IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA730/2024
CA731/2024
[2025] NZCA 298

BETWEEN	REREAMANU RONAKI-WIHAPI Appellant
AND	THE KING Respondent

Hearing:	14 May 2025 (further submissions received 30 May 2025)
Court:	Cooke, Venning and van Bohemen JJ
Counsel:	R M Mansfield KC and B R Smith for Appellant F R J Sinclair and D Lye for Respondent
Judgment:	3 July 2025 at 3.30 pm

JUDGMENT OF THE COURT

A The conviction for manslaughter is quashed as is the sentence for manslaughter.

B The appeal against conviction for murder is dismissed.

C The appeal against refusal of permanent name suppression is dismissed.

REASONS OF THE COURT

(Given by Venning J)

[1] Following a jury trial held in the High Court at Hamilton, Rereamanu Ronaki-Wihapi was found guilty and convicted of two culpable

homicides, manslaughter and murder.[1] On 16 October 2024, the trial Judge sentenced Mr Ronaki-Wihapi to 17 years' imprisonment with a minimum period of imprisonment of seven years on the murder conviction and three years' imprisonment on the manslaughter conviction, to be served concurrently.[2] The Judge declined Mr Ronaki-Wihapi's application for permanent name suppression. However, he made an interim order in accordance with s 286 of the Criminal Procedure Act 2011 (CPA) to allow for the filing and determination of an appeal against that decision.[3]

[2] Mr Ronaki-Wihapi appeals his conviction on the charge of murder and the refusal of name suppression.

The incident which led to the charges Mr Ronaki-Wihapi faced

[3] Mr Ronaki-Wihapi was the driver of a car which hit and killed the victim, Taku Paul. The car driven by Mr Ronaki-Wihapi hit Mr Paul on two separate occasions. The two impacts occurred within a very short time and certainly within a minute of each other. Although he initially faced one charge of murder, as we explain below, Mr Ronaki-Wihapi ultimately faced two charges of murder, one relating to each impact. On the charge relating to the first impact, he was found not guilty of murder but guilty of manslaughter. On the charge relating to the second impact, he was found guilty of murder.

The conviction appeal

[4] The appeal against the murder conviction was initially advanced on two grounds. First, that the verdict of murder was unreasonable. It was submitted on behalf of Mr Ronaki-Wihapi that, having regard to the evidence, no jury could reasonably have reached the conclusion that Mr Paul was still alive at the time he was hit by the car driven by Mr Ronaki-Wihapi on the second occasion.[4] Alternatively, it

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1 The prosecution was conducted by the Crown Solicitor for Tauranga, although the trial was heard in the High Court at Hamilton.

2 *R v Ronaki* [2024] NZHC 3019 [sentencing notes]. The Judge considered that by reference to *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 given Mr Ronaki-Wihapi's age at the time of the offending, the absence of an expiry date, the impact of a 10-year minimum period of imprisonment and lifetime parole effectively would amount to manifest injustice and a determinate imprisonment sentence was the appropriate response.

3 Sentencing notes, above n 2, at [96].

4 Criminal Procedure Act 2011, s 232(2)(a).

was submitted that there was an error during the trial which had led to a miscarriage.[5] When the jury retired to consider their verdicts, they were only provided with one of two pages of the pathologist Dr Stables' further evidence (which had been read to them). The error was only identified after the trial.

The conundrum caused by the verdicts

[5] At the outset of the hearing of the appeal, the Court raised an issue with counsel which neither counsel had directly engaged with in their submissions for the appeal. We advised counsel of our preliminary view that Mr Ronaki-Wihapi could not be convicted twice of a culpable homicide relating to the same victim. Further submissions were requested from counsel. Having received those further submissions, we are now in a position to deal with the appeal.

Factual background

[6] We take the detailed summary of the factual background to the offending from the Judge's comprehensive sentencing notes:[6]

> [9] The offending occurred on the evening of Boxing Day 2022. JB, you at the time were 17 years old. Ms Ronaki is [redacted] and Mr Paul was her partner at the time.
>
> [10] Late in the evening, JB, you were at home at your address in Te Puke. Ms Ronaki and Mr Paul had spent the day at various places around Te Puke and Papamoa. Ms Ronaki arrived [redacted] late in the evening in a highly intoxicated state very distressed, having had an argument with Mr Paul over money. Ms Ronaki believed Mr Paul had stolen money from her — about $500 that she had been gifted at Christmas.
>
> [11] JB, you and [redacted], then aged 15, got into a white Nissan Teana with Ms Ronaki in a bid to locate Mr Paul and help Ms Ronaki to retrieve the money from him. JB, you drove the car as Ms Ronaki was too intoxicated to drive. Ms Ronaki, you sat in the passenger seat, with [redacted] in the back. During the drive there was a message exchange in [redacted] group chat between you, JB, and [redacted]. You relayed to them the allegations made by Ms Ronaki that Mr Paul had taken her Christmas money. [Redacted] sent a message which said, "I'm gonna fight him". [Redacted] also sent a message that she was prepared to "fight the granny's". JB, you sent a message to the effect that you were off to fight Mr Paul, to give him a hiding or to bottle him. I accept that the group of you were concerned for Ms Ronaki's safety if she were to have to confront Mr Paul about the money on her own. JB, you drove

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5 Section 232(2)(c) and (4).

6 Sentencing notes, above n 2 (footnote omitted; emphasis in original).

into town and stopped at Jellicoe Street, to pick up [redacted]. They got into the car and sat with [redacted] in the back.

[12] JB you then continued to drive, while Ms Ronaki called Mr Paul and argued with him over the phone. Ms Ronaki your argument was loud and heated, and you put Mr Paul on speaker phone, so [redacted] could hear in the car. Ms Ronaki you asked where Mr Paul was, and he gave you his location, which was at a party at someone's house. JB proceeded to drive there, and the argument with Mr Paul escalated over the phone as you went on that drive. Ms Ronaki you were extremely upset, and you and Mr Paul shouted at each other over the phone, about the money and why he had taken it. As the argument was escalating and JB turned into Station Road, you unexpectedly saw Mr Paul a short distance ahead of you. Ms Ronaki, you responded to the escalating argument and unexpected sighting of Mr Paul by instructing JB to hit Mr Paul with the car. In your own evidence, you accepted that you said words to the effect of "hit him, do it, run him over". I don't accept that Mr Paul said "hit me" first — that evidence either comes from you Ms Ronaki or in friendly and highly leading cross- examination of [redacted] — which I don't accept as it defies commonsense and does not accord with the sequence JB gave in his police interview. I am sure that the sequence was that Ms Ronaki first said words to the effect of "hit him/run him over" and then Mr Paul responded by saying words to the effect of "go on then hit me" in a challenging way.

[13] JB, within seconds of seeing Mr Paul walking on the southern side of Station Road as you turned the corner, and hearing [Ms Ronaki's] instruction to hit him, you struck Mr Paul on the left side of the car with such force that he struck the windscreen before landing on the road. It was your defence to murderous intent that you believed Mr Paul would jump out of the way. For this strike the jury found you guilty of manslaughter, so it cannot be said that you had murderous intent at that stage.

[14] JB, after you hit Mr Paul the first time, chaos broke out in the vehicle. [Redacted] and Ms Ronaki became hysterical, both shouting at you and both trying to grab the wheel. In a state of shock, you did a U-turn, saw Mr Paul lying on the ground, and made a split-second decision to line up the wheel with his head and accelerate towards him. The chaos in the car continued, [redacted] was hitting you and tried to push the wheel away from Mr Paul's direction. You struck Mr Paul, driving over the top of his chest, and drove speedily away from the scene. The time between the first collision and the second collision was about 13 seconds. I consider that your actions ultimately escalated in a chaotic, distressing and fast-moving situation, without any substantial forethought about the consequences of driving over Mr Paul. The jury found that you had murderous intent when you hit Mr Paul the second time, by driving over him. However, I am not satisfied beyond reasonable doubt that you intended to kill Mr Paul given the circumstances I have just described. I will therefore sentence you on the basis that you intended to cause him bodily injury that you knew could result in death and were reckless as to whether death resulted (in other words, on the basis that you had *reckless* murderous intent).

…

> [16] The entire incident occurred within one minute and 14 seconds which was the time between the car being seen in town on CCTV footage beforehand and then again after the collision.
>
> [17] Mr Paul sustained injuries to his head and chest resulting in his death at the scene.

[7] We note here that Ephron Ronaki, Mr Ronaki-Wihapi's mother, was found guilty of one charge of manslaughter and one charge of attempting to pervert the course of justice. She was sentenced to four years, three months' imprisonment on the manslaughter charge and 12 months' imprisonment on the charge of attempting to pervert the course of justice, to be served concurrently.[7] Ms Ronaki had initially sought to take the blame for the killing of Mr Paul by telling the police she was the driver; ultimately, Mr Ronaki-Wihapi handed himself in and made a full statement accepting that he had been the driver and taking responsibility for his actions.

Procedural developments during trial

[8] At the outset of the trial, Mr Ronaki-Wihapi faced one charge of murder (jointly with his mother). Ms Ronaki faced two additional charges: driving with excess breath alcohol at an earlier stage of the evening and attempting to pervert the course of justice by initially taking responsibility for being the driver of the car at the time Mr Paul was killed.

[9] During the trial, the Judge granted leave to the Crown to amend the charge of murder in the charge notice and to add a new, additional charge of murder against Mr Ronaki-Wihapi.[8] The first charge was amended to include the following:

> Particulars: the first strike of Mr Paul with the Nissan Teana vehicle

[10] The second charge of murder, which was laid as a separate, additional charge rather than in the alternative, included the following particulars:

> Particulars: the second strike of Mr Paul with the Nissan Teana vehicle

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7 Sentencing notes, above n 2, at [99].

8 See *R v Ronaki* HC Rotorua CRI-2022-070-4149, 11 July 2024 (Minute No 14) at [13].

[11] The amendment to the charges followed the evidence of Dr Stables, the forensic pathologist called by the Crown.[9] Dr Stables' examination-in-chief had concluded in the following way:

> A. … So I think we have two patterns of injuries here and they'll be consistent with the proposed scenario of him being upright and being struck, going up onto the windscreen, coming off, impacting on the ground and then later being run over.
>
> Q. And so you've described the abrasion injuries likely from glass in your opinion and then the head injuries to the brain and then we've got the chest injuries, are you able to actually differentiate between those as to what specifically caused his death?
>
> A. Either of those may have resulted in his death.
>
> Q. Either of those meaning the head injuries?
>
> A. Or the chest injuries, either of those I think would have been fatal.

[12] In cross-examination, Mr Mansfield KC had the following exchange with Dr Stables:

> Q. … But the initial injuries caused by the impact or the collision itself on say the first occasion may not in of themselves have caused death?
>
> A. I think those injuries would have eventually resulted in death. Death was just hastened because of the subsequent chest injuries.
>
> Q. But presumably if treatment had been provided immediately just from the collision injuries or the impact injuries in the first instance his life might have been saved?
>
> A. Very pos — it, possibly but I don't think he would've lived a normal existence. He would not have — he may have been ended up in a permanent coma, it's hard to predict but he would not have totally recovered. He would've had some neurological deficit. As I say it may have been that he was — he would be in a permanent coma, that would be one possible outcome.
>
> …
>
> Q. But can we agree that there's no way of knowing with any certainty at this point because as a result of subsequent injuries we know that has led to his death?
>
> A. That's correct. I agree with that.

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[9] Although Dr Stables had not conducted the post-mortem examination on the deceased Mr Paul, he was called to give evidence as the pathologist who had conducted the post-mortem was unavailable.

[13] Dr Stables had given evidence on 25 June 2024, towards the end of the prosecution case. The defence then called evidence. Before closing addresses, Mr Mansfield sought to have Dr Stables recalled by the Crown or, alternatively, for leave to call Dr Stables himself, to explore whether Mr Paul was already dead as a result of the first impact and prior to the second impact. Mr Corlett KC responded on behalf of the Crown by filing a memorandum referring to the decision of this Court in *Fungavaka v R*, a murder case involving two strikes of a pedestrian by a car with the second strike occurring after the execution of a U-turn.[10] In that case, the Court had observed that it might have been preferable to have two separate charges but accepted no prejudice arose as the jury were appropriately directed regarding the need to be unanimous as to which impact (or whether both) caused death.[11] Mr Corlett indicated the Crown may seek to amend the charges to include a second charge of murder to reflect there were two impacts, as suggested by *Fungavaka*.

[14] Mr Mansfield was granted further time to either speak to Dr Stables and/or another forensic pathologist for the defence. Mr Mansfield was able to contact a Dr Glenn who reviewed the material, including the original postmortem report, and provided a further opinion that it could not be excluded as a possibility that death could have occurred within a minute of the first impact and before the second impact.[12] Dr Glenn's advice was then referred to Dr Stables who by this time was overseas.

[15] Ultimately, the matter was resolved on the basis recorded by the Judge in a minute issued following a hearing on 9 July 2024.[13] The Judge recorded that a further communication from Dr Stables by way of email exchange could be admitted as hearsay evidence. Once the further information from Dr Stables was available, the Judge then granted the Crown's application to amend the charge notice by amending charge one and including the second charge of murder. The Judge considered there was no basis to depart from this Court's "direction" in *Fungavaka* that there should be two charges of murder in these circumstances and there was no prejudice to the defence in granting the application.

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10 *Fungavaka v R* [2017] NZCA 195.
11 At [15].
12 The pathologist carrying out the postmortem had noted the cause of death as "multiple injuries sustained in a motor vehicle incident".
13 Minute No 14, above n 8.

[16] Dr Stables' further evidence included the following:

> *Assuming hit 1 caused the head injuries, would Mr Paul have died instantly?*
>
> Assuming impact 1 caused the head injuries death would not have occurred instantly. The injuries to the section of the brain (known as the brainstem) would have resulted in immediate unconsciousness. Death may have then occurred several minutes to several hours later (assuming there was no second impact).
>
> …
>
> *Assuming no hit 2 injuries and that hit 1 injuries alone actually caused death, how long would it have taken for death to occur?*
>
> I cannot answer this question with any degree of accuracy. If death occurred solely due to the head injuries, it may have taken a few minutes to a few hours. It would certainly not be instant.
>
> *Is it possible that Mr Paul was dead as a result of the hit 1 injuries before he suffered the hit 2 injuries?*
>
> As the direct result of the head injuries it is possible that Mr Paul died prior to the second impact. It is equally possible that he was alive, albeit unconscious, and dying prior to the second impact.
>
> *If so, what is your assessment of the likelihood that death from the hit 1 injuries had occurred before the hit 2 injuries?*
>
> I cannot comment on the likelihood of death occurring solely due to the first impact. I have no preference for death occurring solely to the first impact, the second impact alone, or the combined injuries of both impacts. From a cause of death it is impossible to separate these two events. All I can opine is that given the nature of the head injuries it is possible that Mr Paul was either dead, or deeply [unconscious] and dying as the result of the first impact. … I can state that the second impact injuries to the chest would have caused extremely rapid (less than a minute) death.
>
> In summary, I am not able to assist the court in definitely determining whether Mr Paul was either dead or dying following the first impact. From a pathological perspective it is impossible to separate between these possibilities.

[17] Dr Stables was also referred to the advice the defence had received from Dr Glenn:

> **Question:**
>
> … Dr Glenn, a pathologist recently consulted by the defence following your evidence, has advised that: having reviewed all of the evidence to date, including the initial PM report and photographs provided, in answer to the enquiry whether death could have occurred within a minute of the first impact and before the second impact, that could not be excluded as a possibility.

Answer:

I have no issues with Dr Glenn's opinion. However, pathologists, at best, can only give an approximate range of time it may take for a person to pass [a]way. They cannot give a precise timing.

My opinion is, and has always been throughout trial, that I could not exclude the possibility that Mr Paul was deceased following the first impact and prior to the second impact. Dr Glenn seems to be agreeing with me.

…

The scenario being proposed is was he deceased following first impact. My expert opinion was, and still is, that that scenario cannot be excluded and he may have died as the result of the first impact. But as this cannot be proved or disproved it only remains as a possibility.

Dr Stables then added:

By inference Mr Paul could have died within a minute.

[18] Dr Stables' further evidence was read to the jury after the evidence of the witnesses called on behalf of the defendants had concluded. The Crown then recalled Detective Senior Sergeant Varnam, the officer in charge. He gave evidence that it would have taken the car driven by Mr Ronaki-Wihapi just over 13 seconds to travel from the point of the first impact to the second, assuming a constant speed.

[19] Detective Senior Sergeant Varnam's evidence concluded just after midday on 9 July 2024. It was followed by the Crown and defence closing addresses. The Judge completed his summing up to the jury on 10 July at just after 3 pm. The jury returned their verdicts the next day at about 4 pm. As noted, in Mr Ronaki-Wihapi's case, the jury returned verdicts of not guilty of murder but guilty of manslaughter on charge one, and guilty of murder on charge two.

The issues on appeal

[20] Given the way the trial developed and considering the filed appeal points, the following issues arise on the conviction appeal:

(a) Was there an error in the appellant Mr Ronaki-Wihapi facing two charges of murder in relation to the death of the same victim, Mr Paul?

(b) If there was such a charging error, what are its consequences for the verdicts and the appeal?

(c) Was the verdict of murder unreasonable having regard to the evidence of Dr Stables?

(d) What is the consequence of the jury not being provided with a complete transcript of Dr Stables' further evidence when they retired to consider their verdicts?

Was there a charging error?

[21] The first issue is whether Mr Ronaki-Wihapi can be convicted twice for the culpable homicide of Mr Paul.

[22] Common sense would suggest that it is not possible to be guilty of murdering the same person twice. The law accords with common sense on this issue. To prove the charge of murder, the Crown must establish a culpable homicide.[14] Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.[15] It is not possible to kill a person who is already dead. Or, looked at another way, a defendant is not guilty of multiple charges of murder for each separate injury that he inflicts that contributes to death. He is guilty of a single offence of murder.

[23] The Judge expanded on his reasons for allowing the Crown to amend the charge and his decision to take separate verdicts on charges one and two in his trial ruling delivered on 12 July 2024. We set out that ruling in full as follows:[16]

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14 Crimes Act 1961, s 160.

15 Section 158. Homicide is culpable where the killing is carried out in the ways set out in s 160(2). Except as provided in s 178, culpable homicide is either murder or manslaughter.

16 *R v Ronaki* HC Rotorua CRI-2022-470-4149, 12 July 2024 (Trial Ruling No 5) (footnotes omitted).

[1] As noted in Minute No 17, I ruled that separate verdicts could be taken on charges 1 and 2. These are my reasons for doing so.

[2] In support of its position that a verdict could be taken for each of the two charges of murder, the Crown relied on *R v Witika and Smith* and *R v Proude*.

[3] The defendants in *R v Witika and Smith* were charged with, among other things, murder (charge 4) and failing to perform a legal duty to provide medical care for the victim (their child) without lawful excuse, thereby committing manslaughter (charge 5). They were both found guilty of manslaughter on each of counts 4 and 5. The Court of Appeal stated:

> A further question of law was reserved by the sentencing Judge on the application of counsel for Witika. It is whether the Court has jurisdiction to sentence these prisoners when there are findings of guilt on two separate and distinct counts of manslaughter relating to the death of the same person. The argument was that there is no such jurisdiction and that the trial Judge should have directed the jury to look at the whole situation such that if they determined one cause of death had been proved against an accused then they should not proceed to reach a verdict in respect of a second cause of death.
>
> This is misconceived and overlooks that there may be more than one substantial contributing cause of death. Where that is so culpability in respect of each is be determined. Indeed separate offenders may be involved. In this case the separate counts were directed to unlawful acts of violence causing peritonitis resulting in death and failure to provide medical care resulting in death. They are not inconsistent and they focus upon separate culpability. The case is covered by the decision of this Court in *R v Clarke* [1982] 1 NZLR 654 in which guilty verdicts were upheld in respect of both manslaughter and alcohol affected driving causing death. It was held that the act or omission constituting each offence was not substantially the same and therefore s 10 Crimes Act did not apply to require prosecution for only one offence and that there was no abuse of the process of the Court. This question therefore is answered in the affirmative.
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> The appeal by Witika against conviction on each count is dismissed.

[4] The same facts arose in *R v Proude*. The defendants Mr Proude and Ms Teinakirai were facing trial for the manslaughter for causing a child's death by assaulting her and, quite independently, by failing without lawful excuse to provide her with the necessaries of life (medical care). There were two counts of manslaughter. The question arose at the pre-trial stage whether the Crown could charge two counts of manslaughter, not in the alternative but cumulatively. The Court stated:

> [20] The second and more fundamental challenge is to the Crown's decision to charge the two manslaughter counts cumulatively. In effect, the defence says, the Crown contends that Mr Proude and Ms Teinakirai caused Ms Joseph's death twice over, and in two incompatible ways. The Crown must elect between them, or they must be laid alternatively.

> [21] If there were any force to this point there might be call to exercise the power under s 342(1) to quash one or other count as not charging a crime or to amend the indictment so as to make them alternatives. But, again, the course the Crown has taken is fully open to it.
>
> [22] In *R v Witika* [1993] 2 NZLR 424 there were, as here, two such counts; murder the result of assault as to which the jury convicted of manslaughter, and manslaughter by failing to obtain medical care. There, faced with the argument that the trial Judge should have directed the jury to determine one cause of death and not to bring in any verdict as to the other, and that jurisdiction was lacking to convict and sentence on both, Gault J, speaking for the Court, said at 437:
>
> > "This is misconceived and overlooks that there may be more than one substantial contributing cause of death. Where that is so culpability in respect of each is to be determined."
>
> In that case the Court held that the two counts had as their focus "separate culpability" and were not inconsistent one with the other. There could be no abuse of process, therefore, in convicting and sentencing on both. That must be so here too.
>
> [23] The Crown contends that Mr Proude and Ms Teinakirai substantially caused the death of Ms Joseph in two distinct ways. They assaulted her together as principals, or as a principal and a party. Then, when she was incapacitated by the assault, they failed in their duty to obtain her a necessary of life, medical care. Each could be a distinct substantial contributing cause to death; and one follows, and does not exclude, the other. The issue is rather as to the sufficiency of the evidence.

> [5] Accordingly, there is clear authority that it is appropriate to ask a jury to deliver separate verdicts of murder if it is alleged the deceased was killed in separate and distinct ways. The Court of Appeal held in *Fungavaka* that there should be two charges of murder in indistinguishable circumstances to this case to reflect that the deceased could have been killed in two distinct ways due to two separate strikes by a car. I was therefore satisfied that the appropriate course was for the jury to consider and deliver separate verdicts on two charges of murder. The question trail reflected this position.

[24] We now further consider the authorities to which the trial Judge referred. In reaching its conclusion the two verdicts could stand in *R v Witika*, this Court relied on its earlier decision of *R v Clarke*.[17] In *Clarke*, guilty verdicts were upheld in respect of charges of manslaughter and alcohol-affected driving causing death. This Court accepted that both charges were permissible and did not engage s 10 of the Crimes Act 1961 because the charges involved different elements. The manslaughter

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[17] *R v Witika* [1993] 2 NZLR 424 (CA) at 437 citing *R v Clarke* [1982] 1 NZLR 654 (CA).

charge required proof death was caused by the defendant's careless driving, while the second, cumulative charge required proof death was caused by the defendant while intoxicated. The presence and the influence of the alcohol had to be shown to be a material cause of the act or omission which led to the death.[18] The case of *Clarke* can be contrasted with the present case where the defendant was charged twice with exactly the same offence.

[25] Section 10 of the Crimes Act which was referred to in *R v Clarke* provides:

> **10 Offence under more than 1 enactment**
>
> (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.
>
> (2) Where an act or omission constitutes an offence under 2 or more Acts other than this Act, the offender may be prosecuted and punished under any one of those Acts.
>
> (3) Where an act or omission constitutes an offence under 2 or more provisions of this Act or of any other Act, the offender may be prosecuted and punished under any one of those provisions.
>
> (4) No one is liable to be punished twice in respect of the same offence.

[26] In *Clarke*, this Court accepted that even if s 10 was to be interpreted as restrictive rather than permissive, the act or omission constituting each offence was not the same or substantially the same. It followed there was no abuse of process in the defendant facing two charges.[19] Similarly, in *Witika*, the convictions for manslaughter were upheld as the charges alleged different bases for liability.[20] That is an important distinguishing factor from the present case.

[27] In *R v Proude*, Mr Proude and his co-accused were facing trial for manslaughter for causing a woman's death by assaulting her and "independently, by failing without lawful excuse to provide her with the necessaries of life, medical care".[21] The woman was mentally impaired and had the understanding of a ten-year-old child.[22] Once again, in *Proude* there were two separate courses of conduct amounting to offences,

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18 *R v Clarke*, above n 17, at 656–658.
19 At 656–657.
20 *R v Witika*, above n 17, at 437.
21 *R v Proude* HC Auckland CRI-2008-092-1926, 25 November 2009 at [1].
22 At [7].

even though both involved the death of the woman. Part 8 of the Crimes Act provides for several duties tending to the preservation of life, including the duty of those who have care or charge of a vulnerable adult to provide necessaries under s 151, which itself provides for two separate and independent legal duties. The first is to provide that person with necessaries and second, to take reasonable steps to protect that person from injury.

[28] In each of these cases, *Clarke*, *Witika* and *Proude*, the offences of which the defendants were convicted were distinct and involved proof of different elements. That is not the situation in the present case as Mr Ronaki-Wihapi was charged twice with exactly the same offence.

[29] The Judge was also influenced by the observations of this Court in *Fungavaka*. That case involved a very similar factual situation to the present. Following a jury trial, Mr Fungavaka was convicted of a charge of murder for striking the victim with a car twice in quick succession. One of the grounds of appeal was that the Crown had laid a single, under-particularised murder charge against Mr Fungavaka. The point was taken on appeal that there was a risk Mr Fungavaka was convicted without the jury ever agreeing that he had the requisite intent at the time of the fatal impact (which was accepted could have been on either occasion).[23] This Court noted:[24]

> [12] As to the alternative argument, that the two impacts should have each been separately charged as murder, we agree with Mr Koya that there were two separate acts on the part of Mr Fungavaka. The first was driving the car in the direction of the victim and striking her. The second occurred after he turned the vehicle around and then proceeded to run Ms Manuel over.
>
> [13] Section 17(1) of the Criminal Procedure Act 2011 provides that "a charge must relate to a single offence". In *Mason v R* the Supreme Court was concerned with the application of the predecessor to s 17 — s 329(6) of the Crimes Act 1961, which provided that every "count shall in general apply only to a single transaction". The Court said that distinctly identifiable acts of alleged offending should be the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if the acts are combined in a single count, endorsing the comments of Anderson J writing for the Court in *R v Qiu*:
>
> > Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of

[23] *Fungavaka v R*, above n 10, at [1].
[24] Footnotes omitted.

> conviction, they assist the sentencing Judge by indicating the extent of culpability.
>
> [14] We consider that this reasoning applies with equal force to s 17 of the Criminal Procedure Act so that where there are distinctly identifiable acts of offending, those acts should be charged separately.
>
> [15] In this case it might have been preferable to formulate two charges, but we do not consider that any prejudice to Mr Fungavaka flowed from the Crown's failure to do so. Mr Koya claims there was a risk that the jurors reached a guilty verdict without being satisfied that Mr Fungavaka caused the victim's death at a time when he had murderous intent. But that risk does not even reach the level of the theoretical in this trial. It was not at issue that Mr Fungavaka was responsible for each impact, nor that each impact was a substantial and operative cause of death. The only issue was whether the Crown had proved beyond reasonable doubt that one or other of the impacts was non-accidental.

[30] In the present case, the trial Judge was apparently influenced by the opening words of [15]. However, the first point is that clearly those comments were obiter. Reliance on the observation in that first sentence of [15] also overlooks the concluding three sentences of the paragraph. Ultimately, this Court accepted that the Judge's direction to the jury sufficiently related the requirement for murderous intent to coincide with the two distinct impacts.[25] The Court did not address whether the two charges would be brought in the alternative, and we do not consider that the case suggests that a defendant can be found guilty of a charge of murder twice. With respect to the Judge, *Fungavaka* is not a precedent which required there to be two cumulative murder charges before the Court.

[31] In the present case, while there were two distinct impacts, they were separated by perhaps as little as 13 or so seconds, with both certainly occurring within one minute. The appropriate course was for there to be one charge of murder particularised in relation to the two events. As Mr Paul had been killed, once the jury were satisfied that Mr Ronaki-Wihapi had deliberately driven the car towards Mr Paul and hit him, he was guilty of manslaughter at the least. The jury should then have been directed to consider Mr Ronaki-Wihapi's state of mind and intention at the time of both impacts. To convict him of murder they had to be sure he had murderous intent at the time of inflicting an injury which was a substantial and operative cause of death.

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[25] At [16].

[32] Alternatively, if the Judge was to permit the Crown to present two charges of murder to the jury, they should have been in the alternative.

[33] For completeness, we note s 26(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) confirms that no one who has been finally convicted of an offence shall be tried or punished for it again. However, that provision does not apply in the case of simultaneous convictions.[26] It has no application to the present case.

[34] The short point is that there was a charging error in this case. Mr Ronaki-Wihapi should not have faced two cumulative charges of murder for the death of Mr Paul. He should either have faced a single charge, particularised in a way that alleged that it was satisfied either by the first impact or alternatively by the second impact, or two charges of murder advanced in the alternative. The verdicts of manslaughter and murder cannot stand together.

What are the consequences of the charging error?

[35] The next issue is whether, as Mr Mansfield submits, the verdict of manslaughter should stand with the murder charge set aside or, as the Crown submits, the conviction for manslaughter should be set aside with the charge of murder being upheld. There is a third option — Mr Mansfield's alternative submission — that both convictions should be set aside, and the matter remitted for a retrial.

[36] The issue on this second point is whether the charging error has created a real risk the outcome of the trial was affected or has resulted in an unfair trial. The error is not such that it could be said the trial was a nullity.

First verdict — manslaughter

[37] As both convictions cannot stand, which one should remain, if one is to be maintained, is determined by the questions the jury answered in the case. Under charge one, the first charge of murder, the question trail included the following question about the first impact:

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[26] *R v Moore* [1974] 1 NZLR 417 (CA) at 420.

> 3. Are you sure that [Mr] Ronaki-Wihapi intentionally hitting [Mr] Paul with the car on the first occasion was a substantial and operative cause of [Mr] Paul's death?

If the jury answered no, they were directed to find Mr Ronaki-Wihapi not guilty of both murder and manslaughter on count one. The jury must have answered that question in the affirmative because they then went on to consider, but ultimately were not sure, that Mr Ronaki-Wihapi had either of the murderous intents at the time of the first impact. By finding him guilty of manslaughter, the jury must have found that the first impact was a substantial and operative cause of Mr Paul's death, but Mr Ronaki-Wihapi lacked murderous intent at the time of that first impact.

[38] However, when the jury went on to consider charge two, the murder charge relating to the second impact, the first question they were asked was:

> 1. Are you sure that when [Mr] Paul was hit on the second occasion with the Nissan Teana, he was alive?

If they answered no, the jury was directed to find Mr Ronaki-Wihapi not guilty of both murder and manslaughter on count two. The jury must have answered the question in the affirmative because they then went on to work their way through the questions in that trail to find Mr Ronaki-Wihapi guilty of murder.

[39] At first sight, there may appear an inconsistency between the jury's finding on charge one that the first impact of the car driven by Mr Ronaki-Wihapi was a substantial and operative cause of Mr Paul's death but then finding that they were sure that Mr Paul was still alive when he was hit on the second occasion. However, the apparent inconsistency is readily explainable by the words used in question three for the first charge and by the evidence. As a result of the first impact, Mr Paul was lying unconscious on the road, effectively defenceless against the second impact when run over and hit the second time by Mr Ronaki-Wihapi. The evidence was such that the jury could properly find that, whilst the first impact by itself was likely to have been a substantial and operative cause of death and may well have ultimately caused death, death would not have been immediate, and that Mr Paul was still alive when run over the second time. The second impact was the actual cause of death, and it was inflicted with murderous intent.

[40] Having found, as they must have, that they were sure Mr Paul was still alive at the time of the second impact, the verdict for manslaughter on the first charge cannot stand. Section 10 of the Crimes Act prevents a defendant from being convicted twice for the same (or included) offence. The conviction for manslaughter must be set aside. However, on the questions the jury were asked, and the answers they must have given to those questions, there is a reasoned basis for the guilty verdict on the second murder charge.

Second verdict — murder

[41] In his supplementary submissions, Mr Mansfield argued that the Crown's suggestion the murder conviction should be upheld and the conviction for manslaughter quashed be rejected for the reasons articulated in relation to the two grounds originally advanced on the appeal. We deal with those below. However, Mr Mansfield also submitted generally that the charging error should lead to a retrial. He submitted that, had the jury been asked to consider one charge rather than two, they would have heard different closings, a different summing up, would have been presented with a different question trail, and their deliberations would have developed in different ways.

[42] Having reviewed counsel's closing addresses, we do not consider that they would have been materially different if there had only been one charge of murder particularised in relation to the two impacts, or if there had been two charges of murder in the alternative. For example, in closing for the Crown, Mr Corlett submitted:

> … When my learned friend Mr Mansfield opened, he said the issue was intention. Now, on the second hit I think what the defence might say to you is look members of the jury, maybe he did line Mr Paul's head up and boost towards him; maybe when he did that, he did want to kill him; certainly, when he knew that he was running over Mr Paul as he lay on the road, he knew that he was likely to kill him; and maybe he didn't care whether he killed him or not; but maybe he was already dead. Oh, that's a defence. Maybe he was already dead members of the jury so you should acquit him. Maybe he was already dead. Madam Foreman, members of the jury, you now have a new charge notice that has two counts of murder. The Crown says in relation to hit one that he did intend to kill Mr Paul, or that alternatively, he certainly intended to cause him injury that was more than trifling and you can infer that intention from what he did at the time but also what he subsequently did namely, that he came back – it wasn't an accident – he came back and had another go. From that you can know well I know what he was intending on the first occasion because he came back. You can take that into account.

> On the second hit, this is where I think my learned friend is coming that, oh maybe he was already dead, maybe that's a defence. So what I'm going to address now is why the Crown says that it is proved beyond reasonable doubt that Mr Paul was alive until some time after he was hit on the second occasion. Let's start with speed. Mr Ronaki-Wihapi says that when he hit Mr Paul the first time, he was doing about 20–30 km/h…

And then when referring to Dr Stables' evidence:

> … Dr Stables when he gave evidence said, well he could have survived the first injuries, and this was the questions and answers from my learned friend [noted above].
>
> So that was the evidence of Dr Stables that he may have been able to survive that first injury. Also Dr Stables' evidence that you've just heard read out this morning, you now know that he wouldn't have died instantly. This is not the sort of mechanism of death would result in instant death. … Dr Stables said this was not an instant death. He said that the damage that was caused can, on the first hit, can result in a coma or death. This is what you heard this morning. He said it may have taken a few minutes, certainly not instant. But he said the second impact death would have been extremely rapid from the second impact.

[43] Mr Corlett then referred to the further evidence of Detective Senior Sergeant Varnam referring to the gap between the two impacts as "13 seconds if you're making some assumptions about constant speed, but that's between hit one and hit two".

[44] In his closing, Mr Mansfield had noted, talking about the second impact and dealing with Mr Ronaki-Wihapi's Instagram message:

> … This message where at some time later he's sending a message "Yeah I was in the moment when I hit again" so he's talking about the second hit. "In the moment" remember that's classic terminology for this "fright, flight and freeze" that we've heard about and I want to come back to. "Yeah I was in the moment when I hit again. I just lined the wheel up with his head and boosted it"…

[45] And then later:

> Now we know now from the later evidence from Dr Stables that it cannot be ruled out that Mr Paul did not die from the first impact. Not where the motor vehicle hit him, but where his head hit the windscreen and where his head hit the pavement or road where he landed that's what caused an injury which had all the potential to be fatal. Not immediately, but within seconds and certainly well less than a minute. He has opined using all his experience to tell us that it's possible that Mr Paul was dead and already dead prior to the second impact, that that's not something that we can rule out. And can I suggest that if you reach that conclusion then that's the end of it. … if you think well we're sure and I caution you about that, but if you think you're sure he intended to

> hit him then can I suggest on the evidence you've got given the time and circumstances that young man found himself in, he never contemplated killing him so hence didn't take that risk and there's no evidence at all to suggest he wanted him dead or intended that.
>
> So it's either not guilty altogether if you accept it's an accident or it's not guilty of murder but guilty of manslaughter if you thought he intentionally struck him but didn't contemplate death or intend to kill…

[46] And again:

> … If Mr Paul is already dead, you don't need to in my submission take the inquiry any further but that is subject to a direction from his Honour. But he can't be guilty of murdering somebody who is already dead and we can't rule out it seems, the possibility that Mr Paul is dead by the time of the second collision. If contrary to that evidence you think he must have been alive or you're sure that he was, then you'll need to think about whether in the environment of that motor vehicle as it existed at the time for this 17-year-old he intended to kill him — so did he intend to hit him again? …

[47] Mr Mansfield is correct that inevitably the question trail for the jury would have been different without the charging error. However, on the material questions — namely, whether Mr Paul was still alive at the time of the second impact and the defendant's intent at the time he hit Mr Paul on the second occasion — there is no reason to consider the jury would have come to a different view had there only been one charge of murder, or charges in the alternative. There was effectively no contest that Mr Ronaki-Wihapi was the driver and that Mr Paul had been hit twice in quick succession. The focus was always on Mr Ronaki-Wihapi's state of mind and intent at the time of the two impacts. Those issues were properly before the jury and the focus of counsel's addresses and the Judge's summing up.

[48] There was ample evidence before the jury for them to have determined that Mr Ronaki-Wihapi had the necessary mens rea for murder. Mr Ronaki-Wihapi was interviewed by Detective Mitchell on 5 January 2023. The DVD interview and transcript of the interview were produced as Crown exhibits. During the course of the interview, Mr Ronaki-Wihapi accepted that he deliberately drove towards Mr Paul intending to hit him on both occasions and that he expected Mr Paul would end up in hospital. In particular, in relation to the second impact he said:

> RR ... I sped up and hit him with the car and then he went flying onto the ground, onto the road and then I t, I went up a bit and I turned around and ran him over again.

JM You ran him over again?

RR Yeah. My mum was tryna push the steering wheel away.

JM Say that to me again.

RR My mum was tryna push the steering wheel away.

JM Your mum was trying to push it away?

RR The steering wheel when I was going straight toward him.

[49] Previously, in an Instagram message to his friend, Mr Ronaki-Wihapi had said that he drove straight towards Mr Paul to run him over. He said he was "in the moment" when he hit him again, that he lined up the wheel with his head and just "boosted it".

[50] Mr Mansfield suggested that, after determining Mr Ronaki-Wihapi was not guilty of murder but guilty of manslaughter, the jury would not have been required to go on and consider the second impact. But if only one charge of murder was before the jury, or two charges of murder in the alternative, a properly directed jury would have been directed to consider the effect of both impacts and Mr Ronaki-Wihapi's mens rea at both times. For those reasons, we do not consider the defence would have been materially different.

[51] The Supreme Court in *Haunui v R* confirmed the approach taken by this Court in *Wiley v R* to the issue of whether the outcome of the trial was affected as follows:[27]

> [67] … The question under s 232(4)(a) is "whether the error, irregularity or occurrence in or in relation to or affecting [the] trial has created a real risk the outcome was affected". That question "requires consideration of whether there is a reasonable possibility another verdict would have been reached". If the answer to that question is "no", that is the end of the matter and the appeal will be dismissed. If the answer to that question is "yes", we consider the effect of the Criminal Procedure Act is that the appeal court then asks whether it is sure of guilt. If the answer is "no", the appeal will be allowed. If the answer is "yes", the court determines the error did not in fact create a real risk that the outcome was affected and the appeal will be dismissed. Finally, as we have noted, if the appeal court is satisfied that the jury's verdict was unreasonable (s 232(2)(a)) or that the error has resulted in an unfair trial or a trial that was a nullity (s 232(4)(b)), the appeal will be allowed and the proviso reasoning does not apply.

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[27] *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 affirming *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 (footnotes omitted).

[52] Subject to the original appeal points that Mr Mansfield raised on behalf of Mr Ronaki-Wihapi which are addressed below, we consider that if there had been no charging error, and Mr Ronaki-Wihapi had faced one charge of murder, or two charges in the alternative, given the jurors' answers to the relevant questions, they were unanimous on the essential elements of murder and there is not a reasonable possibility a different verdict would have been reached.[28] It follows there has been no miscarriage because of the charging error. We then turn to the points raised by Mr Mansfield regarding the appeal generally.

Was the murder verdict unreasonable given the pathology evidence?

[53] Mr Mansfield submitted that, given Dr Stables' evidence and the absence of any other evidence that Mr Paul remained alive, no jury could reasonably have concluded, to the standard of beyond reasonable doubt, that Mr Paul was still alive when he was hit for the second time.

[54] Mr Mansfield referred to *R v Owen* in which the Supreme Court approved the principles summarised by this Court in *R v Munro*, where it is suggested the verdict is unreasonable based on the evidence.[29] The following principles are applicable:[30]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant … must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict

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28 On the jury unanimity point, see *King v R* [2011] NZCA 664.

29 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13] affirming *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

30 *R v Owen*, above n 29, at [13].

> is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[55] Mr Mansfield submitted several factors supported the view that the first impact was a serious crash which killed Mr Paul. First, the speed at the time of the first impact. He noted the Police Crash Investigator, Senior Constable Stokes, produced a range of between 35 and 65 km/h for the speed at the time of the first impact. Mr Ronaki-Wihapi himself had said he was driving at between 20 and 30 km/h. Next, the effect on the deceased's body. The deceased went up on the bonnet, hit the windscreen, broke it, and then, in Mr Ronaki-Wihapi's words went "flying onto the ground, onto the road". Senior Constable Stokes estimated as a result of that first impact the deceased's body was thrown between 13.93 m and 15.42 m from the point of impact, landing on the road.

[56] Mr Mansfield submitted that the injuries from the first impact would have been fatal, referring to the original evidence of Dr Stables. Then, he noted that in the further evidence read to the Court, Dr Stables had agreed that Mr Paul could have been dead at the time of the second impact. Mr Mansfield submitted there was no other independent evidence to suggest that Mr Paul had survived the first impact. On that basis, Mr Mansfield submitted that, in the absence of any other evidence Mr Paul was still alive, no jury could reasonably have been sure that he was still alive at the time of the second impact. The verdict of murder on the second count was unreasonable.

[57] However, with respect to those submissions, when Dr Stables' evidence is considered as a whole, his primary opinion was that death from the first impact would have occurred several minutes to several hours later. It would certainly not be instant. While Dr Stables could not exclude the possibility Mr Paul was dead, that was not his favoured opinion. As the Crown put it, the likelihood he was still alive was bookended by possibilities that could not be scientifically proved or established either way: namely, that he was dead before the second impact or that he could possibly have survived the first impact long-term but with significant brain injuries or in a coma.

[58] It was for the jury to determine whether Mr Paul was still alive at the time of the second impact. The Judge properly gave them the standard direction, that this was

a trial by them rather than a trial by experts. The concept of proof beyond reasonable doubt is a legal one, rather than a medical one.

[59] In *Kuka v R*, this Court considered an appeal based on an argument that the medical evidence did not establish, to the required criminal standard, that Ms Kuka's failure to seek medical attention was a substantial and operative cause of death.[31] While that case concerned the effect of an omission, rather than the effect of a positive act, the Court's observations about the approach to medical evidence is generally applicable. The Court noted:

> [25] Medical experts do not make absolute claims about what would have happened given a particular condition. Scientists do not speak in those terms. A doctor is very unlikely to say "If X drug had been administered, the victim certainly would have recovered". Rather, the doctor would frame their opinion as a high probability, such as "If X drug had been administered, the victim would in all likelihood have recovered".
>
> [26] Notwithstanding that medical experts speak in terms of probabilities (however high) rather than absolute certainties, in the criminal context a jury must be sure of an accused's guilt before they can convict. In the recent English case of *R v Gemma Evans* [2009] EWCA Crim 650 (although not an analogous fact situation to the present case) one of the ingredients of the offence of manslaughter upon which the trial judge had directed the jury was:
>
> > … [whether] the prosecution made [the jury] sure that the defendant's breach of [her] duty of care caused the death of [the victim].
>
> This direction was not criticised in the Court of Appeal.
>
> …
>
> [29] The improbability of doctors answering with certainty the question, "what would have happened but for the omission?" was observed by William Young J (as he then was) in *R v Little* HC CHCH T17/01 12 June 2001:
>
> > [109] … the concept of proof beyond reasonable doubt is a legal and not a medical one. When doctors talk about what would "probably" have happened, had events panned out differently, it is not necessarily to be assumed that they are talking about a degree of likelihood or probability which falls short of what is required by the criminal law.

[60] Similarly, in the present case, the jury was not required to answer the question to the level of scientific proof. We consider the jury was entitled to conclude that

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31 *Kuka v R* [2009] NZCA 572.

Dr Stables' evidence, taken as a whole, established that death from the first impact, whilst likely, would have taken several minutes or hours so that Mr Paul was still alive at the time of the second impact.

[61] We note that the Judge apparently agreed with the jury's conclusion, inherent in the guilty verdict on the second murder charge, that Mr Paul was still alive at the time of the second impact. In his sentencing notes, the Judge accepted:[32]

> [15] … There was only a matter of seconds between the two collisions and Dr Stables' evidence was that the first impact alone may not have caused Mr Paul's death…

[62] As this Court observed in *Kuka*, medical experts do not use the language of criminal law. The fact a jury must be sure of an accused's guilt is not necessarily incompatible with the impossibility of proving for certain what would have happened.[33] Further, as Mr Sinclair put it, it would be contrary to legal policy to quash a murder conviction in reliance on a scientific conundrum — a jury must have scientific proof of death, but science cannot give that proof because of the near-simultaneous acts of violence for which the accused is responsible, and where murderous intent is present (though not at the moment of the first and hypothetically fatal injury).

[63] We are satisfied that it was reasonably open to the jury to find beyond reasonable doubt that Mr Paul was still alive at the time of the second impact.

What is the consequence of the jury not having both pages of Dr Stables' further evidence?

[64] Mr Mansfield's alternative argument was that there was a further error affecting the trial. The agreed written response from Dr Stables to the further questions put to him and Dr Glenn's opinion was read into the evidence but only the first of the two pages was provided to the jury with the transcript of the evidence. The trial Judge recorded this error in a minute.[34]

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32 Sentencing notes, above n 2.
33 *Kuka v R*, above n 31, at [28].
34 *R v Ronaki* HC Rotorua CRI-2022-070-4149, 16 July 2024 (Minute No 21).

[65] Mr Mansfield submitted that the failure to provide the second page to the jury created a real risk the outcome of the trial was affected as the evidence was crucial to the issue of whether the deceased was still alive at the time of the second impact.

[66] Mr Mansfield noted the jury were led to expect they would have a complete written copy of the evidence to check when they retired. After the evidence was read to them, counsel made competing submissions on the effect of the evidence. Further, the Judge had told them they would have a written copy of all the evidence when they retired to deliberate. Mr Mansfield submitted there was a real risk the jury relied on the material they were provided with as being correct and complete. That would have left them with the view that the deceased must have been alive at the time of the second impact when Dr Stables had gone on in the second page of the evidence to confirm he could not exclude that.

[67] For a number of reasons, we do not consider that the failure to provide the second page of the transcript of Dr Stables' evidence to the jury when they were deliberating has led to a miscarriage in this case.

[68] The starting point is, as the Crown submits, the evidence is what it is seen and heard in court, not the transcripts which are provided as an aid to memory. On that point, it is relevant that Dr Stables' evidence was read to the jury at the end of the trial and would have been fresh in the jurors' minds.

[69] Mr. Mansfield directly addressed the jury about the evidence:

> Now we know now from the later evidence from Dr Stables that it cannot be ruled out that Mr Paul did not die from the first impact. Not where the motor vehicle hit him, but where his head hit the windscreen and where his head hit the pavement or road where he landed that's what caused an injury which had all the potential to be fatal. Not immediately, but within seconds and certainly well less than a minute. He has opined using all his experience to tell us that it's possible that Mr Paul was dead and already dead prior to the second impact, that that's not something that we can rule out. And can I suggest that if you reach that conclusion then that's the end of it…

[70] Next, the Judge's summing up repeated that point when referring to Dr Stables' evidence about the possibility of death before the second impact:

> [Mr Ronaki-Wihapi's] case is that you simply cannot be sure that Mr Paul was alive at the time of the second impact because that's what Dr Stables' evidence was. [Dr Stables'] evidence that was read to you is that he cannot exclude the possibility that Mr Paul [had] died as a result of the first impact.

[71] Further, the first page of the two pages of Dr Stables' further evidence that was provided to the jury included the following response to the direct question:

> *Is it possible that Mr Paul was dead as a result of the hit 1 injuries before he suffered the hit 2 injuries?*
>
> As the direct result of the head injuries it is possible that Mr Paul died prior to the second impact…

[72] Further, the first page also recorded Dr Stables' following evidence:

> *If so, what is your assessment of the likelihood that death from the hit 1 injuries had occurred before the hit 2 injuries?*
>
> … All I can opine is that given the nature of the head injuries it is possible that Mr Paul was either dead, or deeply [unconscious] and dying as the result of the first impact. I am not able to be more specific than that…

[73] The jury would have been well aware from the above that Dr Stables had conceded he could not exclude the possibility that Mr Paul was dead prior to the second impact. They were also aware, for the reasons given above, that was not his preferred opinion. We are satisfied that there is no reasonable possibility the jury would have come to a different verdict if they had been provided with the second page of the transcript. The error has not resulted in a miscarriage.

Name suppression

[74] The appeal against name suppression is pursued on the ground that the Judge erred in finding that Mr Ronaki-Wihapi would not suffer extreme hardship if his name was not permanently suppressed. Mr Ronaki-Wihapi previously had name suppression throughout the trial process.

[75] The approach to apply to an application for name suppression is settled. In *M (SC 13/2023) v R*, the Supreme Court endorsed the two-stage approach formulated

previously by this Court in *Robertson v Police.*[35] The first stage requires the Court to consider whether it is satisfied that one of the threshold grounds under s 200(2) has been established.[36] It is submitted for Mr Ronaki-Wihapi that publication of his name would be likely to cause him extreme hardship. "Likely" means the stated harm or risk is a real and appreciable possibility that cannot be dismissed as remote or fanciful.[37]

[76] At the second stage, the Court must weigh the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the view of the victim and the public interest in knowing the character of the offender.[38]

[77] Mr Mansfield accepted that a high threshold is required for name suppression where extreme hardship is claimed. He submitted, however, this is a contextual exercise.

[78] Mr Mansfield submitted that in Mr Ronaki-Wihapi's case, the principle of open justice was tempered by the provisions of the Oranga Tamariki Act 1989 and the youth justice principles which guide its interpretation. The protective provision of s 438 of the Oranga Tamariki Act prevents publication of Youth Court proceedings. While Mr Ronaki-Wihapi was before the High Court, the youth justice principles informing the Oranga Tamariki Act were nevertheless a relevant factor. Further, s 25(i) of the NZBORA affords every child charged with a criminal offence "the right … to be dealt with in a manner that takes account of [their] age."

[79] Mr Mansfield then noted the Judge considered Mr Ronaki-Wihapi's background and personal circumstances, as well as a psychologist report from Dr Immelman which recorded Mr Ronaki-Wihapi had post-traumatic stress disorder (PTSD) and depression. Mr Mansfield noted that Dr Immelman also considered

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35 *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [35], citing *Robertson v Police* [2015] NZCA 7 at [39]–[41].

36 *M (SC 13/2023) v R*, above n 35, at [35].

37 *Nathan v R* [2023] NZCA 656 at [27]–[28] affirming *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 at [21]. See also *Huang v Serious Fraud Office* [2017] NZCA 187 at [10]; and *Wharekura v R* [2022] NZCA 352 at [11].

38 *M (SC 13/2023) v R*, above n 35, at [36]–[37].

Mr Ronaki-Wihapi to be vulnerable because of his age and maturity and had opined that publication of his name would cause Mr Ronaki-Wihapi hardship that could only be described as extreme.

[80] Mr Mansfield next emphasised that Mr Ronaki-Wihapi had no previous convictions, was otherwise of good character and had genuine remorse. At the time of the offending, he was 17 years old. He is now only 20 years old. Mr Mansfield suggested that Mr Ronaki-Wihapi had more prospects of being successfully rehabilitated than most young people who appeared before the adult courts, but Mr Ronaki-Wihapi and his whānau had expressed concern at the effect publication would have on his prospects of rehabilitation.

[81] Mr Mansfield noted the comments of this Court in *DP v R* on the potential impact on rehabilitative prospects, by reference to the attention given to Bailey Kurariki following the publication of his name in connection with his conviction for murder.[39]

Analysis

[82] The Supreme Court has confirmed that extreme hardship means "severe suffering or privation", or hardship that is excessive in the circumstances of the case.[40] For the following reasons, we agree with the Crown submissions that in this case, Mr Ronaki-Wihapi cannot establish that publication of his name would meet that threshold.

[83] Open justice remains the starting point.[41] There is no presumption in favour of name suppression for young offenders outside the Youth Court.[42] While youth principles are a primary consideration to be given significant weight, there is no evidence in Mr Ronaki-Wihapi's case to suggest his youth is a particularly relevant factor. As the Crown submits, his emotional maturity demonstrated by his remorse,

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39 *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [31]–[33].
40 *M (SC13/2023) v R*, above n 35, at [69], citing *Robertson v Police*, above n 35, at [48].
41 *M (SC13/2023) v R*, above n 35, at [44].
42 At [65].

empathy and acceptance of responsibility suggests he will be well equipped to deal with any passing commentary that may follow publication of his name.

[84] Dr Immelman opines that publication of Mr Ronaki-Wihapi's name or images could cause him extreme hardship, but he does not tie that to the legal concept as defined in the authorities. His opinion seems to be based on Mr Ronaki-Wihapi's PTSD and young age. However, as noted, there is no presumption for suppression because of age, and while Mr Ronaki-Wihapi may suffer from PTSD, Dr Immelman noted that he has the capacity to emotionally regulate himself.

[85] There may well be some media attention, at least initially. However, as Downs J noted in the minority decision in *DV (CA451/2021) v R*, sustained media interest is unlikely in such cases.[43] And we also take the view that Mr Ronaki-Wihapi's situation is quite different to that faced by Mr Kurariki as discussed by the Court in *DP v R*. We also note that in *DP v R* the defendant was only 13 at the time of the offending.

[86] While Mr Ronaki-Wihapi also relied on the case of *DV (CA451/2021) v R,* the offending in that case was far less serious. Further, the appellants in that case were discharged without conviction. A more relevant comparator is the case of *McNamara v R.*[44] In that case, the argument for suppression based on youth was stronger than in the present case. Mr McNamara was a 14-year-old convicted of murder, and still the threshold of extreme hardship was not met.

[87] Finally, any effect on Mr Ronaki-Wihapi's employment prospects in the future and the label of murderer are consequences of the conviction rather than of publication.

[88] For those reasons, we agree with the Judge that Mr Ronaki-Wihapi cannot meet the test for extreme hardship in this case.

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43 *DV (CA451/2021) v R* [2021] NZCA 700 at [74].
44 *McNamara v R* [2024] NZCA 670.

[89] Given that finding, it is strictly unnecessary to consider the second limb. However, on that aspect, we again agree with the Judge's assessment that name suppression is not appropriate. The high public interest in identifying those convicted of murder supports publication. That interest, which is a proper interest of public concern, outweighs Mr Ronaki-Wihapi's private interests in the present case. Finally, apart from the public interest in the transparency of open court proceedings, the considerations of accountability and deterrence are also relevant.

[90] For those reasons, the appeal against name suppression must be dismissed.

Result

[91] The conviction for manslaughter is quashed as is the sentence for manslaughter.

[92] The appeal against conviction for murder is dismissed.

[93] The appeal against refusal of permanent name suppression is dismissed.

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