent with its theory which was that the male complainant was the aggressor.

[31] Before the jury retired to consider their verdicts, the trial Judge amended the charge of aggravated robbery against Mr Anderson. The Judge removed the reference to Mr Darling and the s 66(1) (parties) component. The amended charge read that Mr Anderson robbed the female complainant of her handbag and at the time caused grievous bodily harm to the male complainant. Mr Anderson was acquitted on all three charges he faced.

The decision of the Court of Appeal

[32] The Court of Appeal began its consideration of whether there had been a miscarriage of justice by examining whether Mr Darling's guilty plea to the charge under s 235(b) and the acquittal of Mr Anderson of the s 235(a) charge could be reconciled.[9]

[33] Essentially, the Court determined these two facts could not be reconciled. That was because Mr Anderson's acquittal drew "into question whether there was a robbery at all".[10] Further, the not guilty verdict suggested there was reasonable doubt about whether Mr Anderson had the necessary intention to commit a robbery. But even if the jury were satisfied he did have such an intent, this intent was different to the common intention required under s 235(b). If Mr Anderson did not have an intention to act together with Mr Darling to commit the robbery, an essential element of the charge against Mr Darling could not be proved.[11]

[34] Nor was this a case where the pool of evidence against the two defendants was different, which might explain the difference in outcomes. Further, this was not a situation where anyone else could have carried out the robbery. Moreover, the

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9 CA judgment, above n 1, at [51].
10 At [54].
11 At [55].

Crown's case linked Mr Darling's offending to that of Mr Anderson.[12] Finally, the Court saw the circumstances surrounding the entry of the plea as adding weight to the risk of a miscarriage. This is a reference to the various pressures which we have noted.[13]

The arguments in this Court

[35] There is considerable common ground between the referrer and counsel assisting in this case, both as to the test to be applied where a conviction appeal is brought following a guilty plea and as to the answer to the question of law posed on this referral. In particular, counsel agree the test to be applied where a conviction appeal is brought following a guilty plea is whether a miscarriage of justice will result if the conviction is not overturned. In terms of the test, counsel also referred to *R v Le Page* and subsequent cases identifying categories indicating a miscarriage of justice notwithstanding a guilty plea.[14] Counsel agreed the categories discussed in *Le Page* were not closed and that the ultimate question remained whether there had been a miscarriage. Counsel also agreed that while a subsequent acquittal may be relevant in determining whether a miscarriage has resulted from a guilty plea, in this case Mr Anderson's acquittal did not affect Mr Darling's guilt.

[36] It follows that on the question raised by the referral, it was common ground that the Court of Appeal decision in this case was wrong. We address the submissions further as necessary in the discussion that follows.

[37] We note here that counsel assisting the Court also canvassed in the written submissions another basis on which it is said that a miscarriage of justice may arise. That related to the various pressures on Mr Darling at the time he entered his plea. As we discussed with counsel at the commencement of the hearing, that issue falls outside of the scope of the question of law that was referred. Accordingly, counsel did not address the issue in oral argument and we do not address it in this judgment. Further, while there was some discussion of this aspect in the Court of Appeal judgment, the focus was on the consistency with Mr Anderson's acquittal. It is not disputed that the

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12 At [57].
13 Above at [25].
14 *R v Le Page* [2005] 2 NZLR 845 (CA) at [17]–[19].

fact a plea is not voluntarily and willingly given may give rise to a miscarriage. But here, further factual findings regarding Mr Darling's decision would have been necessary to determine this issue. We add that, where a defendant is remanded in custody, matters such as the effect of lengthy pre-trial delays on the entry of a guilty plea may be an issue for consideration in a case where such matters are directly raised.

[38] We now discuss the test applicable where a conviction is challenged following a guilty plea and then consider the question posed on the referral.

The test is whether there has been a miscarriage of justice

[39] It is important to reiterate at the outset that the overriding test in an appeal following a guilty plea is whether a miscarriage of justice will result if the conviction is not overturned.[15] A miscarriage of justice is defined as:[16]

> (4) …any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

[40] A "trial" is defined as including "a proceeding in which the appellant pleaded guilty".[17] The Act accordingly contemplates the possibility of a miscarriage despite a guilty plea.[18] In considering the application of the miscarriage test, the Court of Appeal in *Le Page* said there were "at least" three broad situations in which a miscarriage of justice would be indicated. Those were where:[19]

> (a) the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;

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15 Criminal Procedure Act, ss 229 and 232. Whether a miscarriage of justice has resulted is also the ultimate issue on appeal after a guilty plea in Australia. See, for example, *Layt v R* [2020] NSWCCA 231, at [24]–[28] for a summary of the principles; and *R v Kardogeros* [1991] 1 VR 269 (VSCA).

16 Section 232.

17 Section 232(5).

18 Matthew Downs (ed) *Adams on Criminal Law — Procedure* (looseleaf ed, Thomson Reuters) [*Adams on Criminal Law*] at [CPA232.14].

19 *Le Page,* above n 14, at [17]–[19]. See, by way of an example of a similar approach, that of the

(b) on the admitted facts, the appellant could not in law have been convicted of the offence charged; or

(c) the guilty plea was induced by a ruling which contained a wrong decision on a question of law.

[41] Subsequently, in *Merrilees v R* a further category was added, namely:[20]

> … where trial counsel errs in his or her advice to an accused as to the non-availability of certain defences, or outcomes, or if counsel acts so as to wrongly, and perhaps negligently, induce a decision on the part of a client to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced.

[42] Finally, in *Wilson v R*, this Court accepted that the summary in *Le Page* is "incomplete".[21] The Court continued, stating that this was because:[22]

> … it does not recognise the possibility that a conviction following a guilty plea may be quashed on appeal (and no retrial ordered) where there is an abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system. In principle, where an abuse of process by the police or prosecuting authorities is sufficiently significant to justify the granting of a stay, the fact that a defendant has entered a guilty plea should not prevent him or her from appealing against conviction in reliance on the abuse of process. The entry of the stay in this type of case indicates that the prosecution should not have gone to trial for reasons based on the public interest. The fact that a conviction results from a guilty plea rather than a trial should not change the position, at least in principle.

[43] As is apparent from *Le Page* itself, the references to categories in which a miscarriage may be identified are intended to provide some guidance. The categories identified are simply illustrative of situations where an appeal has succeeded notwithstanding the entry of a guilty plea. In particular, the categories should not operate to confine or restrict the inquiry, which is whether justice has miscarried. The High Court of Australia put it in this way in *R v Darby*: "In our opinion [the]

Court of Criminal Appeal of Western Australia in *Borsa v R* [2003] WASCA 254 at [20].

20 *Merrilees v R* [2009] NZCA 59 at [34].

21 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [104] per William Young, Glazebrook, Arnold and Blanchard JJ.

22 At [104] per William Young, Glazebrook, Arnold and Blanchard JJ.

determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject."[23]

[44] As is also clear from *Le Page*, the categories are not closed.[24] This too, as we have said, is common ground. Delivering the judgment of the Court of Appeal in *Le Page*, Panckhurst J said that it was "only in exceptional circumstances that an appeal against conviction will be entertained" following a guilty plea, as the appellant was required to show a miscarriage would result if the conviction was not overturned.[25] There is no dispute between counsel that the circumstances must be exceptional.

[45] We agree with the submission of counsel assisting the Court that using that term, "exceptional", is a convenient shorthand way of capturing the policy considerations underpinning guilty pleas which are relevant here. Those policy considerations include finality and individual autonomy.[26] No doubt reflecting the underlying policy imperatives, the Court in *Le Page* went on to say that "[w]here the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned".[27] However, that statement needs to be read in light of the full passage, which reiterates the miscarriage test, and the judgment as a whole. When read in that context, it is clear that the Court nonetheless envisaged that the policy considerations may give way in those cases where otherwise a miscarriage will result. That must be so.

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23 *R v Darby* (1982) 148 CLR 668 at 678 per Gibbs CJ, Aickin, Wilson and Brennan JJ. That case was not dealing with an appeal following a guilty plea but with an argument that a conspirator's guilty verdict at trial was unsustainable in light of his co-conspirator's subsequent acquittal.

24 *Adams on Criminal Law*, above n 18, at [CPA232.14] sets out a number of illustrations of circumstances that may provide grounds for a successful appeal against conviction after a guilty plea. See also the discussion in Mark Lucraft (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2023 ed, Sweet & Maxwell, London, 2022) at [7-46] discussing the similar categories adopted in England and Wales and where it is specifically said that "this is not necessarily a closed list"; and *Halsbury's Laws of Australia* (online ed) vol 130 Criminal Law at [130-13975].

25 *Le Page*, above n 14, at [16].

26 See *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [45]–[46] as to the benefits a guilty plea delivers to the administration of justice and to those who otherwise are required to participate in the trial process. The Court also made the point that the justification for taking a plea into account in sentencing assumes those who respond to incentives to plead guilty are actually guilty. If that assumption is not right, the incentives are contrary to the public interest and, importantly, risk breach of human rights.

27 *Le Page*, above n 14, at [16].

[46] To summarise, the categories identified in the authorities to date are illustrations of when a miscarriage of justice may have occurred. But the overriding test is whether there will be a miscarriage in the particular case unless the guilty plea is able to be impugned and the conviction set aside.[28]

Was there a miscarriage of justice?

[47] We agree with counsel that the Court of Appeal was wrong to conclude there was a miscarriage of justice here and, in particular, that the acquittal of Mr Anderson meant that Mr Darling's conviction could not stand. The Court of Appeal looked at this question in terms of whether the case came within the second category identified in *Le Page*, that is, whether, on the admitted facts, the appellant could not in law have been convicted of the offence charged. But the Court erred in its approach in considering this, as we now discuss.

[48] In reaching the view that the second category in *Le Page* applied, the Court of Appeal canvassed a number of authorities. We accept the submissions of counsel for the referrer that the cases of *Stewart v R*[29] and *Jones v R*[30]discussed by the Court of Appeal are not on point.

[49] *Stewart v R* involved an appeal by Ms Stewart against conviction on a charge of sexual violation by unlawful connection. The case against Ms Stewart was that she was a party to the offence by encouraging the principal offender, Ms Oliver. The two were tried together and found guilty. Their appeals against conviction were decided separately. Ms Oliver adduced fresh evidence on her appeal that the complainant's injuries were not consistent with their account of the assault. Her appeal succeeded and on the retrial the Crown offered no evidence. Ms Oliver was discharged under s 347 of the Crimes Act 1961, as it then was, thus being deemed to be acquitted. It was against this background that Ms Stewart's appeal proceeded. The Crown accepted the appeal should succeed.

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28 If the reason for allowing the appeal in such cases is that a stay would have been available, there would be no order for a retrial, whereas in other circumstances, the court may order a trial take place.

29 *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1.

30 *Jones v R* [2014] NZCA 613.

[50] The Court in *Stewart* considered that the appeal and subsequent s 347 discharge of the principal offender indicated a reasonable doubt about whether the alleged primary offending took place at all, such that the conviction of a secondary party for encouraging that offending must be considered unsustainable. This was an unremarkable result, where Ms Oliver was the only possible principal offender and her deemed acquittal implied the elements of the offence could not be proved.

[51] It is relevant to note also that this Court said it would not always be the position that a secondary party must also be acquitted if the principal is not convicted. The Court continued:[31]

> There will be circumstances in which a jury can safely convict a person of secondary liability for an offence notwithstanding that the evidence, or fresh evidence, leaves reasonable doubt as to guilt on the part of the principal offender. This may be the case where, for instance, it is certain that the offence took place but the identity of the principal offender is unknown or in doubt, yet the identity of the secondary party is clear. It may be the case where the principal offender cannot be found guilty by reason of infancy, insanity or death, or is otherwise not amenable to prosecution. And it may also be the case where the criminal liability of the parties is separately established, especially on the basis of different evidence – if, for example, evidence against the secondary offender is inadmissible against the principal offender.

[52] The Court of Appeal in Mr Darling's case also discussed *Jones v R*. The appellant in that case was convicted as a party to blackmail. He was convicted at trial along with the principal offender, Mr Clutterbuck. Mr Clutterbuck's conviction was overturned on appeal on the basis the trial Judge was wrong not to allow him to give evidence.[32] The Court in *Jones* did not see the situation as quite so absolute as *Stewart*, where Mr Clutterbuck was not discharged under s 347, but the Court considered that the same result was nonetheless appropriate. That was because the Court took the view that Mr Jones as a secondary party would have been acquitted in the absence of the conviction of Mr Clutterbuck.

[53] The key feature of these two cases distinguishing them from the present case is that in neither case was there a guilty plea. This meant that the defendants were tried together in both of these cases.

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31 *Stewart v R*, above n 29, at [5] (footnotes omitted).
32 *Clutterbuck v R* [2013] NZCA 373.

[54] The Court of Appeal also wrongly saw *McIntyre v R* as similar to this case.[33] That case did involve a guilty plea. The appellant had pleaded guilty to a charge of accessory after the fact to murder. At a subsequent trial the person charged with murder was acquitted on the basis of the defence of self-defence. The Crown accepted that in that case the appellant could not in law be an accessory to a murder that had not occurred.

[55] The Court in *McIntyre* made the point that to succeed against the appellant, the prosecution had to prove that the substantive crime was committed, although it was not necessary for someone to be convicted of that crime. But in the circumstances no murder could be proved and in that situation the conviction could not be sustained. That case did fall within the second category of *Le Page*. The acquittal of the alleged murderer on the basis of self-defence necessarily meant that Mr McIntyre could not be guilty of being an accessory after the fact to murder. Moreover, the plea in that case was to being an accessory after the fact. Accordingly, the guilty plea did not itself constitute evidence that the principal offence had taken place.

[56] That said, we agree, as counsel submitted, that a subsequent acquittal of a co-offender could, in some circumstances, be relevant in a case involving an attempt by another offender to challenge a conviction based on a guilty plea. As the cases make clear, the significance of the acquittal of a co-offender to the outcome of a conviction appeal must be addressed on a case-by-case basis, having regard to the overall circumstances of the case. This necessarily follows from the fact that the test is whether a miscarriage of justice will result if the conviction is allowed to stand. As we discuss, it appears that the Court of Appeal treated Mr Anderson's acquittal as determinative, ignoring other relevant circumstances.

[57] Turning then to the facts of this case, Mr Darling ultimately pleaded guilty to a different charge than that faced by Mr Anderson. To explain the position more fully, we note first that the offence of aggravated robbery is provided for in s 235.[34] Under

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33 *McIntyre v R* [2017] NZCA 579, [2018] NZAR 43.

34 "Robbery" is defined in s 234(1) of the Crimes Act as "theft accompanied by violence or threats of violence, to any person or property, used to extort the property stolen or to prevent or overcome resistance to its being stolen". "Theft" is relevantly defined in s 219(1)(a) as the act of "dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property".

the section, as we have foreshadowed, aggravated robbery may take several forms. It is useful to set out the section in full.

> **235 Aggravated robbery**
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> Every one is liable to imprisonment for a term not exceeding 14 years who—
>
> (a) robs any person and, at the time of, or immediately before or immediately after, the robbery, causes grievous bodily harm to any person; or
>
> (b) being together with any other person or persons, robs any person; or
>
> (c) being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument, robs any other person.

[58] Mr Anderson was charged under (a) and Mr Darling was ultimately charged under (b). The elements of the two offences are different. For Mr Anderson to be convicted the Crown was required to prove that, first, he robbed the female complainant of her handbag; and second, at the same time, he caused grievous bodily harm to the male complainant. Section 235(b) by contrast involves a robbery while being together with another person or persons. It is clear that before Mr Darling could be convicted, it was not necessary to prove that Mr Anderson caused the wounds to the male complainant, which was an important issue in his trial.[35]

[59] Reflecting these points about the differing offences, the Crown's charge list as amended on 3 December 2018 and to which Mr Darling's guilty plea was entered, read "that [Mr] Darling on 16 November 2018, at Nelson, together with [Mr] Anderson, robbed [the female complainant] of her handbag". The words "ss 235(a) and 66(1)" and reference to causing grievous bodily harm no longer formed part of the charge sheet. Mr Darling did not plead guilty to offending under s 235(a) on a s 66 "party" basis as originally proposed and nor, as it transpired, was Mr Anderson tried under s 235(a) on a party basis either.[36] As counsel assisting submits, this was not a case where a secondary party pleaded guilty and then the principal offender was acquitted of the same offence.

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[35] See above at [27]–[31].

[36] The Court of Appeal in *Feterika v R* [2007] NZCA 526 noted that the "collective element" in the s 235(b) charge effectively "displaces s 66": at [27]. However, this aspect was not mentioned at the hearing and we do not need to resolve it.

[60] We also accept the submission for the referrer that in considering whether the case came within the second category identified in *Le Page*, the Court of Appeal did not examine the admitted facts pleaded to by Mr Darling. Rather the Court, as we have indicated, sought to reconcile the two differing outcomes. That was to ignore the fact that, as is common ground, the admitted facts to which Mr Darling pleaded were sufficient to establish the elements of the offence of aggravated robbery under s 235(b). It is correct that the summary of facts to which Mr Darling pleaded contained no express allegation of an intention on the part of both men to rob,[37] but an inference that Mr Darling had the requisite mens rea could be drawn from those admitted facts. On this basis, there remained evidence that the two complainants had been the victims of theft assisted by violence, aggravated by two people acting together and using their force to undertake the robbery.

[61] Further, as the charge against Mr Anderson was different to the charge to which Mr Darling pleaded, the jury was not required to, and did not address, whether there was a common intention. Whereas, as we have noted, the existence of that common intention could be inferred from the admitted facts. Further, as counsel assisting submitted, the acquittal of Mr Anderson on the alternative charge of wounding with intent to cause grievous bodily harm (s 188(1)) seems explicable on the basis that there may have been issues about causation or intention in relation to the wounds on Mr Anderson's part. (This is reflected in the question trail given to the jury on this charge which asked it to consider: (a) whether Mr Anderson wounded the male complainant by stabbing him; and, if so, (b) whether Mr Anderson intended to cause the male complainant grievous bodily harm.) We add that potential alternative charges which did not involve allegations of grievous bodily harm — that is, s 234 (robbery) or s 235(b) (robbery in concert) — were not put to the jury in Mr Anderson's trial.

[62] Mr Anderson's acquittal accordingly said nothing about Mr Darling's guilt. It was not correct to say that Mr Anderson's acquittal "draws into question whether there was a robbery at all".[38] The most that can be said here is that the jury was not satisfied beyond reasonable doubt that Mr Anderson was guilty of a different offence with different elements.

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37 See *Feterika*, above n 36, at [32]–[34].
38 CA judgment, above n 1, at [54].

[63] It follows that we answer the question posed on the referral in the negative. As noted above, this does not affect the quashing of Mr Darling's conviction.

Result

[64] The question of law (arising from *Darling v R* [2022] NZCA 504) referred to this Court being whether Mr Anderson's acquittal meant that Mr Darling could not, in law, have been convicted of the offence with which he was charged, despite his guilty plea, is answered "No".

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