IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 19/2025
[2025] NZSC 191

BETWEEN	MANU HORI IONGI Appellant
AND	THE KING Respondent

Hearing:	22 October 2025
Court:	Winkelmann CJ, Ellen France, Williams, Kós and Miller JJ
Counsel:	K E Hogan KC and T Hu for Appellant N E Walker and H D Benson-Pope for Respondent
Judgment:	11 December 2025

JUDGMENT OF THE COURT

A The appeal is allowed. The conviction of Manu Iongi for manslaughter is quashed.

B Order made under ss 233(3)(a) and 241(2) of the Criminal Procedure Act 2011 that a judgment of acquittal be entered.

REASONS

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

Introduction

[1] In the early hours of the morning on Wednesday 15 January 2020, a black BMW car performed a 40-minute circuit of South Auckland, from Flat Bush to Māngere, on to Ōtara, and then home to Flat Bush. Fourteen minutes into the journey, at 2.42 am, it stopped outside a house in Calthorp Close, Māngere. Neighbours heard a car stop, a handbrake applied, a knock at a door, a voice asking "Are you home?", a gunshot fired, a voice calling "Hurry up", two sets of footsteps hurrying back towards the car, two car doors slamming, and a car driving off at speed. None of the neighbours actually *saw* any of this; this is what they *heard*.[1]

[2] The gunshot fired that night killed Mrs Meliame Fisi'ihoi, aged 57. She had looked out a window to see who had come onto her property. She was killed by a single blast from a shotgun fired at close range through the window.

[3] A few minutes later, at about 3 am, the black BMW car arrived at the Ōtara residence of Havea Iongi. The car contained three of his cousins: the car's owner, Falala'anga (Falala) Iongi, was behind the wheel; the appellant, Manu Iongi, was in the front passenger seat; and Falala's brother, Viliami Iongi, was in the back seat. All seemed out of sorts: Falala and Viliami were agitated; Manu was subdued. Viliami handed Havea a shotgun, the barrel of which was warm, and told him to hide it, before the three drove away.

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[1] Several neighbours gave evidence, and this is a summary of their collective evidence. The primary witness was a 14-year-old girl who was up late watching a TV show with her cousin, by an open window quite near the car.

[4] All four men were members of the 36 faction of the Crips street gang. Falala and Viliami Iongi were feuding with another member of the same gang—Mrs Fisi'ihoi's son, Stephen—over a drugs-for-shotgun swap that had gone wrong. The feud became violent. A fistfight outside the Fisi'ihoi home in early November 2019 became a brawl in which Stephen hit Viliami with a bat. Then, on 4 December 2019, Falala and Viliami visited the home again, and Viliami fired shots at Stephen and an associate, George Vuna, severely wounding the latter.[2] Six weeks later, on 15 January 2020, the feud became a homicide.

[5] Falala and Viliami Iongi were convicted of Mrs Fisi'ihoi's murder, and Manu Iongi was convicted of her manslaughter.[3] Conviction appeals by Falala and Manu failed in the Court of Appeal.[4] Leave for Manu to appeal to this Court was granted, the approved question being whether the Court of Appeal was correct to dismiss his appeal against conviction.[5]

Background

[6] We will set out, as succinctly as possible, the procedural history behind this appeal (bearing in mind the events occurred over five years ago) and the Crown's cases against the primary offenders, Falala and Viliami Iongi—as well as its rather different case against the appellant, Manu Iongi.

[7] Before doing so, we record that we have concluded that the following factual points may be taken to have been proved by the Crown beyond reasonable doubt:[6]

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2 The victims did not identify Falala and Viliami Iongi at that time, and they were not apprehended. Had Stephen Fisi'ihoi identified them, his mother would still be alive.

3 *R v Iongi* [2024] NZHC 304 (Powell J). At the same trial Falala and Viliami Iongi were also convicted of discharge of a firearm with intent to cause grievous bodily harm, and of wounding with the same intent, on 4 December 2019: see above at [4].

4 *Iongi v R* [2024] NZCA 522 (Cooke, Collins and Grice JJ) [CA judgment]. Falala Iongi's appeal against sentence was however allowed. The minimum period of imprisonment of 17 years was quashed and substituted with a period of 15 years.

5 *Iongi v R* [2025] NZSC 73 (Winkelmann CJ, Kós and Miller JJ). Leave to appeal against sentence was denied: at [4].

6 The Crown is not of course required to prove individual facts beyond reasonable doubt; only the factual elements of the charges: *Thomas v R* [1972] NZLR 34 (CA); and *R v Gee* [2001] 3 NZLR 729 (CA) at [27].

(a) The black BMW car that undertook the late-night circuit—captured on 37 separate CCTV cameras in the course of its 40-minute journey—belonged to Falala Iongi.[7]

(b) The occupants of the car were the three men charged: Falala, Viliami and Manu Iongi.[8]

(c) The car paused during the leg between Flat Bush and Māngere in the vicinity of the Manukau Cemetery, where Viliami and Falala's mother (and Manu's aunt) is buried.[9]

(d) The car then parked near Mrs Fisi'ihoi's house at 2.42 am.

(e) Stephen Fisi'ihoi lived in a portable cabin on the street front of the Fisi'ihoi property. He was not home that night.

(f) The gunman who shot Mrs Fisi'ihoi was either Viliami or Falala.

(g) The gun handed to Havea Iongi was the gun used to shoot Mrs Fisi'ihoi.

None of these points were challenged before us; they are consistent with the jury's verdicts and are conclusions the jury was entirely able to reach. We need not now reconsider them.

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7 It was common ground that the BMW car was Falala Iongi's, although he was not the registered owner.

8 This conclusion depended on the evidence of Havea Iongi. Although challenged vigorously by all defence counsel, the jury was entitled to believe him on this particular. Falala and Viliami Iongi gave evidence in their own defence, admitting driving in the car, generally in the locations where it was caught on the CCTV cameras, but for the purpose of drug dealing rather than shooting Stephen Fisi'ihoi. They also denied that Manu Iongi was with them, contrary to Havea's evidence. It may be taken that the jury disbelieved their evidence.

9 The pause, of the order of two minutes, may be inferred from an evident delay between CCTV images while the car was travelling on the Southwestern Motorway near the Manukau Cemetery. The Crown invited the jury to infer that this pause was to discuss what the three would do when they got to Calthorp Close. We accept that that is a possibility, but that is as far as we would be prepared to go on the evidence: see below at [85].

[8] The following points are also established to a high degree of likelihood:

(a) Either prior to the journey, or during it, Falala and Viliami Iongi formed a plan to go to the Fisi'ihoi house with the intention of using the shotgun against Stephen Fisi'ihoi.

(b) Two men left the car, one armed with a shotgun, and went onto the Fisi'ihoi property.

(c) The verdicts suggest the jury considered it was Falala and Viliami who left the car, and that Manu Iongi did not leave the car.[10]

(d) Manu remained inside the car, in the front passenger seat in which he was seated when the car arrived at Havea Iongi's house in Māngere 14 minutes later.

These points are consistent with the jury verdicts and were clearly open to the jury on the evidence. They were not substantially challenged before us.

[9] The fundamental point of disagreement, on which this appeal turns, is whether the jury could safely draw the conclusion on the evidence that Manu Iongi was aware of his cousins' plan and had joined in on it (or had otherwise encouraged or assisted in it). We record that although he was in the car on the journey, these further facts are important:

(a) He was younger than Viliami and Falala Iongi (18 at the time compared to 20 and 27, respectively).

(b) His prior offending was less serious than theirs (none had involved use of a weapon, whereas Falala and Viliami both had convictions for serious violence and firearms offending).

(c) He did not live with them (Falala and Viliami lived together).

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[10] See below at [87].

(d) There was no evidence he had been out with them earlier in the evening.

(e) He was not involved in the 4 December 2019 shooting, nor in any of the previous conflict between Falala and Stephen Fisi'ihoi more generally (Stephen gave evidence that he did not know Manu).

(f) He likely remained in the car during the shooting—as the jury seems to have found.[11]

(g) There were no texts or other communications of any kind implicating him in such a plan (or, subsequently, inculpating him).

[10] We will return to these matters when we contrast the Crown and defence cases at trial. We mention them now so that the reader will appreciate, as we do, that the cases against Falala and Viliami Iongi on the one hand, and Manu Iongi on the other, are quite different. And it is timely to remember, in a case built on party or joint enterprise liability under s 66 of the Crimes Act 1961, that simple "guilt by association" is no part of our criminal justice system.[12] Joint enterprise liability has a notorious history of incarcerating young persons, for very serious criminal offences, where their commitment to another person's plan of violence was uncertain, and where

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11 See above at [8(c)].

12 The same is true of common-law criminal liability. Joint enterprise liability "is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law": *R v Jogee* [2016] UKSC 8, [2017] AC 387 at [77] (SC and PC). See also Julia Tolmie "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at 467 and following; and the warning in *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [167] per McGrath, Glazebrook and Tipping JJ. But compare Susie Hulley and Tara Young "Joint enterprise in England and Wales: why problems persist despite legal change" (2025) 37 CICJ 134 at 143–147; Beatrice Krebs "Overwhelming Supervening Acts, Fundamental Differences, and Back Again?" (2022) 86 JCL 420; and AP Simester "Accessory liability and common unlawful purposes" (2017) 133 LQR 73 at 88–89. As to joint enterprise liability under s 66(2), see this Court's decision in *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1.

foresight was misused as a substitute for intent.[13] Given those risks, it is essential each element giving rise to joint enterprise liability is clearly proved beyond reasonable doubt, and that clear and detailed jury directions are given, especially on the use of inferential reasoning.[14] These concerns arise directly in the present appeal.

Procedural history and aborted trial

[11] On 14 April 2021, Falala and Viliami Iongi were charged with Mrs Fisi'ihoi's murder, along with discharge of a firearm with intent to cause grievous bodily harm and wounding with the same intent arising from the incident involving Stephen Fisi'ihoi and his associate in December 2019. Manu Iongi was charged as a party to the murder the following day.

[12] The trial was set down for five weeks commencing on 30 May 2022. A remarkable plethora of pre-trial applications had to be dealt with. Once underway, the trial quickly fell behind schedule. A day was lost at the outset due to difficulties with defence counsel accessing one of the defendants, and another day was lost because of post-COVID medical issues affecting the trial Judge.[15] Two further days were consumed by further disclosure during the second week, which necessitated the recall of three prosecution witnesses. Two public holidays added to these delays. Beyond scheduling, the trial was plagued by evidentiary complications. A significant number of witnesses refused to comply with summonses, requiring the issue of warrants and, in some cases, arrests to secure attendance. There were frequent

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13 See *Miller v R* [2016] HCA 30, (2016) 259 CLR 380 at [125] per Gageler J: "The literature does nothing to dispel the concern expressed by Kirby J in *Clayton* that the extension of secondary criminal liability to individuals unable to extricate themselves from a group as violence gets out of hand operates to catch potentially weak and vulnerable secondary offenders, fixing them with 'very serious criminal liability because they were in the wrong place at the wrong time in the wrong company'" (citing *Clayton v R* [2006] HCA 58, (2006) 81 ALJR 439 at [119]). See also Professor Graham Virgo's submission to the House of Commons Justice Committee that "the concern about joint enterprise in murder cases was 'not about the conviction of the principal for murder, but it is with the treatment of those on the periphery as murderers, even though they did not cause death and had a lesser *mens rea* relating to the commission of any crime'": Justice Committee *Joint enterprise: follow-up – Fourth Report of Session 2014–15* (HC 2014–15, 310) at [30] (italics in original). And see Stephen Odgers "The High Court, the Common Law and Conceptions of Justice" (2016) 40 Crim LJ 243 at 243–245.

14 As this Court observed in *Ahsin*, above n 12, at [167]: "It is … particularly important in cases of gang violence that the jury directions are detailed and specific, in order to avoid the possibility of defendants being found guilty by association, rather than on examination of their particular role, state of mind and circumstances."

15 *R v Iongi* [2022] NZHC 2014 (Powell J) at [4].

applications for witnesses to be declared hostile. The problems extended to both witnesses yet to testify and those who had already given evidence.

[13] Against this backdrop, at the beginning of week five, counsel for Falala Iongi applied for a mistrial to be declared.[16] Counsel argued that police misconduct in exercising search warrants and obtaining statements had tainted the evidence, amounting to an abuse of process. Powell J dismissed the mistrial application, but concluded on other grounds that the trial could not continue: the growing number of admissibility issues required extensive time to resolve in the absence of the jury, which was not feasible given the circumstances; and further delays would have prejudiced the defendants' right to a fair trial.[17] The trial was consequently aborted on 27 June 2022.[18] Directions were issued requiring counsel to address admissibility matters before any retrial.

The Crown case against Falala and Viliami Iongi

[14] Trial recommenced on 30 October 2023 before a fresh jury. The Crown's theory was that both this incident and the earlier shooting on 4 December 2019 arose from a dispute between Falala Iongi and Stephen Fisi'ihoi over a shotgun that the latter had sourced for the former in exchange for methamphetamine. Falala was dissatisfied with the gun. When Stephen refused to return the meth or exchange the gun for a more satisfactory one, tensions escalated between the two men. There was an initial violent confrontation at Calthorp Close, followed by an exchange of video messages and, in a sharp escalation, the shooting in December 2019.[19]

[15] Eyewitness testimony from Stephen Fisi'ihoi at trial identified Falala and Viliami Iongi as the men involved in the December 2019 shooting, corroborated by evidence given by the wounded associate and another witness. Forensic analysis supported this account: wadding and pellets recovered from the scene and George Vuna's injuries were consistent with blue Eley Olympic 12-gauge cartridges, the same type linked to the January 2020 murder. A spent cartridge found at the

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16 Citing *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].
17 *Iongi*, above n 15, at [12]–[14].
18 At [15].
19 See above at [4].

December scene was forensically matched to shells discovered at a house at Hillside Road, Papatoetoe, a location associated with the defendants through a Crips associate.

[16] As for the 15 January 2020 shooting, the Crown said that in the early hours of that day, Falala and Viliami Iongi (along with Manu Iongi) travelled in Falala's BMW with a loaded shotgun with the intention of shooting Stephen Fisi'ihoi. When they arrived, two of them (likely Viliami and Manu) got out of the car while one (likely Falala) remained inside with the engine running. After knocking, they encountered Mrs Fisi'ihoi, who pulled back the lounge curtain. She was shot in the head through the window at close range and killed instantly. The defendants then fled at speed, taking the gun to the home of their cousin, Havea Iongi, for safekeeping. Havea's evidence placed the defendants in Falala's BMW shortly after the shooting, looking out of sorts, and with the alleged murder weapon. The sequence of events leading to and including the shooting itself (though not the identification of the defendants) was corroborated by witnesses who heard the events unfold, and by forensic evidence.

[17] The Crown relied on multiple strands of evidence to identify Falala and Viliami Iongi as the principal offenders. First, Havea Iongi's evidence, which has already been canvassed above, implicated the defendants. Secondly, the evidence described above at [15] linked the two shootings, meaning guilt in relation to the murder could be inferred from their involvement in the earlier shooting. Thirdly, the Crown pointed to CCTV footage and cell phone polling data. CCTV showed a black BMW 3 Series travelling from Flat Bush to Calthorp Close before the murder and returning via Ōtara, where it lingered for 10 minutes near Havea's home. The car's distinctive features, including its headlights and a faulty indicator, were confirmed by a BMW expert and matched to Falala's vehicle—a 2005 320i E90 sedan. Polling data placed Viliami's phone near Calthorp Close at the time of both shootings, aligning with the movements of the BMW. The Crown argued that this evidence, combined with Havea's account, proved the presence and involvement of Falala and Viliami. Finally, the defendants' behaviour after the murder—such as Falala resetting his phone and calling a woman shortly after the shooting, and the hurried disposal of the gun—demonstrated consciousness of guilt.

[18] The Crown invited the jury to infer that the defendants acted together under a common plan to shoot Stephen Fisi'ihoi or somebody at his address, and that it was a probable consequence of that plan that somebody would be killed. On this basis, the Crown said Falala and Viliami Iongi were guilty of discharging a firearm with intent to cause grievous bodily harm, wounding with the same intent, and murder.

The Crown case against Manu Iongi

[19] In relation to Manu Iongi, the Crown pointed to the following strands of circumstantial evidence.

[20] First, the defendants were all closely related. While brothers Falala and Viliami Iongi were especially close, Viliami and Manu Iongi sometimes hung out together. They were all members of the 36 faction of the Crips gang, all three being patched and "inked" (i.e., tattooed with the number 36, a symbol of affiliation to the faction).[20] The Crown said this was important because "[y]ou would only bring people you know well and trust … into a plan that involves the retributive and potentially fatal shooting of someone."

[21] Secondly, the Crown submitted that although Manu Iongi may not have shared Falala and Viliami Iongi's direct motive ("to take care of unfinished business" with Stephen Fisi'ihoi), Manu had his own "clear" motive: "It's to help his cousins. It's to carry out this retributive act on someone who had ripped them off."

[22] Thirdly, the Crown said Manu Iongi had access to a black sawn-off single barrel shotgun, some time before 23 December 2019, as could be seen in a TikTok video. Although Falala and Viliami Iongi had access to other shotguns, any one of the three could have been the one used to kill Mrs Fisi'ihoi. Manu had a photo on his phone of a shot shell of the kind potentially used in the murder. Bullets of the type handed over by Viliami to Havea Iongi on the night of the killing were found in Manu's house. The gun would "not only be noticeable to every member in that car but would have been the topic of discussion".

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[20] 36 being a cipher for CF, an abbreviation of "Crips Family".

[23] Fourthly, the car journey caught on CCTV could be attributed to Falala Iongi's black BMW: the timing was "not a natural time to choose to go and speak to someone about a disagreement … especially when you take a loaded shotgun". The Crown suggested that the time was chosen to ensure the absence of eyewitnesses and that Stephen Fisi'ihoi would be caught "off guard". The car's route was one of the most direct available, demonstrating "real forethought". The car stopped for approximately two minutes en route at Puhinui, "consistent … with one final planning chat about what's going to happen at Calthorp Close". During the journey, the three defendants were in the car for approximately 14 minutes, including the two-minute "stop" which was "more than enough time for the three to discuss what the trip was for" and what they would do once at the scene, "if they hadn't already".

[24] Fifthly, the Crown suggested the driver had stayed in the car at the scene with the engine running. The Crown said that meant Falala Iongi "likely" remained in the car, but was otherwise inexplicit as to which two of the three men had left the vehicle. More generally, the Crown submitted to the jury that Falala and Viliami Iongi "went with Manu Iongi in the car so that he could play an active part in assisting his older cousins", concluding that "they each had a role to play".

[25] Sixthly, the Crown pointed to Manu Iongi's "unusual behaviour" after the shooting. Havea Iongi said "Manu was looking like he hadn't seen him, he was sitting quiet in the front". While a minor point, the Crown said that too was indicative of guilt.

[26] Finally, the Crown suggested that Falala and Viliami Iongi would only have sent someone they knew they could trust to collect the weapon (after Havea Iongi messaged Falala telling him to pick it up). The Crown suggested Manu Iongi's retrieval of the shotgun was "consistent with him having been part of the plan all along and not someone just brought along for the ride". The Crown also said that "if he had been surprised by the shooting the night before and wasn't involved in it, he would never have gone back to pick it up the next day". Picking up the gun showed "[h]e was knowingly involved".

[27] Overall, the Crown submitted it was totally implausible in these circumstances for any one of the three defendants to be unaware of the purpose of the trip, or not to be a trusted and close associate who was there for a reason. As the Crown put it:

> … it would be unbelievable to suggest that someone who was unaware of the purpose of that trip and who didn't share an intention to be fully involved in it would be brought along in that car for a drive at that time of the night. Everyone in that car in those circumstances had to be knowingly involved in that plan, and the Crown says all three defendants were.

The defence case for Manu Iongi

[28] Much of the defence closing address was directed to an attack on the credibility of Havea Iongi, who alone put Manu Iongi in the frame for what had occurred at Calthorp Close. The jury, however, took a different view of Havea's credibility, and clearly believed his evidence in that respect. So, we will focus instead on the secondary argument made by the defence on Manu's behalf at trial.

[29] That was that even taking Havea Iongi's evidence at its highest, all it did was establish that Manu Iongi got into a vehicle, the black BMW, at some point that night and stayed in it. As the defence put it, "[t]here is no evidence of Manu doing a single thing that night other than getting in the car and staying in it." The evidence was, therefore, equally consistent with Manu simply being a passive presence in the vehicle when the crime was committed up the road in Calthorp Close. There was no evidence of any planning, no evidence that they were socialising together that night and no evidence that at any time Manu was in the driver's seat. The evidence of the 14-year-old neighbour referred to earlier, that the car handbrake was applied, was more consistent with the *driver*, most likely Falala Iongi, getting out of the vehicle. So there was no evidence of Manu doing any criminal act at the scene that night.

[30] Nor, the defence said, was there evidence of motive. Manu Iongi was unknown to Stephen Fisi'ihoi, who had never heard of him. There was no evidence that Manu knew Stephen either. There was no evidence of him having any ill will towards Stephen. He had not been involved in the 4 December 2019 shooting. There was no evidence that he knew anything about that. There were no inculpatory statements by him, indicating any level of knowledge or intention or participation in the shooting. None of the intercepts produced anything inculpatory.

[31] The fact there was an earlier TikTok video of him holding a gun, and the fact that he had possession of some bullets, were more consistent with his social setting than in any participation in this particular crime. That context also meant that if he had seen the shotgun in the car (and there was no evidence that he had), it would not necessarily have indicated to him that a crime was about to occur. Counsel submitted:

> You can infer that Manu voluntarily got in the car, that is conceded. You can also infer he stayed in the car, but that's it. You cannot infer he was involved in the shooting. There is no evidence that he took any action to help, encourage, or procure Falala Iongi or Viliami Iongi to shoot her or that he joined a plan to shoot her. There is no evidence of any discussions prior to the shooting. There is no evidence of him doing anything to help or encourage or enter into a plan.

[32] Similarly, there was no evidence about Manu Iongi being in on a plan to shoot a person at Calthorp Close:

> There is a myriad of other scenarios regarding what a third person in that vehicle might have known. For example, Manu may have thought the trip was for an entirely unrelated purpose. Manu may have thought the purpose of the trip was to scope out Stephen Fisi'ihoi's property which may have required a gun for self-defence. Or to wilfully damage that property. Or to intimidate Stephen Fisi'ihoi using stand over tactics, short of actually shooting him or even physically hurting Stephen Fisi'ihoi. None of these possibilities would indicate Manu Iongi knew a killing or a shooting was intended.

[33] Nor could anything be inferred from the evidence that Manu Iongi returned the next day and collected the shotgun. That was the act of an accessory, and in that respect he was no different from Havea Iongi, a Crown witness, who had received and looked after the shotgun overnight. Being an accessory after the fact did not mean he was guilty of the earlier crimes with which he was charged.

The summing up

[34] The summing up was fairly spare in its content. In fairness to the trial Judge, he made clear to counsel that he would take that approach and would not provide distinct summaries of each side's case.

[35] The Judge provided standard directions about burden and standard of proof, and about inferences and circumstantial evidence. As to this he said:[21]

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[21] Emphasis in original.

> Counsel in this context use the phrase **circumstantial evidence**. That is because inferences are usually drawn from circumstantial evidence. The Crown therefore asks you to have regard to all of the evidence that you regard as **reliably established** in deciding whether you are satisfied beyond a reasonable doubt that the Crown has established that each of the defendants had the necessary involvement, knowledge and/or intention at different times. To do this requires and relies on reasoning by inference, and, as counsel discussed with you, it derives its force from the presence of a number of strands of evidence. I say again that inferences are not speculation; they are drawn from [the] facts that you find to be reliably established as opposed to speculating on matters that may be possible but are not based on any facts before you.

[36] He followed that with the standard illustration using the "strands of a rope" metaphor—where individual strands may not meet a beyond reasonable doubt conclusion, but the combined strands do.

[37] The question trail was structured to deal with the first and second charges concerning the events on 4 December 2019 first. After asking eight questions in relation to those two charges, the question trail moved on to the death of Mrs Fisi'ihoi on 15 January 2020. It asked a series of essentially identical questions regarding, consecutively, Falala Iongi, Viliami Iongi and Manu Iongi. In particular, it put the charge in three ways:

(a) as a principal ("intentionally firing a shotgun at her");

(b) as a s 66(1) party ("intentionally helping, encouraging or otherwise procuring [either of the other defendants] to fire a shotgun at a person at 73 Calthorp Close"); and

(c) as a s 66(2) party (involving forming a plan "to fire a shotgun at a person at 73 Calthorp Close" and to assist each other in doing so).

In Manu's case, manslaughter was only offered on the second and third of those premises.[22]

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[22] Manslaughter was also offered in respect of Falala and Viliami Iongi, but the jury evidently did not reach that stage, having found them both guilty of murder.

[38] The Judge provided the following directions in relation to these questions:[23]

> [133] As Falala Iongi has denied being involved it is for you to determine whether the necessary inference can be inferred about his involvement from facts that you accept to have been reliably established. The Crown says you can infer intention from a wide range of factors including the time of night the BMW left Flat Bush, the route taken, the short stop on the way, and the accounts of what occurred from the neighbours at Calthorp Close, from which the Crown contends can be inferred that all three defendants were involved – being the driver and two who got out of the car – so as to meet the requirements of Question 11(b) or (c), noting that Falala Iongi was driving the BMW at the time it arrived at Havea Iongi's home and there is no suggestion that anyone else drove his BMW that night.
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> [134] In contrast the defence position is the inferences that are available all fell well short of meeting any of the tests set out in Question 11, pointing in particular to the lack of detail and/or the inconsistencies in the evidence provided by the neighbours.
>
> [135] After completing your analysis, if all 12 of you have answered **yes** to the Question 11 question that corresponded to the Question 10 question that you answered yes to, then you can find Falala Iongi guilty of murder.
>
> [136] If on the other hand you answered no to all of the relevant questions in Question 11 you must then go to Question 12 to consider whether Falala Iongi is guilty of manslaughter. This question provides:
>
> > 12. If your answer to **Question 10(b) or (c)** was yes, are you sure that either:
> >
> > a. As a party under s 66(1), when Falala Iongi took part in the killing by intentionally helping, encouraging or otherwise procuring Viliami Iongi or Manu Iongi to fire a shotgun at a person at 73 Calthorp Close, he knew that the shooter would cause more than trivial physical harm? or
> >
> > b. As a party under s 66(2), when Falala Iongi took part in the killing of Meliame Fisi'ihoi he knew that a probable consequence of carrying out the plan (to fire a shotgun at a person at 73 Calthorp Close) was that the shooter would inflict more than trivial physical harm?
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> [137] As you can see Question 12 effectively changes the threshold so that in the event you were not sure that death was intended, a probable consequence or it was known that the shooter would shoot someone with murderous intent, as long as you are sure that Falala Iongi knew that the shooter would inflict more than trivial physical harm then he is guilty of manslaughter.

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[23] Emphasis in original.

> [138] When you have completed your analysis of Falala Iongi, you must then move on and work through the same questions with regard to charge 3 for Viliami Iongi commencing at Question 13, and then Manu Iongi from Question 16.
>
> [139] While the application of the tests to both Viliami Iongi and then Manu Iongi are the same, obviously the evidence of involvement and the inferences that can be drawn in relation to Viliami Iongi and Manu Iongi may differ from those available in respect of Falala Iongi. For example, as I have already noted, there is no suggestion that anyone other than Falala Iongi was the driver of his BMW, while only Viliami Iongi's cell phone polled in the vicinity of Calthorp Close at around the time Mrs Fisi'ihoi was killed.
>
> [140] While the Crown contends that similar inferences can be drawn from the evidence of the movements of the car and the evidence of the neighbours at Calthorp Close in respect of both Viliami Iongi and Manu Iongi's intentions, with regard to Manu Iongi's intention Ms Hogan's submission was that there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the alternatives in Question 11. The differences in the evidence applicable to the different defendants both highlights and reinforces my earlier comments that it is absolutely necessary for you to work through each of the questions with regard to each of the defendants before you can reach a verdict against a particular defendant on a particular charge.

[39] After the jury retired, the Crown Solicitor raised a concern with the Judge as to the adequacy of the directions particularly relating to Manu Iongi. She did so in the best traditions of the Bar, because senior counsel for Manu was not in Court on the day of the summing up, having been excused to appear in another trial. Following the Crown Solicitor's intervention, the Judge gave a further direction in relation to the position for Manu:

> Secondly, and likewise, those summaries that I gave you also apply in the same way to Manu Iongi but in the event that you reject Havea Iongi's evidence that Manu Iongi was in the BMW there is no other evidence of involvement. Alternatively, even if Havea Iongi's evidence was accepted and Manu Iongi was found to be in the car, I remind you of Ms Hogan's submissions that there is otherwise no evidence by which Manu Iongi could be inferred as being anything other than a "passive bystander", and that in any event, there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the alternatives in Question 11. What I am doing is just setting out, again, in a slightly more detailed way the summary of Manu Iongi's position on that issue and as I said throughout my summing up, I was not intending to go through in detail the detailed submissions that all counsel made about all of the issues.

The verdicts

[40] The jury retired shortly before 1 pm on Tuesday 5 December 2023. They were recalled for the Judge's addendum to his summing up at 2.23 pm, before resuming deliberations at 2.29 pm. At about 4.35 pm, the jury submitted three questions to the Judge:

> 1) Can we please view the entire CCTV tracking footage of the [Vehicle of Interest]?
>
> 2) Afterwards, can we please view the CCTV footage from camera #47[24]
>
> 3) For question 16(c), do we need to say yes to (i), (ii), and (iii), or can we say yes to one or two of those options?

The entire CCTV footage was played for the jury. As to the third question, the Judge advised that a finding of guilt required an affirmative answer to all three sub-questions to question 16(c), which related to Manu Iongi's liability for murder as a party to a joint enterprise under s 66(2) of the Crimes Act.[25]

[41] Unanimous verdicts were delivered by the jury at 3 pm the following day, Wednesday 6 December. As noted earlier, in relation to the killing of Mrs Fisi'ihoi, Falala and Viliami Iongi were convicted of her murder, and Manu Iongi was convicted of her manslaughter. We do not, of course, know which reasoning paths of the three available for murder, and the two available for manslaughter, were adopted by the jury.

The appeal to the Court of Appeal

[42] Manu Iongi appealed both his conviction for manslaughter and his sentence of eight years and six months' imprisonment (with a minimum period of four years and three months).[26] Three grounds of appeal were advanced in respect of the conviction. First, that the trial Judge erred in admitting Havea Iongi's statement under s 30 of the

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[24] This was the second of several cameras which captured the BMW on its return to Flat Bush in the early hours of 15 January 2020.

[25] The sub-questions respectively asked whether the jury was sure that (i) Manu Iongi had formed a plan with Falala and/or Viliami Iongi to fire a shotgun at a person at 73 Calthorp Close; (ii) he had agreed with one or both of them to help each other achieve that plan; and (iii) one of the three accused had fatally shot Mrs Fisi'ihoi in the course of carrying out that plan.

[26] CA judgment, above n 4, at [4(c)] and [5]. Falala Iongi appealed against sentence only, resulting in a reduction of his minimum period of imprisonment from 17 to 15 years: at [165].

Evidence Act 2006;[27] secondly, that the jury's verdict was unreasonable;[28] and thirdly, that the Judge failed adequately to summarise Manu's defence in his summing up.[29] The sentence appeal contended that the starting point of 10 years' imprisonment was manifestly excessive.[30]

[43] On the first ground, the Court agreed that Havea Iongi's statement had been improperly obtained (he having been arbitrarily detained by police in breach of s 22 of the New Zealand Bill of Rights Act 1990) and that there was a causal link between the impropriety and the statement itself.[31] However, the Court held the balancing exercise favoured admission. While the impropriety breached an important right and involved "an element of pre-meditation", the police had not knowingly broken the law and there was "nothing sinister" in its failure to follow the proper process.[32] The evidence was of high quality, and essential to the prosecution of Manu Iongi for very serious offending, justifying its admission.[33] The first ground accordingly failed.[34]

[44] On the second ground, the Court held the jury's verdict was not unreasonable for the purposes of s 232(2)(a) of the Criminal Procedure Act 2011. It acknowledged two possibilities on the evidence: first, that Manu Iongi remained in the car with the engine running during the shooting; or second, that he was one of the two individuals who exited the vehicle.[35] Either way, the jury could infer that he was present at Calthorp Close and intentionally assisted the principal offenders (whether by enabling a swift getaway, or by aiding the shooter by his presence or assistance), satisfying the requirements for party liability under s 66(1) or (2) of the Crimes Act.[36] The Court added that the defence proposition that Manu was a mere bystander and did not assist the principal offenders was "difficult to reconcile with the broader evidence of the offending"—namely, the circumstances and apparent coordination of the attack, and

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27 At [5(a)]. See above at [28]–[29].
28 At [5(b)].
29 At [5(c)].
30 At [5].
31 At [61]–[64].
32 At [62] and [67].
33 At [69]–[71]. See also Evidence Act 2006, s 30(2)(b).
34 At [72]–[73].
35 At [86]–[88].
36 At [89].

the background of hostilities between Falala Iongi and Stephen Fisi'ihoi.[37] As to alleged evidential inaccuracies and inconsistencies, the Court said it was the jury's function to assess the evidence and determine what weight to place on individual items.[38] It concluded the available evidence was more than sufficient for the jury to be satisfied that Manu was guilty as a party to the offending.[39]

[45] On the third ground, the Court held that the summing up and additional directions, while lacking a "detailed analysis of the competing positions of the Crown and defence counsel", adequately conveyed the essence of Manu Iongi's defence to the jury.[40] The Court was "satisfied that the combined effects of the Judge's explanation of the question trail and his additional directions to the jury ensured that no miscarriage of justice occurred", dismissing this ground of appeal.[41]

[46] As to sentence, the Court accepted that the starting point adopted by the trial Judge was "arguably at the higher end of the available range", but concluded it was within the appropriate range given the nature and seriousness of the offending and the role played by Manu Iongi.[42] The appeal against sentence was accordingly dismissed.[43]

[47] Thus, all grounds of appeal failed, and Manu Iongi's conviction and sentence were upheld.[44]

Issues on appeal to this Court

[48] The appeal to this Court gives rise to two issues:

(a) Was the jury verdict against Manu Iongi unreasonable?[45]

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37 At [90].
38 At [93]–[95].
39 At [96].
40 At [112]. See also at [113]–[114].
41 At [115].
42 At [138]–[141].
43 At [142].
44 See at [117], [142] and [166].
45 Criminal Procedure Act 2011, ss 232(2)(a) and 240(2).

(b) Has a miscarriage of justice arisen because of judicial misdirection of the jury?[46]

[49] It is logical to deal with these issues in the order above, because at heart this is an unreasonable verdict appeal. The competing inferences the Crown and defence invited the jury to draw are best explored under the first ground. That is how counsel before us also approached it. The nature of those inferences affects the directions required, which we consider under the second ground. In evaluating the first ground, we do so on the basis of the directions we later find under the second ground should have been given.

Unreasonable verdict?

[50] The question here is whether the jury verdict against Manu Iongi was unreasonable. That is to say, is it a verdict which no jury could reasonably have reached, to the standard of beyond reasonable doubt, having regard to all the evidence?

Submissions

[51] The submissions of both parties bore a close relationship to counsel's closing addresses at trial.

[52] For Manu Iongi, Ms Hogan KC accepted that the Crown had proved that at about 2.45 am on 15 January 2020, Falala Iongi's black BMW went to the scene of the murder in Calthorp Close. The Crown had proved that two men had exited the car before the shooting. It had proved that shortly after the murder Manu was in the car with Falala and Viliami Iongi at their cousin Havea Iongi's address. The Crown had proved that Manu was sitting in the front passenger seat of the car and was uncharacteristically quiet. But, said Ms Hogan, "that is it":

> The Crown did not prove, and was not able to prove, that Manu Iongi did any unlawful act or that he had joined any unlawful purpose. It was a reasonable possibility that at Calthorp Close Manu Iongi remained in the front passenger seat of the car, merely a passive bystander to the criminal acts/purposes of the two older men. Since it could not be excluded as a reasonable possibility, the jury should have acquitted Manu Iongi not just of murder (as they did) but also of manslaughter.

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[46] Sections 232(2)(c) and 240(2).

[53] Ms Hogan submitted that once Havea Iongi's evidence had been accepted, which the jury must have done, the case did not turn on the credibility of any witnesses. Rather it turned on what (if any) inferences could legitimately be drawn from the evidence. An appellate court was as well placed as a jury to undertake that exercise.

[54] Ms Hogan submitted that in the unusual circumstances of this case, the evidence did not logically allow the jury to infer that Manu Iongi was one of the two men who got out of the car, or that he was the getaway driver. As she put it, "[t]hat evidence also allowed the jury to reasonably infer that Manu remained in the car in the passenger seat, and was merely a passive bystander." In this case, the jury could not exclude the reasonable possibility that Manu was merely a passive bystander to the shooting of Mrs Fisi'ihoi. For example, the jury could not exclude any of the following reasonable possibilities:

(a) That Manu did not know of or foresee any actions by Falala or Viliami Iongi at 73 Calthorp Close.

(b) That Manu only knew or foresaw that Falala and Viliami would go to 73 Calthorp Close to inflict property damage and intimidate Stephen Fisi'ihoi; to use violence less than "shooting at a person"; or to carry out a shooting only in self-defence.

[55] None of those various possibilities would attract liability for manslaughter. None could be dismissed by the jury.

[56] Ms Hogan placed particular reliance on the analysis of this Court in *Kuru v R*, where the jury had failed to acknowledge the possibility of different factual scenarios, including spontaneous rather than planned violence.[47]

[57] Ms Hogan contrasted the position in *Burke v R*, and in *Kuru*, where the Crown had pitched a s 66(2) purpose at a low level of criminality.[48] Here it was pitched at a very high level: "firing a shotgun at a person".[49] That would suggest that once the jury

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47 *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985.
48 *Burke*, above n 12.
49 See above at [37]–[38].

had found actus reus by Manu Iongi—i.e., accession to a common plan—it should have found that he had foresight of death, or that he knew the co-accused had had a murderous intent. Given the singular nature of the alleged plan, and the weapon of choice, it was a logical fallacy that Manu could have knowingly joined the plan but not have foreseen death or known that the shooter had murderous intent. Rather, by acquitting Manu of murder, the jury must necessarily have found that he did not knowingly assist in, or accede to, a plan "to fire a shotgun at a person". The jury must therefore have effectively answered questions 16 and 17 of the question trail inconsistently.

[58] For the Crown, Ms Walker submitted that the circumstantial evidence at trial provided a sound factual basis for a manslaughter conviction. It could reasonably be inferred from the evidence that Manu Iongi was a "knowing and willing participant in a planned retaliatory shooting at the Fisi'ihoi family home":

(a) Manu was with the others when they left Flat Bush at 2.28 am and over the next 17 minutes travelled to Calthorp Close. He would have heard, or been part of, all conversations in the car.

(b) There was a loaded shotgun and other ammunition in the vehicle.

(c) Manu remained present at the scene (either in the car or on the Fisi'ihoi property) while the events occurred.

(d) He returned the following day to collect the gun.

[59] That was said by Ms Walker to support the inference that following the failed attempt to shoot Stephen Fisi'ihoi on 4 December, the shooting on 15 January "was a carefully planned response". Manu Iongi's involvement was deliberate: "only someone trusted by Falala and Viliami would have been included in the third trip to 73 Calthorp Close in such circumstances".

[60] Ms Walker submitted that familial gang connections, Manu Iongi's possession of a comparable shotgun, the photograph of a 12-gauge shot shell on his phone

(consistent with the type of ammunition used at the first shooting, and likely also the second) and the presence of ammunition at his home (which resembled some of the ammunition wrapped in the towel with the murder weapon) all supported Manu being a knowing and willing participant in a retaliatory shooting plan. There was a clear basis for the jury to conclude that by his presence in the car, at the scene, he was not merely a passive bystander but rather intentionally encouraged or was involved in the shooting, thereby allowing the others to proceed more effectively with their plan. Even if he said nothing, the jury could have drawn the simple inference that his presence was intended to "provide muscle" should anything go awry during the plan to shoot. His continued involvement by collecting the murder weapon the next day provided "strong further support" for the Crown case that he had been a knowing and willing participant, not somebody caught in the wrong place at the wrong time.

Discussion

[61] As this Court said recently in *Kuru*, quoting the Court of Appeal in *R v Munro*, the legal test on its own is quite straightforward:[50]

> A verdict will be … unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt.

[62] In *R v Owen*, this Court approved the following aspects of *Munro*:[51]

> (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.

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50 *Kuru*, above n 47, at [205] per Glazebrook J concurring, quoting *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [87] per Glazebrook, Chambers, Arnold and Wilson JJ as approved in *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [15]. See also at [18] per curiam.

51 *Owen*, above n 50, at [13] referring to *Munro*, above n 50, per Glazebrook, Chambers, Arnold and Wilson JJ.

(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 who invokes s 385(1)(a) [of the Crimes Act] 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 is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[63] Where leave has been granted to reconsider a decision of the Court of Appeal involving unreasonable verdict as a live ground of appeal, this Court comes to its task of appellate review in accordance with these same principles. But the different context in which it does so must be acknowledged. This Court's function is, in general, as a second appellate court[52] responsible for the final appeal available, barring only a new reference under prerogative or the Criminal Cases Review Commission Act 2019. Where leave has been granted by this Court in these circumstances—itself a rare event—it will have been because it has been demonstrated that a substantial miscarriage of justice may have occurred.[53] Where the liberty of the appellant is in issue, and without departing from the principles in *Owen*, the appellant is entitled to a hard look being taken at the evidence and the trial process. In doing so, this Court is obviously in as good a position as the Court of Appeal to assess the evidence—and sometimes better, because the focus in a second appeal will often be clearer.[54]

[64] In *Munro*, a fatal accident case, the Court of Appeal held that the verdict was unreasonable following a close and detailed review of the evidence—given the challenge to the verdict was based on the evidence as a whole.[55] The Court recognised that there could be cases where, "despite any gaps or inconsistencies in the Crown case, a reasonable jury was entitled to reject contrary evidence and to consider guilt proved beyond reasonable doubt".[56] There were however a number of aspects of the

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52 Though this Court may sit as a first appeal court in exceptional cases: Senior Courts Act 2016, s 75; and see Criminal Procedure Act, ss 230(1)(c) and 231(1)(b). See for example *Hall v R (Jurisdiction)* [2022] NZSC 98, [2022] 1 NZLR 144.

53 Senior Courts Act, s 74(2)(b).

54 In this appeal, for instance, the primary focus has been on the reasonableness of the verdict; in the Court of Appeal, it was on the admissibility of Havea Iongi's police statement.

55 *Munro*, above n 50, at [233] per Glazebrook, Chambers, Arnold and Wilson JJ.

56 At [90].

Crown case that were either unsupported by the evidence or for which "the evidence … was at least equally consistent with the defence case".[57]

[65] That included, in particular, the sole eyewitness to the accident whose evidence "accorded with much of the physical evidence and aligned much better with the defence theory than with that of the Crown".[58] As to the expert evidence, this was not a case where the jury was simply entitled to reject the evidence of one expert and accept that of another:[59]

> … [R]ather, the concessions made by the Crown, and lack of evidence underpinning key elements of the Crown case, mean that the jury, acting properly, could not reasonably find the appellant guilty beyond reasonable doubt.

[66] On the basis of the evidence taken as a whole there was no "rational basis for the jury to have rejected the defence version of events as a reasonable possibility".[60]

[67] In *Kuru*, Mr Ratana, a senior member of the Mongrel Mob, had been shot and killed following a confrontation with members of the Black Power Whanganui chapter.[61] The Crown alleged that Mr Kuru, the president of the Black Power chapter, had ordered, sanctioned or authorised the plan for members of the chapter to damage Mr Ratana's property and to intimidate him, accompanied by firearms. It was not part of the alleged plan that Mr Ratana or any other person be injured. Mr Kuru was convicted as a party to the manslaughter of Mr Ratana, under s 66(2) of the Crimes Act.

[68] After applying the test in *Owen*, this Court concluded that there was a total absence of direct evidence against Mr Kuru, while the remaining strands of circumstantial and other evidence, either individually or taken as a whole, were either equivocal or insufficient to establish guilt.[62] There was no plausible route by which to find Mr Kuru guilty beyond a reasonable doubt. As to these matters, we note four particular points.

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57 At [194].
58 At [111]–[112] and [231].
59 At [232]; and see at [201].
60 At [229].
61 *Kuru*, above n 47.
62 At [19] citing *Owen*, above n 50.

[69] First, although much had been made of Mr Kuru's role as leader of the Black Power chapter, the planned intimidation was put together hastily, not unlike prior, non-lethal confrontations involving the chapter and Mr Ratana. It remained possible that Mr Kuru was unaware of the plan.[63]

[70] Secondly, while the Crown had contended that the assembly point for the group who confronted Mr Ratana had been at Mr Kuru's house, the evidence did not back up that submission.[64] Rather, the confronting party members had met at a number of different locations.

[71] Thirdly, Mr Kuru's presence on the street was explicable by reference to other factors—in particular, a meeting with the school principal concerning Mr Kuru's son.[65] Had Mr Kuru been planning the alleged confrontation, that meeting would have provided a valuable alibi, but for the fact that the timings did not coincide. His presence in a street near the location of the confrontation at about the time the shots were fired was suspicious. But it was equally consistent with Mr Kuru not knowing what was happening and going to investigate the shots that had been fired.[66] A jury could not discount as a reasonable possibility that he had been drawn up the street either by yelling or by hearing the first shot fired.

[72] Finally, Mr Kuru's conduct at a meeting of the gang chapter the following day was also equivocal, and equally consistent with the response of a gang chapter leader angered by what had occurred, with its obvious adverse consequences for that gang.[67]

[73] We make two other points comparing *Kuru* with the present appeal.

[74] First, there is a significant *similarity* between the two cases inasmuch as there were no prior communications indicating the intended participation in the planned confrontations by either appellant. The absence of such evidence necessarily makes proof of a plan more difficult for the Crown.

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63 At [213], [306]–[307] and [309].
64 At [217]–[218] and [285] per Glazebrook J.
65 At [219] per Glazebrook J.
66 At [289]–[294] per Glazebrook J.
67 At [296]–[298] per Glazebrook J.

[75] Secondly, there is also a significant *difference* in that the alleged plan in *Kuru* was pitched by the Crown at a much lower level: to go to Mr Ratana's address, threaten him, damage his property and take guns along to that event. The Crown had, as here, originally alleged that the plan was to shoot Mr Ratana, but had dropped back to a plan to intimidate, with accompanying weapons.[68] Commendably, in the present appeal the Crown has never equivocated as to the extent of the plan: what was alleged was a plan to "fire a shotgun at a person" at Calthorp Close.[69]

[76] We consider the criteria prescribed in *Owen* and *Kuru* for an unreasonable verdict are met in this appeal.

[77] We proceed against the background that the jury was entitled to accept the evidence of Havea Iongi, and to reject the contrary evidence given by Falala and Viliami Iongi at trial.[70] Although Havea's credibility came under sustained attack at trial and in the Court of Appeal—a course which, as Ms Hogan noted, may have diminished focus on the unreasonable verdict appeal ground—that attack was not pursued before us. The jury was therefore entitled to accept that Manu Iongi was in the car when it arrived at Havea's house from Calthorp Close, and to infer from that that he was in the car *at* Calthorp Close. It was entitled also to accept Havea's evidence that Manu was in the passenger seat when the car came to his house, and to infer from that that he was also there when the car left Calthorp Close. It was entitled to further accept Havea's evidence that Manu retrieved the gun from his house the next day.

[78] It is helpful at this point to set out s 66 of the Crimes Act in full:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) actually commits the offence; or

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68 At [118]–[119], [305] and [309] per Glazebrook J. A second, lesser difference is noted by us below at [85]: Manu Iongi's proximity to those planning the attack was closer, on the evidence, than that of Mr Kuru to those who attacked Mr Ratana.

69 Had the Crown pitched the alleged plan at a lower level of criminality, as in *Kuru*, above n 47, it might have been easier to establish a common purpose, but harder then to establish requisite foresight of a shooting occurring. Conversely, by pitching the plan at a higher level, the Crown had a steeper hill to climb in establishing intent to pursue that common purpose, but could thereafter invite the inference that the defendants knew a shooting was a probable consequence of their joint enterprise: *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [49].

70 Manu Iongi, as he was entitled to, did not give evidence in his defence.

(b) does or omits an act for the purpose of aiding any person to commit the offence; or

(c) abets any person in the commission of the offence; or

(d) incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

In the present appeal, it makes sense to consider s 66(2) joint enterprise liability before considering party culpability under s 66(1).

(a) Joint enterprise liability: s 66(2)

[79] Section 66(2) would require the jury to be sure that Manu Iongi (1) was aware of the plan "to fire a shotgun at a person at 73 Calthorp Close"; (2) agreed to help the others effect that plan; and (3) knew that a probable consequence of carrying out the plan was that the shooter would inflict more than trivial physical harm.

[80] The Crown case on those three elements depended, in the absence of direct evidence, on inferences to be drawn from circumstantial evidence. Supporting the inferences the Crown invited the jury to draw were these factors:

(a) Manu Iongi's presence during the preceding 14-minute car journey;

(b) the relative improbability that a mere bystander would be taken along if such a plan had been hatched;

(c) his potential use as further "muscle";

(d) his close familial connection with the other offenders;

(e) his status as an "inked" member of the Crips gang;

(f) his prior possession of a shotgun; and

(g) his later retrieval of the gun.

[81] We accept these—and particularly the first four—are points for the Crown. We note that we see the limited evidence of his prior familiarity with guns—the TikTok video, and his prior possession of a shotgun and concurrent possession of (different calibre) ammunition—as a more neutral consideration, that simply being a prevalent aspect of Crips gang membership, associated with its involvement in illegal methamphetamine dealing.

[82] However, standing against that is other evidence from which a contrary inference may be drawn. We identify seven counter-considerations, which we take in their relevant chronological order, although they need to be read in combination.

[83] First, Manu Iongi was not involved in the earlier, 4 December 2019 shooting incident. There was no evidence he knew Stephen Fisi'ihoi or held any animosity towards him. Stephen confirmed in oral evidence that he did not know Manu. That distinguishes his position from that of his co-accused, who did hold such animosity and had acted on it violently on at least two prior occasions—most recently, and involving discharge of a firearm, just six weeks before the murder.[71] Manu's starting position was, therefore, significantly different.

[84] Secondly, the case was unusual in the context of joint enterprise prosecutions—although like *Kuru* in this respect—in that there was no evidence of planning or prior communications ahead of the drive to Calthorp Close. The existence of a plan might readily be inferred in the case of the other two men in the car from the bad blood already spilt in their prior attack on Stephen Fisi'ihoi and his associate. What is *missing* is any communication or other evidence tying Manu Iongi to that plan. The position in *Burke* may usefully be contrasted, where there was ample, direct evidence that Mr Burke had been tasked with assisting in an intra-gang, disciplinary hiding of the victim—the plan then going awry when the other assailant introduced a knife to the assault.[72] As we have said, the facts in *Kuru* are far closer to those here, although the jury could at least be sure Manu was present in the car. But presence,

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71 See above at [4] and [14].

72 *Burke*, above n 12, at [14]–[19] per O'Regan, Williams and Kós JJ.

without more, does not convert a bystander into a party culpable of a homicide perpetrated by others.

[85] Thirdly, because of the absence of direct evidence, the case against Manu Iongi therefore depended almost entirely on his *presence* in a vehicle driven by another, and in which a loaded shotgun was present. In this respect, Manu's proximity to those planning the attack was closer, on the evidence, than that of Mr Kuru to those who attacked Mr Ratana. But on the other hand, there is no solid evidence as to the form that plan took before Manu joined the others in the car, whether it evolved from one plan to another, whether it was shared with Manu (or what else he may have been told as to the purpose of the journey, and at what stage) and what stance he took if he was told about the plan—supportive, passive or oppositional. Manu, it will be recalled, was just 18, whereas Falala and Viliami Iongi were aged 27 and 20, respectively; and the elder two both had prior convictions for serious violence and firearms offending, whereas Manu's prior offending did not involve use of firearms or other weapons. Deliberate participation in a planned killing would have represented a significant escalation in seriousness. The Crown also sought to draw support from the two-minute pause on the journey, near Māngere, referred to earlier.[73] As we noted, it is *possible* that was to discuss the execution of the plan. If so, it suggests a spur-of-the-moment, or uncertain and evolving, enterprise, rather than a plan well thought through by everyone in the car. It is equally possible the stop involved no further commitment to a shooting plan at all: that it involved some other illegal activity (such as a drug deal with a third party), or an argument in which Manu refused to join the plan (resulting in his remaining in the car at the time of the shooting).

[86] Fourthly, we accept that the jury could infer Manu Iongi would have been aware of the presence of the gun in the vehicle. But given the range of criminal activity in which the Crips gang engaged, especially illegal methamphetamine dealing, we do not consider a direct line can be drawn from knowledge of the gun to presuming knowledge of, or support for, the alleged plan to shoot Stephen Fisi'ihoi (or someone else) at Calthorp Close.

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[73] Above at [23].

[87] Fifthly, there is the curious inactivity of one of the three men at Calthorp Close. It was common ground that it might be inferred from the evidence of sounds that only two men left the car, and that one probably remained within it. The Crown case seemed to be that one man—probably the owner and driver of the car, Falala Iongi—remained at the wheel after putting on the handbrake. That suggestion is speculative at best. The contrary and more likely course was that those who left the vehicle were the same two who knew the scene, having visited the address twice already in recent months to attack Stephen Fisi'ihoi—i.e., Falala and Viliami Iongi. That inference is supported by the fact that when carrying out the first shooting at the Fisi'ihoi home on the afternoon of 4 December 2019, Falala and Viliami had exited the vehicle unaccompanied (i.e., with no getaway driver waiting behind the wheel) before shooting at Stephen Fisi'ihoi and George Vuna. The verdicts of murder against Falala and Viliami suggest the jury formed the view they were the two who exited the car on the occasion of the second, fatal shooting. That then left Manu Iongi sitting in the car, probably in the front passenger seat. Why was he left behind? That he remained in the car suggests a decision made to limit his participation in what was about to happen—but whether he made that decision, or the others made it for him, cannot be said. What he was doing by staying in the car is a matter of pure speculation. Perhaps, as the Crown says, he was serving as additional muscle—although he would have been of scant use in that role, sitting inside the car. Perhaps he was some sort of lookout—in a deserted suburban street at 2.42 am. Equally possibly, in all the circumstances we have just related, he took no material role at all, having been drawn onto the fringes of a plan he wanted no part of, in a feud he had had no part in.

[88] Sixthly, we note the absence of post-incident evidence of the plan itself—as opposed to dealing with the aftermath of what might, as far as Manu Iongi was concerned, have been either a planned violent assault or a violent debacle he was unwillingly drawn into. It is hard to draw anything much from the fact he arrived at Havea Iongi's house in a subdued mood. The other fact is Manu's retrieval of the gun the following day. We however do not find that of any assistance in assessing what role he might have played the night before. It is true that a wise non-participant might have steered well clear of further involvement. Whether Manu was either wise or free to act in accordance with his better judgment is simply unknown. We are not prepared

to speculate on that. All this particular evidence establishes is accessory liability after the fact.[74]

[89] Finally, we bear in mind the dynamics of a trial involving three family members, all gang members, where the principal offenders offered exculpatory, but perjured, evidence of non-involvement of all three. That defence strategy necessarily would have rendered difficult any different account being given by Manu Iongi—and probably precluded his giving evidence, had he wished to do so. We do not speculate on what evidence might have been given, or whether Manu would otherwise have elected to give evidence. In our view that factor requires that care be taken not to draw too-firm views about the significance of the familial and gang relationship as factors evidencing participation in a plan. The dynamics here were potentially far more complex.

[90] In summary, while the Crown pointed to Manu Iongi's presence during the car journey, gang affiliation, familial ties and later retrieval of the gun as indicators of willing involvement in a joint enterprise, these factors are counterbalanced by fundamental gaps: no evidence of prior planning or communication, or animosity towards the victim on his part, and, crucially, the likelihood—seemingly accepted by the jury—that he remained in the car during the shooting. We see that final point as the insoluble obstacle for the Crown in this case. It is impossible to discount the reasonable possibility that Manu's reason for staying in the car was that he did not want or intend to participate. That uncertainty is only deepened by the absence of direct evidence that Manu knew of or agreed to the plan and the probative impotence of the evidence of his conduct before and after the shooting.

[91] In these circumstances, we consider both the Crown and defence inferences remained open before the jury. The Crown case had not displaced the defence inference of non-participation by Manu Iongi in the plan developed, at some point, by the other two men. The availability of both inferences on the evidence required the jury to guess, or speculate, as to which was in fact right. As in *Munro* and *Kuru*, therefore, there was no rational basis for the jury to have rejected the defence inference

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74 See above at [33].

of non-participation in the plan as a reasonable possibility. A properly directed jury could not be sure Manu was aware of the plan by the others to fire a shotgun at a person at Calthorp Close, and had agreed to help them effect that plan.

(b) Party liability: s 66(1)

[92] Turning then to the alternative basis for culpability, under s 66(1), given the analysis above as to participation in a plan, we consider a jury could be even less sure Manu Iongi had actively assisted in or encouraged the shooting at Calthorp Close on any other basis. Indeed, as Ms Hogan pointed out, had the jury formed that view, their proper verdict would have been one of murder, not manslaughter.

Conclusion

[93] It follows the verdict of manslaughter against Manu Iongi was not one available to the jury on the evidence at trial, and that the conviction must be quashed. It is now settled principle that a directed verdict of acquittal should normally follow where a verdict is quashed on the basis the jury could not reasonably have reached it, to the standard of beyond reasonable doubt, having regard to all the evidence.[75] Accordingly, we will make an order directing a verdict of acquittal. Nothing in this judgment disturbs the convictions of Falala and Viliami Iongi for murder.

Misdirection leading to miscarriage?

[94] We turn now to the second issue. It raises two sub-issues regarding the trial Judge's summing up to the jury. First, whether the Judge's summary of the defence case for Manu Iongi was satisfactory. Second, whether the jury ought to have been specifically directed on the correct application of the standard of proof in a case which was wholly dependent on circumstantial evidence and inferential reasoning.

Submissions

[95] Counsel for Manu Iongi submit that the trial Judge erred in summarising the defence case, failing to clearly distinguish his defence—that there was no evidence

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[75] *H (SC 49/2021) v R* [2022] NZSC 42, [2022] 1 NZLR 21 at [39]. That verdict was also directed by this Court in *Kuru*, above n 47.

from which to infer that Manu had committed a culpable act or had a culpable state of mind, and that there were numerous other inferences reasonably available, including that he was merely a passive bystander—from the defences put forward by counsel for Falala and Viliami Iongi. In the context of a five-week, multi-defendant murder trial where the Crown case against Manu relied exclusively on heavily contested inferences, the "high-level summary without reference to evidential arguments" given by the Judge was manifestly inadequate.

[96] Turning to jury directions, Ms Hu (who delivered these submissions) submitted that the trial Judge's summing up was insufficient to guard against the dangers of inferential reasoning identified by Alderson B in *R v Hodge*—namely, that the human mind is prone to distort facts and look for certain inferences while minimising other facts and inconsistent inferences.[76] In that case, it was held that before finding a defendant guilty in an entirely circumstantial case, the jury must be satisfied:[77]

> … not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the [defendant] was the guilty person.

[97] Regardless of the approach taken to inferential reasoning directions—and in particular whether or not the *Hodge* formulation is strictly required, as in certain circumstances in Australia[78]—the jury needed more assistance in this case to apply the correct balance and standard of proof where invited to draw inferences from circumstantial evidence. This because the case against Manu Iongi was "minimal in the extreme and entirely circumstantial"; defence counsel had raised alternative, innocent inferences of which the jury was not reminded (and nor was it reminded of the inferences the defence invited it to reject); the Crown and defence inferences were presented as binary options between which the jury had to choose; the direction on the standard of proof was given only at the outset and in the abstract; and the case for the jury was very complex.

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76 *R v Hodge* (1838) 2 Lewin 227 at 228, 168 ER 1136 (Assizes) at 1137.

77 At 228.

78 See *Shepherd v R* (1990) 170 CLR 573 at 578 per Dawson J; *R v Kotzmann* [1999] VSCA 27, [1999] 2 VR 123 at 138 per Callaway JA; and Judicial College of Victoria *Bench Book: Criminal Charge Book* (online ed) at [3.6(8)] and [3.6(30)].

[98] Finally, Ms Hu invited the Court to hold that in cases such as this, which are marginal and depend entirely on inferences drawn from circumstantial evidence, a "*Hodge*-type" direction should be given. Counsel endorsed comments by the Supreme Court of Canada in *R v Griffin* and *R v Villaroman* which draw distinctions between the functions of directions as to the standard of proof, on the one hand, and as to circumstantial evidence and inferential reasoning, on the other.[79] That Court has held in essence that in cases turning exclusively or largely on inferences drawn from circumstantial evidence, the jury should be directed that an inference of guilt may be drawn only if it is the sole reasonable inference that such evidence permits—though no special formulation or particular language is required.

[99] For the Crown, Mr Benson-Pope emphasised the wide discretion afforded to trial judges in determining the level of detail required, submitting that it was permissible in the circumstances of this case for the Judge to give only a general overview of the defence case, setting out each party's position while running through the question trail.[80] Defence counsel challenged Havea Iongi's evidence "vigorously" in closing and contended that it could not support the inference that Manu was involved in the murder. The remainder of the defence case in closing focused on rejecting the inferences drawn by the Crown as unavailable. Had those submissions been repeated by the Judge in summing up, it would have been necessary also to summarise the corresponding threads of evidence raised by the Crown, risking the appearance of imbalance. Repeating the alternative inferences proposed by the defence would also have risked inviting impermissible speculation. In any case, the Crown submits, thorough cross-examination of Havea, who was the key witness, as well as the contents of the closing addresses and the addendum to the summing up, would have left the jury with no doubt as to the competing arguments. Indeed, when pressed on the matter before us, Ms Walker referred to the addendum in support of the submission that the core planks of the defence case were put squarely to the jury.

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79 *R v Griffin* 2009 SCC 28, [2009] 2 SCR 42 at [33] per Binnie, Deschamps, Abella, Charron and Rothstein JJ; and *R v Villaroman* 2016 SCC 33, [2016] 1 SCR 1000 at [28]–[31].

80 *McGhee v R* [2012] NZCA 345 at [18]; and *R v Keremete* CA247/03, 23 October 2003.

[100] The Crown says it was open to the jury then to find Manu Iongi guilty:[81]

> This was not a weak Crown case where choosing between inferences involved impermissible speculation. Once the jury accepted Havea's evidence that the appellant was in Falala's BMW that night, there was no leap in logic to concluding he was also willingly and knowingly involved in the planned shooting. The jury were entitled to prefer the inferences advocated for by the Crown and to find he was not a passive bystander in such circumstances.

[101] Turning to the directions, the Crown submits the Judge's directions on the burden of proof, circumstantial evidence and inferences were adequate and no change to the orthodox approach to such directions is necessary. The directions given were consistent with the guidance of the Court of Appeal in *R v Wanhalla* and the standard of proof was linked to the standard directions regarding circumstantial evidence and inferential reasoning.[82] A direction was also given to the effect that being "a mere passive bystander is insufficient" for party liability under s 66(1) of the Crimes Act, referring specifically to defence counsel's submission on that point. Further, the jury was reminded repeatedly of the appropriate approach to inferential reasoning, the burden and standard of proof, and the central planks of Manu Iongi's defence in the closing addresses of counsel. At the hearing, Mr Benson-Pope emphasised the Judge's direction that "if … what the defence is saying is reasonably possible, then you will not be able to be satisfied beyond a reasonable doubt".

[102] In the abstract, the Crown submits the established position that detailed and specific directions on circumstantial evidence are not required should be maintained. The simple direction that the jury is "entitled to draw inferences, but that such inferences should be logical inferences from proven facts, not mere speculation or guesswork", endorsed in *R v Puttick* and subsequent cases, suffices.[83] Elaborate or abstract directions risk confusing, rather than assisting, the jury. Counsel refer to the Court of Appeal's recent judgment in *Dunn v R*, where it reiterated that the *Hodge* direction has never been required as a matter of law in New Zealand and noted that "it appears that since 1986 the direction has seldom, if ever, been given".[84]

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81 Footnotes omitted.

82 *R v Wanhalla* [2007] 2 NZLR 573 (CA).

83 *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647; *R v Hart* [1986] 2 NZLR 408 (CA) at 413; and *Do v R* [2024] NZCA 97 at [23]–[25].

84 *Dunn v R* [2025] NZCA 216, [2025] 2 NZLR 786 at [74]–[78]. But see *Dunn v R* [2025] NZSC 163 at [10] and n 9.

Discussion

[103] The starting point is that, as McGrath J said for this Court in *Ahsin v R*, the adequacy of a judge's summing up and directions to the jury is a highly contextual matter, though detailed and specific directions assume greater importance in gang violence cases where there is a risk a jury will default to finding "guilt by association".[85]

[104] As to summing up the case for the defence, the Court of Appeal in *Waters v R* summarised the duty of the trial judge in the following terms:[86]

> The judge must be satisfied that the defence case is fully understood by the jury. The extent of the detail that the judge must traverse will depend on the case. In a complex case, the judge will generally need to go through the key factual allegations for both sides, to give them order and coherence for the jury, and make it easier for them to carry out their assessment. In a simple case this is not as important, because the issues will be obvious and the facts to be determined will not require particular organisation to assist in deliberations, or particular elucidation to ensure a clear understanding of the respective positions. A judge is not required to repeat all defence counsel's arguments or assist the defence case by setting out inconsistencies or other matters already referred to by counsel.

[105] That duty is fundamental to a fair trial, though what exactly is required to satisfy it will depend on the factual circumstances of each case.[87] The Court of Appeal held in *R v Keremete* that "there is a wide discretion as to the level of detail to which the judge descends" in summarising rival contentions as to the factual issues.[88] Importantly, as the Court of Appeal made clear in *R v Shipton*, where there are multiple defendants the defence for each individual defendant must be put fairly to the jury and isolated from the defences of the co-accused insofar as they differ from one another.[89]

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85 *Ahsin*, above n 12, at [167] per McGrath, Glazebrook and Tipping JJ.

86 *Waters v R* [2018] NZCA 84 at [8] (footnote omitted); and see at [7]. See also *R v Clayton-Wright* (1948) 33 Cr App R 22 (Crim App) at 29; *R v Ryan* [1973] 2 NZLR 611 (CA) at 614; and *Tamati v R* [2025] NZSC 70, [2025] 1 NZLR 419 at [38].

87 *R v Shipton* [2007] 2 NZLR 218 (CA) at [33]–[35] citing *R v Marr* (1990) 90 Cr App R 154 (CA) at 156.

88 *Keremete*, above n 80, at [18]. See also *McGhee*, above n 80, at [18].

89 *Shipton*, above n 87, at [54]–[55]. See also *Ahsin*, above n 12, at [162]–[163] and [167]–[169] per McGrath, Glazebrook and Tipping JJ.

[106] Turning to directions on inferential reasoning in circumstantial cases, the following principles arise from the authorities. First, as the Court of Appeal observed in 1986, in *R v Hart*, the overarching duty of the judge is:[90]

> … to make clear to the jury in terms adequate to cover the particular features of the case that they must not convict unless satisfied beyond reasonable doubt of the guilt of the accused.

The extent of inferential reasoning directions required will therefore depend on the significance of that issue in the case at hand.[91]

[107] Secondly, where proof of an essential issue in dispute depends on the drawing of an inference from circumstantial evidence then, as the Court of Appeal observed in 1988, in *R v Maxwell*, the judge should:[92]

(a) direct the jury that they must be sure the inference the Crown advances is the only reasonably available inference (and that it is not sufficient that it shows merely a strong possibility of guilt);[93] and

(b) canvass other possible inferences raised by defence counsel (and any inferences which might be drawn from the Crown's failure to adduce direct evidence of the matter in issue).[94]

[108] Thirdly, *Hodge*, urged on us by Ms Hu, is simply "a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial".[95] That is not to say it should not be used, but as a general matter we think it unnecessary to go beyond the broad approach taken in *Maxwell*.[96] Nor do we

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90 *Hart*, above n 83, at 413.
91 *Puttick*, above n 83, at 647.
92 *R v Maxwell* (1988) 3 CRNZ 644 (CA) at 647.
93 Citing *R v Horry* [1952] NZLR 111 (CA) at 122.
94 See also *Cullen v R* [2012] NZCA 413 at [20].
95 *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276 (HL) at 282 per Lord Morris, whose speech was adopted without reservation by Cooke J in *Hart*, above n 83, at 413. In *Edwardson v R* [2017] NZCA 618 at [78], the Court of Appeal said, referring back to the fundamental duty noted above at [106]: "This Court has discouraged excessive jury directions on the issue of proof by inference from circumstantial evidence. This Court has also ruled that the concerns underlying directions on inferences can be met by a combination of the orthodox direction on circumstantial evidence and firm directions as to the need for proof beyond reasonable doubt" (footnotes omitted).
96 See below at [114]–[115].

consider the more prescriptive approach taken in the Canadian cases cited is necessary here. As McGrath and William Young JJ observed in *Mahomed v R*:[97]

> [80] New Zealand appellate courts have … been less prescriptive than their Australian and Canadian counterparts as to how trial judges should sum up to juries and, in particular, far less enthusiastic about requiring particular forms of direction to be given in respect of commonly recurring issues.

[109] The issue is not whether a judge has correctly recited a particular formula, but rather whether the jury has been adequately directed as to the case before it and the proper execution of its role.[98] Here, the essential point the judge must emphasise in such a case is simply whether the jury can be *sure* the defendant is guilty, in light of the competing evidential inferences—having adequately reviewed them. That is, whether the Crown has discharged its burden of proof beyond reasonable doubt. Adhering to the approach in *Maxwell* is likely to be the best way of discharging that obligation.

[110] Fourthly, if a case rests on circumstantial evidence from which different and equally available inferences can be drawn, to decide between those inferences would require impermissible speculation.[99] This, ultimately, is the problem for the Crown in the present case. As noted above at [90]–[91], the alternative inference advanced by the defence—of Manu Iongi's *non*-participation in a plan to shoot someone at Calthorp Close—was in our view incapable of displacement *by reasoning* to the degree required: i.e., so that the jury could be *sure* he participated in that plan. Only speculation, rather than reasoning, offered the answer sought by the Crown.

[111] Finally, where a case against one of multiple defendants is wholly or nearly wholly circumstantial, we consider special care is needed to ensure that the overarching duty in *Hart*, set out above at [106], is adequately discharged by the judge. The risk otherwise is that the jury will not apprehend the distinct approach to proof that applies to that defendant, and tend instead to assess his guilt as part and parcel of the culpability of the co-offenders it has already resolved to convict. That is precisely

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97 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 per McGrath and William Young JJ dissenting; but see at [17] and n 1 per Elias CJ, Blanchard and Tipping JJ.

98 See *Do v R* [2024] NZSC 80 at [6] citing *Wanhalla*, above n 82, at [52] and *Wilson v R* [2019] NZCA 485 at [3].

99 *Hutchins v R* [2016] NZCA 173 at [31]; *Cullen*, above n 94, at [19]; and *Kuru*, above n 47, at [284] per Glazebrook J concurring.

why McGrath J referred to the risk of "guilt by association" in *Ahsin*, as we noted above at [103].

[112] We turn now to the application of these principles to the facts of this case. In our view, the Judge's summing up did not conform with these principles in two respects.

[113] First, it failed sufficiently to distinguish Manu Iongi's position from that of Falala and Viliami Iongi. The latter two demonstrably were the participants in the violent feud with Stephen Fisi'ihoi, and were, relatedly, alleged to have been involved in the prior shooting at Calthorp Close on 4 December 2019 (as the jury then found). There was conversely no evidence of Manu having been involved in either. The summing up should not have compressed discussion of the three defendants together where there were significant differences between the defences advanced by Falala and Viliami, on the one hand, and Manu, on the other. The Crown case against Manu was far more marginal and needed therefore to be addressed distinctly.

[114] Secondly, because the Crown case against Manu Iongi was both wholly circumstantial and far more marginal (in that the inferences which the Crown sought to draw were supported by relatively little evidence, from which alternative inferences were arguably available), it was necessary for the summing up to summarise the competing theories of the case more substantially. That might have been done generally in the manner recommended in the specimen direction set out in the *Criminal Jury Trials Bench Book* (though no special language is needed in this regard):[100]

> Whether you draw [the] inference [suggested by the Crown] is for you, as are all matters of fact. An inference is a conclusion drawn from proven facts. It is not a guess. …
>
> The Crown case as to whether the defendant [did the relevant act] depends largely on what is described as circumstantial evidence.
>
> …
>
> When you consider a circumstantial case, you must have regard to what are called defence circumstances, which are circumstances that favour the defence.

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[100] Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* (online ed) at [7.3.3].

> On the Crown case, the factors that link the defendant with the [relevant act] are as follows: [list].
>
> The circumstances on which the defence relies are: [list].
>
> The ultimate issue in this aspect of the case is whether or not, on the totality of all the evidence, you are satisfied beyond reasonable doubt that the defendant [did the relevant act].

[115] We consider it would be preferable to combine directions on inferences and on circumstantial reasoning, as the *Bench Book* suggests, and that "evidence" be referred to (rather than "circumstances").[101] Where (as here) the Crown case was wholly circumstantial on the essential issues of Manu Iongi (1) being aware of a plan "to fire a shotgun at a person at 73 Calthorp Close", and (2) agreeing to help achieve that plan, we consider the direction ought to incorporate more explicitly the first part of *Maxwell* as to the jury needing to be sure that the inference the Crown says the jury should draw from the evidence concerning each such issue is the only reasonably available inference (and that it is not sufficient that the evidence shows merely a strong possibility of guilt).[102]

[116] This was a five-week trial, and there was a significant amount of circumstantial evidence to traverse. But neither the evidential strands themselves nor the inferences the parties sought to draw or reject on those issues are hard to summarise; and the assistance such a detailed and balanced summary would have given the jury was necessary to ensure Manu's case was considered fully and fairly in isolation from those of his co-defendants, as contemplated in *Shipton* and *Ahsin*.[103]

[117] Finally, and for completeness, we do not consider a separate weapons direction was required here, unlike in *Burke*.[104] As Ms Hogan accepted, the function of such a direction was already sufficiently embedded in the question trail, which directed the jury that Manu Iongi had to have known of a plan "*to fire a shotgun* at a person at

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101 At [7.3.2] and [7.26.2].

102 *Maxwell*, above n 92.

103 *Shipton*, above n 87, at [54]–[55]; and *Ahsin*, above n 12, at [167] per McGrath, Glazebrook and Tipping JJ. See above at [103] and [105].

104 *Burke*, above n 12, at [142]–[144] per O'Regan, Williams and Kós JJ, [240] per Winkelmann CJ and [252] per Glazebrook J.

73 Calthorp Close" in order to be found guilty of murder or manslaughter.[105] By contrast, the alleged common plan in *Burke* was framed more broadly, and without reference to a weapon: "to inflict a physical beating or 'hiding' on [the victim]".[106]

Result

[118] The appeal is allowed. The conviction of Manu Iongi for manslaughter is quashed.

[119] We make an order under ss 233(3)(a) and 241(2) of the Criminal Procedure Act that a judgment of acquittal be entered.

ELLEN FRANCE AND MILLER JJ
(Given by Miller J)

[120] We are not persuaded that the Court of Appeal was wrong.[107] We would dismiss the appeal and write briefly to explain why.

[121] We agree with the majority that this is at heart an unreasonable verdict case.[108] Specifically, the question is whether there was evidence from which a reasonable jury, properly directed, might be satisfied beyond reasonable doubt that Manu Iongi was a party to the offence.[109] In our opinion, there was. We also consider that the Judge's directions were adequate in the particular circumstances of this trial. That being so, there was no error that might have affected the outcome.[110]

[122] We begin with the unreasonable verdict issue. The background to the killing of Meliame Fisi'ihoi is the animosity between her son Stephen Fisi'ihoi and one of Manu's co-defendants, Falala'anga (Falala) Iongi. The jury were satisfied that on 4 December 2019 Falala and his brother, Viliami Iongi, each armed with a shotgun,

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105 Emphasis added. A similar conclusion was reached in *Kuru*, above n 47, at [103] per Glazebrook J concurring, where the common purpose advanced by the Crown included express reference to firearms.

106 *Burke*, above n 12, at [27] per O'Regan, Williams and Kós JJ.

107 See *Iongi v R* [2024] NZCA 522 (Cooke, Collins and Grice JJ) [CA judgment].

108 See above at [49] per Winkelmann CJ, Williams and Kós JJ; and see Criminal Procedure Act 2011, ss 232(2)(a) and 240(2).

109 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5] and [17]. See Crimes Act 1961, s 66.

110 Criminal Procedure Act, s 232(2)(c) and (4)(a).

had gone to 73 Calthorp Close, Māngere, and there shot at Stephen. Their return to Calthorp Close on 15 January 2020 with a shotgun was in furtherance of the same animus towards him.

[123] Falala and Viliami took Manu, a cousin and fellow gang member, with them on the drive in the early hours of the morning from Flat Bush to Māngere. In our view it was open to the jury to infer that they took Manu on the journey only because they had recruited him to assist in a confrontation with Stephen, and that Manu must have known of the role he was to play and of the weapon and their intention to use it. The jury might infer that he would not otherwise have been in the car, at that time, on that journey. They might also infer that the brief stop at Puhinui Road was a final opportunity to discuss their plan before putting it into execution.

[124] The evidence does not establish what role Manu played at the scene. The jury could be sure, however, that he was there and he either went to the house with the shooter or waited in the car, which was left in the street with the engine running. Either role, as Ms Hogan KC accepted in this Court, is capable of amounting to assistance or encouragement. If he remained in the car, it was not necessary that he did so in the capacity of getaway driver. It is enough that he secured the car in readiness for his principals.

[125] We accept Ms Hogan's submissions that some of the evidence relied on by the Crown does not go very far. For instance, Manu's subdued demeanour when seen in the car after the shooting is perhaps probative of knowledge of the shooting, but not of any prior knowledge that it was to happen. It is also true that evidence of his gang involvement, including his possession of a shotgun, was relevant to show only that he was part of the gang milieu, a person who could be relied upon to assist his cousins and fellow gang members in an action of this kind. But the question is whether the inference of involvement as a party was available on the evidence overall.

[126] Turning to the Judge's directions, we accept the Crown submissions summarised by the majority above at [101] and [102]. The elements of party liability were correctly outlined, the directions given on inferential reasoning were adequate,

and the jury were warned against finding Manu guilty by association.[111] The question is whether sufficient detail was given of Manu's case on the facts.

[127] We agree that the Judge's summary of Manu's case was very brief.[112] A succinct and concise summing up often assists the jury to focus on the issues in a complex trial. But it is necessary to summarise the points made by the Crown and defence for each defendant, linking the evidence to the elements of the charge.[113]

[128] However, the proposition that more was required here, and specifically on party liability, must be seen in the particular context of this trial.[114]

[129] It is clear that all three defendants hoped the Crown would not be able to place them at the scene at all. They also hoped the evidence of Havea Iongi would be excluded, or that he would not come up to brief.

[130] For Falala and Viliami, it would have been most unhelpful had Manu advanced a case that he was at the scene but did not know what they would do or did nothing to assist them. When they gave evidence, the combination of CCTV footage of the car's journey and polling data from Viliami's phone having placed them near the scene, they attempted to protect Manu by deposing that he was not with them. This dynamic was plainly at work in the trial; the prosecutor suggested it to them directly in cross-examination and then briefly commented on it in closing.

[131] Consistent with that, Manu's primary case, advanced through counsel, was that he was not present at the killing of Mrs Fisi'ihoi. Ms Hogan opened to the jury by contending that the Crown case placing the car at Calthorp Close was entirely circumstantial and stating that the only evidence implicating Manu was that of Havea.

[132] The trial did not go well for the defendants. The Crown painstakingly built a strong circumstantial case. And as Manu himself put it (in an exculpatory statement),

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111 See above at [35]–[39] per Winkelmann CJ, Williams and Kós JJ.

112 See above at [34] per Winkelmann CJ, Williams and Kós JJ.

113 See above at [103]–[105] per Winkelmann CJ, Williams and Kós JJ; and Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* (online ed) at [8.7].

114 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [167] per McGrath, Glazebrook and Tipping JJ.

"[n]o-one's mum should be dead."[115] Gang loyalties yielded. Stephen gave evidence for the Crown. Havea deposed that they left a warm shotgun with him minutes after the shooting, and he placed Manu in the car at that time. It is manifest that, as the Court of Appeal remarked succinctly, the jury might properly infer that the three men in the car had been involved in the killing of Mrs Fisi'ihoi.[116]

[133] It is obvious from Ms Hogan's closing address that she was alive to the risk that the other defendants' evidence that Manu was not with them would be rejected by the jury. She did not abandon that contention. On the contrary, she began with it. But she used her address to focus on the evidence about what happened at the scene, about what Manu knew, and about what he might have done. She suggested he may have thought the journey was for a completely different purpose, or may not have known a firearm was present. She pointed out that his presence in the passenger seat when the shotgun was left with Havea told the jury nothing about what he may have done at the scene, and she suggested the fact that he picked the gun up the next day was at best evidence of a completely different offence.

[134] Counsel's closing address was a clear signal to Powell J that she wanted him to sum up on Manu's liability as a party. The Judge had to respond. It must have been obvious that Manu's prospects of acquittal might now rest on distinguishing himself from his co-defendants. But it was also necessary to exercise care when summing up on a defence that was inconsistent with what remained Manu's primary case. The Judge might opt for a concise summary that relied in part on the way in which experienced defence counsel had put the case.

[135] Powell J chose to give brief summaries of the cases for the Crown and all defendants. Trial judges enjoy a significant degree of discretion when deciding how much detail to give.[117] Balance is also important, and here a full summary would tend to favour the Crown. It had built a detailed case while, as the Judge noted, the case

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115 This evidence was given at trial by Detective Winstanley.

116 CA judgment, above n 107, at [85]. For this reason alone, we do not find comparisons with *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 helpful. In that case, the appellant was not at the scene and it was possible that he did not know of the plan which included the presence of firearms.

117 *R v Keremete* CA247/03, 23 October 2003 at [18]. See also *Lee v R* [2023] NZCA 147 at [28].

for all defendants rested heavily on the simple proposition that Havea was a discredited and unreliable witness.

[136] With respect to Manu, the Judge directed the jury to work through the question trail, which he incorporated into his summing up.[118] He drew their attention to the questions specifically applicable to Manu. Relevantly, the question trail directed them that they must be satisfied Manu took part in the killing by forming a plan to fire a shotgun at a person and agreeing to help the others, and that he knew the shooter would cause more than trivial harm or knew that such harm was a probable consequence of their plan. There is no criticism of the question trail. If the jury followed it, which we have no reason to doubt, they considered Manu's defence separately from that of his co-defendants and focused specifically on party liability.

[137] The Judge also told the jury that although the elements of party liability were the same for Viliami and Manu, the evidence of their involvement and intention differed. He reminded them of Ms Hogan's contention that there was insufficient evidence to show Manu had the necessary state of mind. In his addendum, he reminded them that only Havea gave evidence that Manu was in the car, and that the defence contended there was in any event no evidence to show that he was more than a passive bystander or that he had the necessary intention.[119] That was an accurate summary of Manu's case, capturing both his principal defence and his case on his involvement at Calthorp Close. The alleged deficiency lies only in the Judge's failure to go into more detail, to remind the jury of the contentions that there was no specific evidence of involvement and nothing apart from the car journey to sustain the inference that Manu knew of the plan and intended to assist in some way, or that he knew of the gun at that time. In our view, there is no reason to think that the jury failed to appreciate these matters.

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118 See above at [37]–[38] per Winkelmann CJ, Williams and Kós JJ.
119 See above at [39] per Winkelmann CJ, Williams and Kós JJ.