

**ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR
IDENTIFYING PARTICULARS OF DEFENDANTS AND MR C UNTIL
FURTHER ORDER PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE
ACT 2011.**

SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2024-092-7962
[2026] NZHC 2345**

THE KING

v

M and S

Hearing:	29, 30 June, 1, 2, 6, 7, 8, 9, 13,14, 15, 16, 17 and 23 July 2026
Counsel:	J R Billington KC, G J Burston and R S Bedggood for the Crown DPH Jones KC and N Batts for Mr M P F Wicks KC and C Morris for Mr S
Verdicts	12 August 2026
Reasons:	12 August 2026

REASONS FOR VERDICTS OF GAULT J

*This judgment was delivered by me on 12 August 2026 at 1:00 pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Introduction

[1] Mr M and Mr S each face one charge of wilfully attempting to obstruct, prevent, pervert or defeat (pervert) the course of justice.¹

[2] The alleged offending relates to their involvement in the investigation and prosecution of Mr Alan Hall for the murder of Mr Arthur Easton and the wounding of his son Brendon Easton on 13 October 1985 (Operation Easton). Mr Hall was convicted in September 1986 and his application for leave to appeal was dismissed on 27 August 1987.² Mr Hall's convictions were ultimately quashed 35 years later in 2022 by the Supreme Court on the basis that justice had seriously miscarried.³ The charges in this proceeding followed a subsequent investigation into the handling of Operation Easton.

[3] The amended Crown charge notice alleges that each defendant:

Between 10 December 1985 and 27 August 1987 at Auckland, together with [Mr C] and [the other defendant], in the course of the investigation, prosecution and appeal of Alan Hall on charges of murder and aggravated wounding, did wilfully attempt to obstruct, prevent, pervert or defeat the course of justice, and thereby obtain and maintain the wrongful conviction of Alan Hall.

Particulars:

- Directing and/or arranging for a written statement of Ronald Turner to be prepared and signed for the purpose of being admissible as evidence against Alan Hall, knowing that statement deliberately excluded Ronald Turner's evidence that the man he had seen running across Clevedon Road on the night of 13 October 1985 was Māori, and knowing that the documents recording Ronald Turner's previous statements that the person he had seen was Māori would not be disclosed to the Courts or the defence lawyers; and/or
- Forming a common intention with [Mr C] and [the other defendant] to intentionally mislead and falsely represent that Ronald Turner's description of the man he had seen running across Clevedon Road on the night of 13 October 1985 conformed with the prosecution case that the man was Alan Hall, and to assist each other therein,

¹ Crimes Act 1961, ss 117(d) and 66 (now expressed in s 117(e)). Maximum penalty seven years' imprisonment.

² *R v Hall* [1987] 1 NZLR 616 (CA).

³ *Hall v R* [2022] NZSC 71, [2022] 1 NZLR 131. I deal with the relevance of this decision below at [52]-[61].

thereby being a party to the non-disclosure to Alan Hall's defence lawyers of the documents recording Ronald Turner's previous statements that the man he had seen running across Clevedon Road on the night of 13 October 1985 was Māori, namely:⁴

- Constable Walker's jobsheet recording Ronald Turner's call on the night of 13 October 1985
- Ronald Turner's witness statement dated 14 October 1985
- Ronald Turner's witness statement dated 19 February 1986.

[4] Today I returned the following verdicts:

- Charge 1: Mr M – not guilty.
- Charge 2: Mr S – not guilty.

[5] These are my reasons for those verdicts.

Judge-alone trial

[6] On 5 February 2026, following the defendants' application to change their election, I ordered that the defendants be tried before a judge without a jury under s 53(2) of the Criminal Procedure Act 2011 given that their election was unlikely to cause a delay in the trial being concluded.

Reasons for verdicts

[7] The Court must give reasons for its decision.⁵ This requirement has been addressed in cases before and since the Criminal Procedure Act. In *R v Connell*, the Court of Appeal stated that a judge hearing a criminal trial without a jury is required to deliver:⁶

... a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

⁴ I refer to these three documents as Mr Turner's previous statements.

⁵ Criminal Procedure Act 2011, s 106.

⁶ *R v Connell* [1985] 2 NZLR 233 (CA) at 237-238.

[8] In *R v Eide*, the Court of Appeal addressed the problems with short-form judgments that are particularly acute in fraud prosecutions but would also apply in this case:⁷

The parties (that is, the prosecutor and accused) are obviously entitled to know the key elements of the Judge's reasoning. In a case of any complexity, this will not be possible unless the Judge provides an adequate survey of the facts. As well, in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form. Similar considerations apply if the verdict is not guilty. Further, some regard should be had to how the case will be addressed on appeal. A judgment which is so concise that some of the key facts in the case are required to be reconstructed by this Court on appeal is too concise.

[9] As the Supreme Court said more recently in *Sena v New Zealand Police*:⁸

Connell and *Eide* indicate the kind of reasons which judges should provide. They should show an engagement with the case, identify the critical issues in the case, explain how and why those issues are resolved, and generally provide a rational and considered basis for the conclusion reached. Reasoning which consists of a conclusory credibility preference is unlikely to suffice.

[10] In this case, involving the charge of wilfully attempting to pervert the course of justice, it is also appropriate to give full reasons to explain the verdicts reached. However, to do so, it is neither feasible nor necessary to set out in full or to exhaustively review counsels' extensive submissions in these reasons. I have carefully considered the relevant evidence and counsels' addresses as they relate to that evidence and the charges. In compliance with the above authorities, I address the elements of each charge, the principal evidence that bears directly on those elements, my conclusions in relation to those elements and the reasons for those conclusions.

[11] Before doing so, I address a number of legal matters that are relevant. I then set out in some detail the facts that provide the basis for my later analysis and inferences. That necessarily adds to the length of these reasons in a document heavy, historic, circumstantial case.

⁷ *R v Eide* [2005] 2 NZLR 504 (CA) at [21].

⁸ *Sena v New Zealand Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [36]; the leading case since s 106(2) of the Criminal Procedure Act 2011 also required reasons.

Trial principles

[12] As this is a Judge-alone trial, I remind myself of a number of matters on which a jury would be directed. They may be fundamental, but as the finder of fact in a criminal trial, it is important I bear them in mind.

Separate trials

[13] I remind myself that there are separate trials that are being held together for convenience. The case against each defendant is limited to the evidence admissible against that defendant, not the totality of the evidence, although no issue arises as to admissibility of evidence against only one defendant. The weight to be given to such admissible evidence is a separate matter.

Presumption of innocence

[14] The starting point is the presumption of innocence. The onus is on the Crown. The Crown must prove that the defendant whose case I am considering at the time is guilty beyond reasonable doubt. The Crown must prove each essential element of each charge against each defendant beyond reasonable doubt before I may deliver a verdict of guilty on that charge against that defendant.⁹

[15] Proof beyond reasonable doubt is a very high standard of proof, which the Crown will meet only if I am sure that the defendant is guilty. It is not enough for the Crown to persuade me that the defendant is probably guilty or even that it is very likely that he is guilty. A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the defendant after I have given careful and impartial consideration to all of the evidence.¹⁰

[16] The presumption of innocence means that the defendant does not have to give evidence or call any evidence and does not have to establish his or her innocence.

⁹ It does not, however, require proof beyond reasonable doubt of every fact which may be relevant to proof of each essential element: *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647; *Thomas v R* [1972] NZLR 34 (CA); and *Milner v R* [2014] NZCA 366 at [15].

¹⁰ *R v Wanhalla* [2007] 2 NZLR 573 (CA); and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [30].

[17] Mr M elected to give evidence and to call evidence. This does not alter the onus of proof that rests on the Crown. I remind myself of the “tripartite” direction.¹¹ The three elements to the direction are:

- (a) If I accept Mr M’s evidence on the key issues, I should acquit.
- (b) If I am not sure, and consider there is a reasonable possibility that his evidence might be true, I should acquit.
- (c) If I reject his evidence on the key issues, I must not automatically conclude that he is guilty. I must examine all the evidence that I do accept and decide whether it establishes guilt beyond reasonable doubt.

[18] Mr S elected not to give or call evidence. The onus remains on the Crown.

Evidence – not prejudice or sympathy

[19] I also remind myself that I must reach my decisions on the evidence.¹² This case has attracted a large amount of media interest, including media interest that was the subject of a pre-trial application.¹³ I put all that to one side. I also remind myself to put all feelings of sympathy for or prejudice against any party associated with or affected by this case to one side. That includes the defendants and the Crown prosecutor, Mr C, who was also a defendant until his prosecution was stayed [REDACTED]. It also includes Mr Hall, whose convictions were quashed after serving nearly 18 years in prison,¹⁴ and the Easton family who lost Mr Easton nearly 41 years ago.

Circumstantial evidence and inferences

[20] In relation to circumstantial evidence and inferences, I bear in mind:

¹¹ *R v McI* [1998] 1 NZLR 696 (CA) at 708.

¹² Some of the evidence was given by AVL, read or taken as read and I treat that no differently from the evidence given in person.

¹³ *R v M and S* [2025] NZHC 1311.

¹⁴ Mr Hall was released on parole in November 1994 and lived in the community for the following 18 years before being recalled to prison on an interim basis in May 2012 for breaching a condition of his parole. Recall became final in June 2012. Mr Hall was again released on parole in February 2022.

- (a) That I need to identify the factual evidence that I think is reliable before I can go on to say what conclusion might follow from those facts.
- (b) Whether the conclusion I am being invited to reach based on that evidence is a safe, logical and rational conclusion – not speculation or guesswork.
- (c) I must be satisfied beyond reasonable doubt before drawing an inference the Crown asks me to draw on an essential element of the charge. If there is a reasonable doubt, it must go to the defendant.

Incomplete records, missing witnesses and memory of historic events

[21] The events in question took place approximately 40 years ago. It is therefore unsurprising that records are now incomplete and potential witnesses are no longer available. I deal with this further below. I must determine the issues on the evidence before me and only draw inferences that are properly available from that evidence.

[22] In assessing witness evidence 40 years later, I also must be cautious and remind myself that the passage of time can affect perception of events and the reliability of evidence. Witnesses may forget things or genuinely, but mistakenly, remember things that did not happen in the way they remember them. The passage of time may also affect the defendants' ability to mount an effective defence. I must turn my mind to these issues and decide how much weight to give them in the context of all the evidence adduced at trial. This is an aspect of ensuring the defendants have a fair trial. Further, in assessing the evidence, I bear in mind this issue is particularly acute for Mr M, who suffers from concurrent medical conditions including [REDACTED], and who elected to give evidence.

Good character evidence

[23] Mr M called good character evidence from several witnesses who spoke of his professionalism and integrity. While evidence of previous good character is not in itself a defence, it is a factor I bear in mind when I am assessing the relevant evidence. I also of course draw no inference in relation to Mr S's character.

Expert evidence

[24] Expert opinion evidence is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.¹⁵ Expert evidence about New Zealand law is not admissible.¹⁶ In this case, it is necessary to distinguish between expert opinion given about the law and admissible expert opinion given about the practice of Crown prosecutors and police during the relevant period.

[25] Further, even in relation to ascertaining practice or other facts, this is not a trial by expert. In assessing expert opinions, I have regard to the qualifications and experience of the witness when deciding whether to accept the opinion and if so, how much weight or importance to attach to it.

Elements of the offence of attempting to pervert the course of justice

[26] Section 117 of the Crimes Act 1961, at the relevant time in the 1980s, provided:

117 Corrupting juries and witnesses

Every one is liable to imprisonment for a term not exceeding seven years who—

- (a) Dissuades or attempts to dissuade any person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal; or
- (b) Influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether the juryman has been sworn as a juryman or not; or
- (c) Accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or
- (d) Wilfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice.

¹⁵ Evidence Act 2006, s 25.

¹⁶ *Newton v Family Court* [2022] 3 NZLR 846 (CA) at [186].

[27] What is alleged here is a wilful attempt to pervert the course of justice under s 117(d). To “pervert” the course of justice requires only that the defendant adversely influence the course of justice.¹⁷

[28] It is common ground that on this charge, the Crown must prove beyond reasonable doubt that:¹⁸

- (a) the defendant knew of the existence or possibility of legal proceedings against the person concerned (Mr Hall);
- (b) the defendant carried out a positive act;
- (c) the act had the tendency to prevent a court from doing justice; and
- (d) the defendant, in carrying out the act, intended to prevent a court from doing justice.

[29] The “perversion” of the course of justice embraces both conduct intended to secure a wrong or unjust result and conduct intended to bring about what the defendant believes to be the correct or just result by the use of improper means (the so-called end justifying the means).¹⁹

[30] I emphasise that this case does not involve revisiting whether Mr Hall was the offender, or otherwise questioning his acquittal in any way. The issue here is whether the defendants wilfully perverted the course of justice in the manner alleged.

¹⁷ Mathew Downs (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA117.05(2)]; citing *R v Guess* (2000) 148 CCC (3d) 321 (BCCA), at 339-340. An example is *Powle v R* [2017] NZCA 96, (2017) 28 CRNZ 412.

¹⁸ Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* (online ed) at [5.8.3.2]. Although this passage addresses s 117(e), the same elements apply to former s 117(d).

¹⁹ Downs, above n 17, at [CA117.05(2)]; citing *R v Kellett* [1976] QB 372 (CA); *R v Taffs* [1991] 1 NZLR 69, (1990) 6 CRNZ 274 (CA); *R v Senat* (1968) 52 Cr App R 282 (CA); *Tognolini v The Queen* [2011] VSCA 113, (2011) 32 VR 104. See also *R v Meyrick* CA513/04, 14 June 2005 at [40].

Party liability

[31] In respect of party liability under s 66(1)(b)-(d) of the Crimes Act, the majority of the Supreme Court in *Ahsin* set out the following four requirements:²⁰

- (a) the offence to which the defendant is alleged to be a party was committed by a principal offender;
- (b) the person alleged to be a party assisted the principal offender in the commission of the crime, or abetted, incited, counselled or procured the principal offender to commit the crime;
- (c) the person alleged to be a party in fact intended to assist, abet, incite, counsel or procure the principal offender to commit that particular offence; and
- (d) the person alleged to be a party knew both the physical and mental elements of the essential facts of the offence to be committed by the principal offender were present.

[32] The Crown also relied on cases determining liability where the principal offender cannot be identified. The first of these cases relied on was the Court of Appeal decision in *R v Witika*, given by Cooke P, where the Court said:²¹

Our present impression, without giving a final ruling, is that if the evidence does go far enough to show that both must have been criminally involved, it is not necessary for the precise part played by each to be identified. The essential question is whether the evidence does go to [the] length of showing that one must have struck the blows and the other must have encouraged, or possibly that both struck some blows.

[33] This decision was followed by the decision of the full Court of Appeal in *R v Renata*, also given by Cooke P, where the Court stated:²²

²⁰ *Ahsin v R* [2014] NZSC 153, at [82]-[83] per McGrath, Glazebrook and Tipping JJ.

²¹ *R v Witika* (1991) 7 CRNZ 621 (CA) at 623.

²² *R v Renata* [1992] 2 NZLR 346 (CA) at 349.

Where the principal offender cannot be identified it must be enough for the purposes of s 66(1) to prove that each individual accused must have been either the principal offender or a party in one of the other ways covered by that subsection.

[34] Both *Witika* and *Renata* were applied in the subsequent Court of Appeal case of *R v Singh*.²³

[35] Here, the Crown alleges that each of the defendants were either co-principals under s 66(1)(a), each doing acts which in combination had the tendency to adversely influence the course of justice or, alternatively, intentionally each assisted in the commission of the crime (or otherwise abetted, incited, counselled or procured the principal to commit the crime). The Crown submitted that both defendants were “involved”, that is, acted jointly and were privy to each other’s decisions, together with decisions made by Mr C, which resulted in the alteration of Mr Turner’s evidence and the concealment of exculpatory information. It submitted, therefore, that it is open to the Court to regard the defendants as acting in concert in a manner which characterises each of them either as a principal or a party.

[36] The Crown therefore submitted that if the evidence established that both Mr M and Mr S were involved in the offending, it was unnecessary to identify the precise role played by each individual. Nevertheless, the Crown also submitted that each defendant had slightly different roles at different times in achieving the objective of enhancing the prosecution case in the manner described, and as such they were each involved at relevant times, that is as principals with relation to their own conduct and as parties in assisting the other.

[37] The Crown further submitted that it was not necessary to prove that Mr C committed the offence for Mr M or Mr S to be found guilty. Instead, the defendants’ liability depended on establishing that they failed to meet their obligations, either directly or by creating and facilitating a situation in which Mr C himself failed to meet his legal obligations.

²³ *R v Singh* CA 53/03, 10 December 2003 at [51].

[38] Mr Jones KC, for Mr M, submitted that *Ahsin* applies in the present case, whereas *Witika*, *Renata* and *Singh* have no application. He submitted this is not a case where an offence has been committed and the defendants were definitely involved in some unspecified way. Rather, it must be determined whether an offence has been committed at all. He submitted the Crown's reliance on generic party liability reflects an inability to articulate its case because of evidential insufficiency, as opposed to inadequate specificity.

[39] Mr Wicks KC, for Mr S, submitted the approach in *Witika*, *Renata* and *Singh* should only be applied where, after determining beyond reasonable doubt that the offence charged was committed, it is not possible to identify on the evidence who was the principal offender. In this case, Mr C is the obvious alleged principal but the Crown has chosen not to identify him as such, as there are significant evidential difficulties with proving his involvement to the criminal standard. Mr Wicks submitted it is not sufficient for the Crown to rely on the defendants' involvement by way of their positions [REDACTED] in Operation Easton. *Renata* and *Witika* require criminal involvement – that is, involvement with the conduct in question combined with the intent to pervert the course of justice.

[40] *Witika* and *Renata* (before *Ahsin*) determine that it is unnecessary for the prosecution to identify the precise part played by each defendant if the evidence proves the offence was committed by one defendant as the principal and the other as a secondary party (or by both as co-principals). This is the sense in which both defendants must be “criminally involved”. *Witika* and *Renata* do not provide a shortcut to proving involvement and intent but instead dispense only with the need to identify the defendants' precise mode of participation once the evidence establishes that each must have participated in the offence in one of the ways contemplated by s 66(1). In other words, they still require proof that each defendant must have been either the principal offender or a party in one of the other ways covered by s 66(1). The application of this distinction will be considered, if necessary, in the context of the charges.

Development of issues at trial

[41] In the Crown's written opening, it was submitted the offence of wilfully attempting to pervert the course of justice was complete upon either of two scenarios – the drafting of Mr Turner's s 173A statement (described below) to deliberately omit "Māori"; or the subsequent failure to ensure Mr Turner's previous statements were disclosed in the period after his s 173A statement was tendered and before Court of Appeal decision. Either of these could be characterised as the "positive act" element necessary to establish the charge.

Question trail

[42] Towards the end of the Crown case, I provided a draft question trail to counsel identifying what I considered to be the elements of each charge that the Crown had to prove. Counsel had input into the document and I amended it accordingly. This question trail addressed the agreed elements of the offence by reference to the two particulars of each charge separately.

Closing submissions

[43] During closing submissions, the Crown somewhat departed from the question trail, at least insofar as the alternative positive acts are concerned. The Crown submitted that, in order to maintain the 1986 prosecution case that Mr Hall was the offender, it was essential that Mr Turner's previous statements not be disclosed to the defence. The non-disclosure had to be maintained not only through depositions, and trial, but also in the Court of Appeal. The Crown submitted this was particularly important in the Court of Appeal because by that stage it was very obvious that non-disclosure of underlying jobsheets and documents was at the core of one of the major grounds of appeal. Thus, while the two acts, that is the omission from the s 173A statement and the non-disclosure, can be viewed separately, they are inextricably interrelated.

[44] In pivoting in this way, the Crown relied on a ‘course of conduct’ and the Court of Appeal’s decision in *R v Mead*.²⁴ That case concerned the offence of wilful ill-treatment or neglect of a child,²⁵ and the Court observed that that offence could sometimes comprise a course of conduct and call for broad evaluative judgments having regard to the totality of the evidence. The Crown submitted that, in the same way, wilfully attempting to pervert the course of justice may be framed as a course of conduct and therefore necessarily require a similar assessment of the defendants’ conduct over the charged time period. Individual instances of conduct, when viewed on their own, may not necessarily amount to a wilful attempt to pervert the course of justice – the question should instead be whether the Crown has established beyond reasonable doubt that the charged course of conduct constitutes a wilful attempt to pervert the course of justice.

[45] The defence submitted *Mead* is inapt as a comparator case, as it involved an accumulation of incidents over time, whereas the present proceeding relies on two discrete particulars, not properly characterised as an extended course of conduct. Therefore, a careful analysis of the charge as pleaded, requiring specific acts and intent to be proved, must not be abandoned.

[46] Mr Wicks further submitted that if the offending is characterised as a single course of conduct, the alleged attempt commences with the completion of the s 173A statement omitting reference to “Māori”, with contemporaneous knowledge that Mr Turner’s previous statements would not be disclosed. This characterisation would require the Crown to establish the conduct was undertaken pursuant to the common design it alleges, otherwise it cannot prove the single continuing attempt, as the Crown has not identified an alternative later point at which the alleged joint attempt commenced.

[47] It is accepted that only the elements of the offence must be proved beyond reasonable doubt. As the Court of Appeal made clear in *Mead*, the particulars of a charge (describing the evidence) are not the ingredients of the offence. Also, the

²⁴ *R v Mead* [2002] 1 NZLR 594 (CA).

²⁵ Under s 195 of the Crimes Act 1961.

Crown is not normally required to prove the individual facts in a circumstantial case beyond reasonable doubt.²⁶

[48] Here too it is necessary to distinguish between the elements of the offence and the particulars in the Crown charge notice. Accepting that the particulars themselves need not be proved beyond reasonable doubt, and that the elements of this offence under s 117 of the Crimes Act also sometimes call for broad evaluative judgments,²⁷ those elements must still be proved beyond reasonable doubt on the evidence.

[49] The required elements of the offence in this case include a positive act having the tendency to prevent a court from doing justice. Therefore, whether the alleged offending is characterised as a single act, two separate acts or a course of conduct, a positive act must be proved beyond reasonable doubt.

[50] Further, since the Crown also needs to prove the separate element of intention to prevent a court from doing justice beyond reasonable doubt, characterising the alleged offending as a course of conduct rather than a single positive act would require the Crown to prove that intention coincided with the course of conduct, not merely with the single act having the tendency to prevent a court from doing justice.

[51] In any event, it is preferable to address the elements of the offence and consider how the positive act or acts are best characterised once I have considered the factual evidence. In doing so, I will consider whether the closing submissions require any adjustment to the question trail.

The relevance of the Supreme Court decision in *Hall v R*

[52] The Supreme Court decision plainly provided the catalyst for the investigation into the handling of Operation Easton and the charges in this case. However, the parties disagreed about the effect of the Supreme Court judgment in this case.

²⁶ *Iongi v R* [2025] NZSC 191, [2025] 1 NZLR 900 at [7], n 6 per Winkelmann CJ, Williams and Kós JJ; and *Wilson v R* [2026] NZSC 88 at [135], per Glazebrook J.

²⁷ *R v Meyrick*, above n 19, at [40].

[53] The Crown submitted the Supreme Court judgment's determinations on the law as at 1986 are binding in this case, and that its factual conclusions are admissible albeit not determinative.²⁸ Mr Billington KC, for the Crown, submitted the judgment is evidence of the fact of Mr Hall's acquittal and the reasoning for that outcome, which necessarily includes the significance of the non-disclosure of Mr Turner's previous statements. Mr Billington acknowledged that it remains for this Court, having regard to the independent facts proved in this trial, to determine whether the conduct in relation to Mr Turner's evidence had a tendency to interfere with the course of justice in Mr Hall's case. Nevertheless, he submitted the Supreme Court's decision is highly persuasive in many respects.

[54] Mr Billington also acknowledged that I could disregard the statement that justice miscarried due to either negligence or criminality because that is what I am asked to determine – whether the defendants were criminally involved in a breach of the law. This was a reference to a concluding paragraph in the Supreme Court judgment that featured in the Crown opening in this case:

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

[55] Mr Jones did not accept that the Supreme Court decision is a binding statement of the law on disclosure as at 1986. He submitted it was an oral decision where the Crown had accepted there had been a miscarriage. He submitted the 1986 report of the Criminal Law Reform Committee on the law relating to discovery in criminal cases more accurately stated the law at the relevant time – as being unclear.²⁹

[56] Mr Jones also submitted the Supreme Court decision is inadmissible for the purpose of the factual assessments I am required to make in this case, although he accepted it is relevant that the Supreme Court allowed Mr Hall's appeal and Mr Hall

²⁸ The Supreme Court judgment was admitted by consent as an exhibit in this trial subject to objections on relevance grounds.

²⁹ Criminal Law Reform Committee *Report on Discovery in Criminal Cases* (December 1986).

was acquitted. He submitted I must avoid reverse engineering this case using the Supreme Court judgment.

[57] Mr Wicks took a slightly different position from Mr Jones in relation to the Supreme Court's pronouncements on disclosure at the relevant time. He did not dispute the effect of the Supreme Court judgment as to the law on disclosure but submitted it has to be approached carefully. He noted the Supreme Court judgment refers to the Criminal Law Reform Committee report and earlier cases on disclosure in footnotes and accepted those references are part of the pronouncements on the law.

[58] Mr Wicks also submitted that particular care is required to avoid the influence of hindsight. Knowledge of the Supreme Court's subsequent finding of a miscarriage of justice creates a real risk that decisions and conduct occurring decades earlier will be assessed through the lens of later events, rather than by reference to the information, legal obligations, and practices that existed at the time.

[59] Insofar as the Supreme Court decision states the law on disclosure as at 1986, it is binding on this Court (whether or not the issue was argued in the Supreme Court). The same applies to the earlier Court of Appeal decisions (subject to the Supreme Court decision). I address the law on disclosure – and disclosure practice – at the relevant time below.³⁰

[60] Similarly, insofar as the Supreme Court decision (or a Court of Appeal decision) states the law on admissibility of identification/description evidence as at 1986, it is binding on this Court. I address the law on admissibility of identification/description evidence at the relevant time below.³¹

[61] However, as to the Supreme Court's factual conclusions, the defendants were not parties to or involved in that appeal and the Court acknowledged it was not in a position to determine exactly what happened in relation to some of the matters raised. The Crown's concession in that case that there was either extreme incompetence or a deliberate and wrongful strategy to secure conviction and the Court's factual

³⁰ At [201]-[232].

³¹ At [193]-[200].

conclusions are not binding on the defendants in this case. In any event, rather than the issue being framed as whether what occurred was the result of extreme incompetence or a deliberate and wrongful strategy, this case requires consideration of the defendants' personal involvement and intention in terms of the elements of the offence of wilfully attempting to pervert the course of justice, having regard to the trial principles set out above. Insofar as I refer to the Supreme Court's factual conclusions, I do so for background context. They are not admissible evidence in relation to the elements of the offence in this case.

The facts

[62] As indicated, before turning to the charges, I set out in some detail the facts that provide the basis for my later analysis and inferences.

[63] I acknowledge at the outset that I am conducting the factual assessment approximately 40 years after the event and, as stated above at [21]-[22], that the contemporaneous records are incomplete, relevant witnesses are no longer available and memories of the available witnesses will have been affected by the passage of time. This magnifies the need for care drawing adverse inferences in a circumstantial case. The documentation no longer available includes the defendants' police notebooks, the Crown file (including notes of meetings with police, correspondence, notes of discussions with defence counsel and details of attendances) and the files of defence counsel Mr Peter Williams (who became a QC during the relevant period) and his junior counsel at trial, Mr Orme. Witnesses no longer available include Detective Chief Inspector (DCI) Rowe, Detective Inspector (DI) Ryan, Mr C and [REDACTED].

[64] I am satisfied that the evidence establishes the following facts.

Operation Easton roles

[65] Mr M was a serving police officer for 37 years. He retired in December 1997 at the rank of DI. Mr M was a [REDACTED] at the relevant time. He was appointed [REDACTED] for Operation Easton by his supervisor, DCI Rowe, OC Division Criminal Investigation Branch (CIB), the senior CIB officer for what was then the

South Auckland Division. Operation Easton was Officer M's first appointment [to such a role in] a homicide investigation.

[66] According to the New Zealand Police Criminal Investigation Manual (Manual) at the relevant time, [someone in Officer M's position] was responsible for [several aspects of] the investigation. The evidence indicates that Officer M performed the assigned role [REDACTED] for Operation Easton.

[67] Mr S was a [REDACTED] at the relevant time. He was appointed [REDACTED] for Operation Easton by Officer M. According to the Manual at the relevant time, the responsibilities [REDACTED] of a homicide investigation were:

[REDACTED]

[68] The evidence indicates that Officer S performed the assigned role [REDACTED] for Operation Easton. He would have had an in-depth knowledge of the police file.

[69] DCI Rowe also had an active role in the investigation. He attended the scene on the night of the homicide. He was mentioned in relevant briefing notes for the investigation. He also directed certain key steps, mentioned below. It is perhaps revealing that some witnesses were confused as to the extent of his role. One of the Phase OCs on the investigation thought from memory DCI Rowe was [REDACTED].³² Another Phase OC said that after Mr Hall became a suspect, DCI Rowe [REDACTED]. Mr Bruce Stainton (Mr Hall's solicitor for his appeal) also understood [REDACTED].

[70] Mr C of [REDACTED] was the Crown prosecutor who advised the police, then led the prosecution against Mr Hall and [was involved in] Mr Hall's appeal. Mr C told the Crown Law Office (Crown Law) soon after the application for leave to appeal was filed (in late 1986) that he had been called in shortly after the body of Mr Easton was found and advised the police from this early stage of the inquiry.

³² Phase OCs are the detectives leading each of the separate teams (phases) in the investigation, such as OC Scene and OC Suspects.

Chronology

Homicide

[71] On Sunday 13 October 1985 at approximately 8:05 pm (after dark), police received a 111 call from Brendon Easton, reporting an incident. The transcript of the call included:³³

EASTON	Ah [Brendon] EASTON here of 24A Grove Road, there's a burglar in our place and we've been stabbed.
...	
Control	Whereabouts is the guy
EASTON	Um he ran out and he went through the walkway
Control	Ran out into the walkway. Whereabouts does the walkway go.
EASTON	It's right next to our place and it goes to Alma Cres.
...	
Control	Whats he wearing
EASTON	Are are what was he wearing Bro'
...	
EASTON	Balaclava, jeans
Control	Balaclava. What colours the balaclava
EASTON	What colours the Balaclava?
	It was ah – (2nd voice – Black) ³⁴
EASTON	Black
...	
2nd EASTON	Ah, we've got his balaclava here
Control	You've got the Balaclava there, <i>right can you tell me was he a Maori or a Caucasian.</i>
EASTON	<i>Was he Maori</i> yeah they are Dad the ambulance is on the way.

³³ Emphasis added.

³⁴ The second voice or second Easton referred to in the transcript is Brendon Easton's older brother, Kim Easton.

Control	<i>Yeah, Male, Maori is he</i>
EASTON	<i>Was a Mao, male, it was a Maori or what</i>
2nd EASTON	<i>Maori</i>
Control	How old
EASTON	Pardon. How old Kim?
...	
EASTON	I don't know, about 18 or so
Control	18 or so
Control	About how tall
EASTON (2)	About 6', about the same height as me yes I think so
Control	Okay. What length was his hair
EASTON	What kind of hair. Had a balaclava on.
Control	Yeah
EASTON	Brownish kind of hair I think, Brown, yeah
Control	How long you don't know
...	
EASTON	We, we don't know

[72] Thus, the 111 call included an initial description of the offender as Māori.

[73] The call transcript indicated that during the call, the operator dispatched police units. The operator also communicated to all units an initial description of the offender:

Control	Control 10.1 10.1 description of offender is a male Maori approximately 18 years, 6'tall, Bala, black balaclava and jeans is the only description of clothing. Apparently the balaclava is now in the possession of the three persons at 24A Grove Road.
---------	--

[74] The police initial actions log dated 13 October 1985 recorded the police response to the incident and logged the 111 call received at 8:08 pm, the dispatch of various police units at 8:11 pm and 8:13 pm, and the broadcast of this initial description of the offender at 8:18 pm.

[75] The police log also recorded that at 8:30 pm a police dog handler started tracking down the side of the Easton's house. The dog handler's jobsheet dated 13 October 1985 recorded that he attended the scene to track the offender:

Dog tracked the length of the shed and then jumped the fence. There was a hole where he could get through.

Dog then continued down the walkway to [Alma] Cres. Dog turned left indicating scent on the grass berm as he went around the corner.

Track crossed [Alma] Cres., on an angle to the right hand side of the street and then continued down the footpath towards Shirley [Avenue]. Track continued around the corner of [Alma] on the grass surface to about 40 meters from the intersection.

Track then crossed the Cres., again to the right³⁵ hand side of the road. Again on an angle.

The dog seemed to lose the track about here. I continued to [cast] him in all the directions that I could find without any further success.

[76] It was agreed the total length of the walkway running between Alma Crescent and Grove Road, adjacent to 24A Grove Road, is 107 metres and the distance between the western end of the walkway and the Alma Crescent/Shirley Avenue intersection is 335 metres.

[77] The police log records that the St John ambulance service and a doctor also attended the scene. By approximately 8:37 pm, Arthur Easton had tragically died. The police log indicated that the matter was considered a homicide.

[78] One of the attending St John ambulance officers was Mr Hugh Holt, a volunteer worker.³⁶ In a statement obtained on 15 October 1985,³⁷ he recalled receiving a call to assist sometime between 8:00 pm and 9:00 pm on 13 October 1985 while he was at Middlemore Hospital. After arriving at the scene, he attended to both

³⁵ A note reading "(left??)" is handwritten on the jobsheet below the word right.

³⁶ Mr Holt's evidence was taken as read by consent.

³⁷ The Crown noted that this statement was not provided to the defence. It was provided in September 1988. This non-disclosure does not form part of the charge, and its relevance is limited to being a piece of circumstantial evidence relied on in support of the charge concerning non-disclosure of Mr Turner's previous statements – in different circumstances.

the Easton brothers' injuries. His statement records that while they were in the ambulance and after they had been told their father had died:³⁸

Kim referred to the attacker as a 'black bastard' he said things along the line of "I wish I could have got him". "I wish I had of done more". They actually both said things along this line.

I asked Kim for a description but apart from saying he was a 'black bastard' about 6 foot tall there was nothing further they could add.

...

Both boys definitely referred to the intruder as a 'black bastard'. Brendon did most of the talking and Kim joined in just to confirm what he was saying. ...

...

Both boys said they didn't get a good enough look at the intruder and wouldn't be able to be recognised again.

[79] The police log also indicated that within the first hour Officer M and Officer S were en route to the scene. It also indicated that DCI Rowe attended.

[80] The police log indicated that at 8:57 pm police contacted the orderly officer at Papakura Military Camp. This was to assist in looking for the suspect.³⁹

[81] The police log also stated:

2127 SITREP from scene (Officer M). At 2005hrs an offender described as being male Maori, 18 years, 6' wearing jeans, dark top and balaclava entered the back door at 24A Grove Rd. Ofender (sic) went into one bedroom occupied by 16yr old male. Fight ensued offender stabbed 16 yr old once in back and once in thigh. Offender then went down passageway confronted by deceased. Name EASTON/Arthur aged about 50 years. Offender stabbed EASTON twice in chest and upper body. Another son joined in the fight and was stabbed once in the back.

[82] This description must have been based on the initial description from the Easton brothers.

³⁸ Mr Holt also provided an affidavit to the Hall family's solicitor dated 15 March 1989 stating that Kim and Brendon Easton were certain that the intruder was a "black" person and 6 feet tall.

³⁹ See also below at [156].

[86] It was agreed the width of Clevedon Road where Mr Turner saw the man run across is 12.55 metres.

[87] Mr Turner's sighting was not far from where the dog had lost track of the scent from the scene (40 metres to the corner of Alma Crescent and Shirley Avenue plus just under 100 metres to the corner of Shirley Avenue and Clevedon Road).

[88] On 14 October 1985, Brendon and Kim Easton were interviewed in hospital and statements taken from them. In his evidence, Mr M recalled that as a result of the interviews, he was informed that both the Easton brothers were no longer sure as to the race⁴² of the intruder as they did not see his face. A subsequent police report describing the use of hypnosis in the investigation process records that the Easton brothers could not indicate what race the offender was during an interview with police on the evening of 13 October 1985, within two hours of the offence.⁴³

[89] Also on 14 October 1985, the [REDACTED] daily newspaper, reported on the homicide after interviewing Officer M and provided the following description of the offender:

Detectives are seeking a Maori aged 18 to 20 years, 1.8m (5ft 11in) tall of medium build who wore jeans and a dark top.

[90] That same evening, Officer S completed a directional jobsheet tasking the OC General Enquiries (one of the Phase OCs on the investigation, DS Baker) to have Mr Turner re-seen and a statement taken. Detective Constable Hesketh spoke with Mr Turner and obtained his signed handwritten statement, which was subsequently typed. This signed handwritten statement dated 14 October 1985 relevantly said:⁴⁴

I had been visiting my mother last night. She lives in Alma Crescent which is behind Grove Rd in Papakura.

I left her place at about 8pm last night to go to the A.N.Z. Autobank in Papakura. That's the main Branch on the Great South Rd.

⁴² The terms race and ethnicity were used interchangeably by witnesses and counsel. As ethnicity refers to shared cultural or ancestral identity, whereas race is generally associated with perceived physical characteristics, I use the term race when referring to inferences drawn from observation.

⁴³ This report is addressed further at [103] below.

⁴⁴ Emphasis added.

I got there at 10 past 8pm because I withdrew \$10.00 from the Autobank and it had 2010 hrs on the receipt.

As I left my mothers place which is [address], I drove down to the Intersection of Alma Crescent and Shirley Avenue. There I turned left and stopped at the intersection of Shirley Avenue and Clevedon Rd.

I stopped there just to give way. I looked to my left and I saw this person running across Clevedon Rd. He was really motoring across the Road.

He ran straight to the right of way which leads from Clevedon Rd to Edmund Hillary Ave which is behind Clevedon Rd.

When he got to the Right of way he stopped and looked around behind him. He walked down the right of way a bit and kept looking around and then he ran off down the right of way. It was dark in the right of way and I couldn't see his face when he looked around.

...

I would describe the guy as being a Male Maori and his height would be between 5' 7" and 6'. I am 5' 6" and he was [definitely] taller than me. He was of average build by that I would say your build. When he turned around I could see that he was [definitely] dark skinned, he was not white. I could not see his facial features to recognise him again. By his build and physical features I would say he was in his 20's. He was wearing a dark blue sweat shirt with a hood. By dark blue I mean a blue that is not as dark as new jeans but not a light blue. The guy had the hood up over his head. I did not notice any pattern or stripes on the sweat shirt. He was also wearing jeans. I didn't notice any patches on the jeans or any marks they looked like normal jeans. They were just the natural blue colour.

I didn't notice anything on his feet, by that I mean I didn't notice what he was wearing on his feet.

As I was driving down Alma Cres, and going along the small straight just before Shirley Ave I drove [past] a Police car which was cruising very slowly up Alma Cres without its lights on.

...

[91] On 15 October 1985, [REDACTED] reported Officer M as providing further information, including as to the bayonet used by the offender and the interview with the Easton brothers in hospital the previous day:

Detectives interviewed Mr Easton's two sons in hospital yesterday but they could not add to the description of the intruder. He was thought to be a Maori, aged about 18, about 6ft (180cm) tall, wearing blue jeans and a dark top.

[92] Also on 15 October 1985, an investigation team briefing was held, during which DS Baker communicated Mr Turner's description of the individual running across the road to the general investigation team. This included:

Male Maori, height between 5'7 - 6 ft. average build, definitely dark skinned, couldn't see his facial features, witness would not be able to recognise him again. Could have been 18 or 24/25. Wearing dark blue sweat shirt with hood.
...

[93] Thus, at this stage police were still describing the offender as Māori, definitely dark skinned, despite the uncertainty of the Easton brothers. This was evidently on the basis of Mr Turner's 14 October 1985 description (with the height based on the 13 October 1985 jobsheet).

[94] The same day, police received a call from Mr Phil Cossey, who reported that while driving down Clevedon Road from Grove Road on 13 October 1985, he saw a Māori man run across Clevedon Road from the Grove Road shops, always looking behind him.

[95] On 18 October 1985, [REDACTED] reported that police had completed house-to-house inquiries around Papakura but had not discovered any new leads. The report again referred to Officer M. The report included:

Detectives are searching for a Maori, aged about 18, who was wearing blue jeans and a dark top.

[96] On 20 October 1985, Mr Cossey was interviewed by police and gave a statement, where he recalled a Datsun car was driving ahead of him at the time of the sighting and almost hit the man running across Clevedon Road. Mr Cossey recalled the man appeared to "come from around the corner shop" at the intersection of Grove Road and Clevedon Road and he described the man as a male Māori, about 5'9" and "of a thinnish build, not over thin". An identikit picture of the individual Mr Cossey saw was included with his statement.

[97] It was agreed the distance between the Shirley Avenue/Clevedon Road intersection (Mr Turner's sighting) and the Grove Road/Clevedon Road intersection (Mr Cossey's sighting) is 275 metres.

[98] On 22 October 1985, [REDACTED] reported this sighting and that Officer M said this man may have been an accomplice or a friend of the killer who was not involved in the crime.

[99] The following day, Mr Michael Bungard alerted police that he was the driver of the Datsun car. On 24 October 1985, Officer S sent a directional jobsheet to the OC General Phase, asking for Mr Bungard to be seen and if feasible, an identikit picture prepared. The same day, Mr Bungard was interviewed by police and gave a statement. He referred to turning left out of Grove Road into Clevedon Road and seeing a man running across Clevedon Road in front of him, just past Cameron Street which was on the right. He described the person he had seen as:

... male, dark skinned, you could see it was dark, he was no older than 20 to 21. He was not very tall, about 5 ft to 5 ft 6, or between that. He had quite short fuzzy black hair it seemed to be a small afro type.

No identikit picture completed for Mr Bungard was located on the police file.

[100] There was no suggestion that the man seen by Mr Cossey and Mr Bungard was the offender.

Mr Hall

[101] As Mr M recalled in his evidence, after reaching an impasse as to any particular suspects, he decided to extend the area boundaries for speaking to the public about the hat and bayonet left behind by the offender. These area canvas enquiries were reinstigated on 9 December 1985 and led to a person recognising the hat as belonging to her boyfriend, Mr Gregory Hall. On 10 December 1985, Gregory Hall was interviewed at his home and provided information concerning his purchase of a hat similar to the one police were enquiring about and that his brother, Alan Hall, had a collection of bayonets.

[102] The following day, Alan Hall was uplifted from his workplace and interviewed by police. On 16 December 1985, Alan Hall was reinterviewed for approximately 14 hours. During these interviews, Alan Hall admitted the hat belonged to his brother

and the bayonet was his, but he gave varying explanations as to why he did not have the hat or the bayonet on the night of the homicide.⁴⁵

[103] On 24 January 1986, Officer M authored a report on the use of hypnosis interview techniques with the Easton brothers during the course of the enquiry. In his evidence, Mr M recalled it was DCI Rowe's decision to undertake this hypnosis in an attempt to see whether the Easton brothers could elaborate on the identity of the offender. Ultimately, the hypnosis was unsuccessful in assisting to obtain any further information.

[104] On 30 January 1986, DCI Rowe, Officer M, Officer S and others attended the Easton's home to conduct a reconstruction of the incident with each of the Easton brothers (separately) to assist with their recollection. This led each to say the height of the offender was of a similar height to Constable Lamb (who was approximately 5' 9"). Officer M said this reconstruction was also DCI Rowe's idea.

Mr Turner's further statement

[105] On 19 February 1986, DS White took a further signed handwritten statement from Mr Turner, which was subsequently typed. This signed handwritten statement dated 19 February 1986 said:⁴⁶

I am making this further statement to Detective Sergeant White of the Papakura Police in relation to a sighting I made on the night of the 13th October 1985.

I still feel that the person I saw that night was a maori. His features seemed maori. His stance seemed to be a maori. When I asked my wife to look at this guy I remember saying to my wife "look at that sneaky guy over there.". My wife reckons I said "look at that maori guy". I can't remember if I said that or not.

I am 100% sure he was a maori. That was my immediate impression. I do not feel he was a pakeha, not even a dark skinned one.

⁴⁵ In *Hall v R*, above n 3, Mr Hall's appeal against conviction succeeded on three grounds, including that the evidence obtained from these interviews should have been excluded. The Supreme Court identified a number of concerning features of the interviews, including their length and the involvement of multiple interviewing officers in the absence of a lawyer or support person and initially, absent any caution. The Court further considered that with present day knowledge, Mr Hall's significant disadvantages are readily apparent on even a fairly cursory consideration of the statements. The Crown accepted that even at the time, it was apparent Mr Hall was a vulnerable person: at [37].

⁴⁶ Emphasis added.

On the handwritten statement, it appears that “100%” was originally recorded as “95%”. This was corrected and initialled by Mr Turner.

[106] The clear inference is that this further statement was sought because police recognised that Mr Turner’s earlier description did not match Mr Hall.

Pre-charge meeting with Crown prosecutors

[107] At some point before Mr Hall was charged, Officer S prepared a “Summary of Available Evidence” as a guide for a discussion with the Crown Solicitor in relation to the possible prosecution of Mr Hall. This document included:

INTRODUCTION

This paper is prepared as a guide for discussion with the Crown Solicitor in relation to a possible prosecution of [Alan] HALL for the murder of Arthur James EASTON. What follows is a proposed list of probable witnesses who would be called in the event of a prosecution.

...

6. Ronald Brian TURNER

Will give evidence of leaving his mother’s address at 49 Alma Crescent at about 8 p.m. on the 13.10.1985. He drove down Alma Crescent to the intersection with Shirley Avenue, there turned left and stopped at the intersection of Shirley Avenue and Clevedon Road. He stopped there to give way. He looked to his left and saw a person running across Clevedon Road. The person was really running fast. The person he saw ran straight to the right-of-way which leads from Clevedon Road to Edmund Hillary Avenue which runs parallel with Clevedon Road.

TURNER will give evidence that when this person reached the entrance to the right-of-way, he stopped and looked around behind him. The person he saw then walked down the right-of-way a bit and kept looking around. He then ran off down the right-of-way. TURNER stated that it was dark in the right-of-way and he couldn’t see the person’s face as he looked around.

TURNER describes this person as being a male Maori between 5’7” and 6’ tall, of average build. TURNER is unable to recognise the person again. The person he saw was wearing a dark blue sweat shirt with a hood, and the person had the hood up over his head. The person was also wearing jeans.

TURNER will give evidence that he then carried on to the A.N.Z. Autobank in Papakura where he withdrew \$10. The time on the receipt is 10 minutes past 8. He will produce the receipt. He will give evidence of it taking approximately 5 minutes to drive from the intersection of Shirley Avenue and Clevedon Road to the Autobank.

7. William Ivan Cossey

It is moot whether we should call COSSEY to give evidence or not. His evidence will confuse the issue somewhat, as will the evidence of BUNGARD, the next witness, however if we do not call them we will be obliged to provide copies of their statements to defence so they will probably give the evidence anyway.

[108] Also at some point before Mr Hall was charged, DCI Rowe, Officer M and Officer S had a meeting at [REDACTED] with [REDACTED] and Mr C to discuss the available evidence. There is no contemporaneous record of this meeting, but it was referred to in an undated handwritten document found on the police investigation file (Document 199). Ms Walsh, a Senior Document Examiner for the Police, concluded the author of this document was Mr M,⁴⁷ and Mr M confirmed this in evidence. Mr M could not recall when Document 199 was created, but it must have been at some point after the 1987 Court of Appeal judgment (given reference to that judgment in the document) and before the police investigation file was archived around 1996.⁴⁸ Mr M described Document 199 as an aide memoire for himself for a discussion. Document 199 relevantly included a section headed “Summary of evidence” which Mr M said was referring to the Summary of Available Evidence document referred to above. This section of Document 199 stated:

3 Summary of evidence

Available evidence summarised by [Officer S]
Conference [REDACTED] attending
Self, B.J. ROWE, [Officer S]
[REDACTED]. [Mr C].⁴⁹

Page 5 - Reference to TURNER’s evidence & Maori aspect included

Recollection – [REDACTED] – evidence thin – If we could prove that there was no burglary to Hall’s room – no problem.

– [Mr C] more positive about evidence generally.

⁴⁷ Ms Walsh’s evidence was taken as read by consent.

⁴⁸ See further below at [184].

⁴⁹ This handwritten document located was a photocopy, and the name “[Mr C]” had been written in blue ink onto the photocopied document by an unknown person. Mr M said Mr C was certainly present at the meeting.

[109] These documents indicate that the Crown Solicitor and the Crown prosecutor handling the case were aware of Mr Turner's description of the person he saw as Māori. Mr M said there was no concern by either prosecutor at the pre-charge meeting in terms of Mr Turner's statement involving race. The Crown emphasised the note that Mr C was more positive about the evidence generally than [REDACTED], but I do not infer that related particularly to Mr Turner's evidence. [REDACTED] was noted to say if the Crown could prove Mr Hall's room was not burgled, there would be no problem.⁵⁰

Mr Hall charged

[110] On 2 April 1986, Mr Hall was arrested on charges of murder and aggravated wounding.

Sighting experiment

[111] On 17 or 19 June 1986,⁵¹ DI Ryan (who was not otherwise involved with the investigation), accompanied by DCI Rowe, Officer M and Officer S, conducted a sighting experiment at the intersection of Shirley Avenue and Clevedon Road. DI Ryan's jobsheet included:

The object of the experiment was for me to be able to identify the race of certain persons who would be tasked to run across Clevedon Road, from east of Shirley Avenue and then go down a walk way off Clevedon Road almost opposite the intersection with Shirley Avenue.

Prior to the experiment commencing [Officer M] left the motor vehicle. I parked my vehicle within the intersection in a position I would expect to stop had I been driving out of Shirley Avenue and then turning right onto Clevedon Road to travel towards the Papakura township. I was in the driver's seat.

⁵⁰ This comment refers to Mr Hall's explanation that the hat and bayonet were taken from his bedroom in a burglary.

⁵¹ There is a date discrepancy in the relevant documents, being two jobsheets recording the sighting experiment and a covering letter accompanying them. The covering letter, from DI Ryan is dated 19 June 1986 and records "[a]ttached are my Job Sheets in relation to the experiment ... on the night of 19 June 1986". However, the jobsheet recording DI Ryan's observations identifies the experiment as having occurred on 17 June 1986 at 6:52 pm, although it is signed by DI Ryan on 19 June 1986. By contrast, the jobsheet completed by Officer S recording his supervision of the sighting experiment and the race of the individuals involved identifies the experiment as having occurred on 19 June 1986 at 6:53 pm. Officer S only completed his jobsheet on 2 October 1986, materially later. The Crown suggested he was prompted to do so by Mr Williams' letter to Mr C dated 1 October 1986 (referred to below). That is possible but, as Mr Wicks submitted, Mr C may not even have received that letter by 2 October 1986 given it was sent by post (I cannot make out the date on the received stamp on the letter).

The weather was fine, it was dark, visibility was good if not excellent.

During the experiment targets ran across the road on five occasions and my comments in relation to each are as follows.

It must be emphasized that on no occasion could I be 100% positive of my identification.

1. Appeared to be light skinned, very hard to tell.
2. Unable to define race at all.

After this target had gone down the walk way he was called back at the request of Detective Chief Inspector ROWE and tasked to stand at the walk way entrance and look directly at my car. When he did this I was of the opinion that he was 'possibly' European, but I was not sure.⁵²

3. Opinion formed when he looked around briefly prior to entering the walk way and I thought he was possibly darkish, very hard to tell.
4. Darkish or tanned, very hard to tell.
5. European? Not sure.

[112] Officer S supervised the experiment. His jobsheet recorded:

Supervise the experiment in relation to the TURNER sighting and seeing the persons running across the road. The order in which they went were:

1. Colin SCARLETT (full Caucasian)
2. Stu WILDON (half Maori)
3. Graham ZUILL (with stocking over face) (full Caucasian).
4. Eddie CLARKE (full Maori)
5. Colin SCARLETT (full Caucasian)

[113] It is clear the sighting experiment was conducted to check whether Mr Turner's description was reliable. Mr M recalled that the sighting experiment was directed by DCI Rowe. Although directed and conducted by others, Officer M was aware of, and shared, the concern that Mr Turner's description was not reliable. Officer S must also have been aware of that concern.

⁵² Document 199 records under the heading "Experiment at Clevedon Rd", "what date?" and "[d]one twice". In his evidence Mr M explained that when making these notes, he couldn't recall the specific date that the experiment was carried out on, and he believed "done twice" was a reference to a police officer who was asked to run across the road a second time.

[114] There was some disagreement at trial as to the interpretation of the results of the sighting experiment. The Crown characterised DI Ryan's identifications of the runners as accurate whereas Mr M said that he and others including DCI Rowe and Officer S were concerned the identifications were not accurate. Also, the Crown noted Mr Turner was not asked to identify the runners.

Preparation of briefs of evidence for preliminary hearing (depositions)

[115] At the relevant time in 1986, the Court procedure for indictable offences such as murder included a preliminary hearing (depositions) in the District Court. It was the police's responsibility to prepare briefs of evidence for witnesses, [REDACTED]. In Operation Easton this was the responsibility of Officer S.

[116] At some point after Mr Hall was charged and before his trial commenced, an undated document titled "Evidence to Prove" was prepared, summarising the evidence to be presented against Mr Hall. The document located on the original police file appears to be a combination of two separate documents. Mr M recalled the first document or part was prepared by Officer S.⁵³ This was likely prepared as a roadmap for the preparation of the witness briefs, or else as a summary of the briefs once completed. It refers to Mr Turner's evidence in two places only – that the person he saw running across Clevedon Road was wearing a blue jacket and that he was running in the general direction of Mr Hall's home. It does not otherwise refer to Mr Turner's description of the person. The second document or part also refers to the person's build.

[117] The Manual at the time provided instructions on briefing files, including:

- 4 Before commencing a brief of evidence –
- ...
- (b) Know the file thoroughly. To marshal all the facts, you must be conversant with all statements and reports on the file
- (c) Know the essential ingredients of the offence and any defences for which evidence is to be briefed. Establish ingredients in the briefs

⁵³ The second document or part appears to be more Crown-oriented and therefore was likely prepared within [REDACTED].

- (d) Know the laws of evidence so that all admissible matters will be included and inadmissible matter excluded.
- 5 It is the responsibility of the O/C Case to elicit all the truth in an investigation by clearly and correctly presenting the evidence. ...
- ...
- 7 Prepare briefs from statements, or Job Sheets. Be careful preparing briefs from Job Sheets containing a paraphrase of what a witness has said. Check with the witness before the hearing that the brief is accurate and contains all the evidence he can give.
- 8 When briefing files, ensure -
 - (a) Facts included are accurate and within witness's own knowledge
 - (b) Evidence is relevant and admissible.

[118] The Manual also addressed the following in relation to depositions:

If the Defendant elects trial, depositions will be taken at a preliminary District Court hearing to determine if the prosecution have established a prima facie case. The file order and requirements for depositions are –

- ...
- (k) Briefs with witness statements under
- ...
- (m) Job Sheets

[119] Also, at the relevant time, s 173A of the Summary Proceedings Act 1957 provided for written statements to be admissible as evidence at depositions by consent.

[120] In relation to s 173A statements, the Manual provided:

To prepare and tender evidence pursuant to s173A –

- (a) Obtain an ordinary written statement from witness first, as this may contain useful information inadmissible in evidence eg. hearsay, opinion
- (b) Prepare s173A statement similar to a brief. ...
- (c) Complete statement with admissible evidence
- ...

- (i) Submit file together with Court copies of s173A statements and documentary exhibits to Prosecutor early before hearing. Ensure statements are arranged in order of witnesses.

Pre-depositions meeting with Crown prosecutor

[121] At some point after the sighting experiment but before Mr Hall's depositions hearing scheduled for 24/25 June 1986, Officer M and Officer S had a meeting with Mr C. In his evidence, Mr M said there was an instruction from DCI Rowe to have a discussion with Mr C about whether or not the relevant evidence of Mr Turner should be led. Mr M thought this meeting with Mr C (who was a busy, senior Crown prosecutor) took place at the temporary High Court likely in the lunch adjournment and lasted 15, 20 minutes, perhaps a little longer.

[122] There is no contemporaneous record of this meeting with Mr C, but it was also referred to in Document 199, which relevantly stated:

4 Briefing file

Evidence of TURNER briefed to include details of maori words to effect "I feel / thought he was a maori, I could tell by his manner & stance"

5 Pre deps discussion [Mr C]

Briefs discussed for purpose of 173A. Aspect of how to include experiment to negate 'maori'

[Mr C] of view that TURNER's comments about Maori etc was an opinion he was expressing – not type of evidence that could/should be lead. He considered any attempt to include experiment would tend to discredit him. If raised in xexam – evidence of experiment could be called as rebuttal.

[123] Mr M said this reflected that Mr C advised Officer M and Officer S that Mr Turner's reference to the man he saw being Māori was inadmissible. In relation to the paragraph headed "Briefing file", Mr M said "briefing" was a term colloquially used by police for preparing s 173A statements. His briefing file statement suggests that Mr Turner's s 173A statement was initially drafted to include reference to the person being Māori with words to the effect that Mr Turner felt / thought he was a Māori, he could tell by his manner and stance.

[124] A letter later sent by Mr C [REDACTED] to Crown Law in Wellington, dated 21 October 1986, is also consistent with Document 199's reference to Mr C advising as to the preparation of s 173A statements, relevantly stating:

[Mr C] then advised the Police as to the preparation of the usual Deposition Statements, before presenting the case in the District Court at Otahuhu, when Hall was committed for Trial.

[125] I address this pre-depositions meeting further below.⁵⁴

Finalisation of Mr Turner's s 173A statement

[126] Whether or not Mr Turner's typed s 173A statement was drafted before the pre-depositions meeting with Mr C, the statement was most likely signed by Mr Turner after that meeting. The circumstances of this signing are unclear and Mr Turner, in his evidence in this case, said he could not remember the date it was signed. The signed version was not located on the police file. An unsigned copy (which was the same as the signed version located in the Court file, aside from additional notations in relation to exhibits on the Court version) was on the police file. The s 173A statement may well have been signed on 23 June 1986 when Officer S visited the Turner's address and took a written statement from Mrs Linda Turner (now Linda Burrows), which was then typed. Her statement said:⁵⁵

I was present in the car at the intersection of Shirley Avenue and Clevedon Road on the night of the 13th of October 1985 when my husband Ron TURNER was driving. It was shortly after 8 pm. I was sitting in the front passenger's seat. Ron said something like "Look at that Maori Guy there." When he said this I looked all around but I didn't see anything. I didn't look behind but I looked from side to side and to the front. When I didn't see anything I said "Where?" and Ron indicated across the road and said "There!" I looked but there was nothing there at that stage and Ron said "Oh he's gone now".

[127] However, Mr Turner's affidavit of 22 August 1988 said:⁵⁶

⁵⁴ At [237]-[250].

⁵⁵ The Crown noted that this statement was not provided to the defence. It appears to have been provided in June 1991. This non-disclosure does not form part of the charge, and its relevance is limited to being a piece of circumstantial evidence relied on in support of the charge concerning non-disclosure of Mr Turner's previous statements. I consider it has little relevance in that context given the statement said that she did not see anything.

⁵⁶ This affidavit is referred to further below at [188].

6. THAT on or about the 24th June 1986, a Policeman attended my house. He advised me that the Court required a written statement. He was holding papers and said they had written up my statement and asked me to sign it. I understand this statement was based on my previous statements to the Police.

[128] Whether signed on or about 23 or 24 June 1986, the signed version of Mr Turner's s 173A statement omitted any reference to Mr Turner's earlier description of the man he saw being Māori (or dark skinned). As indicated, the signed version included handwritten exhibit numbers but it is unlikely they had all been inserted when Mr Turner signed.⁵⁷ Omitting those exhibit numbers, the s 173A statement relevantly said:⁵⁸

On the night of Sunday 13 October 1985 I visited my mother who lives in Alma Crescent, Papakura, just behind Grove Road.

I left her place that evening at about 8 p.m. to go to the A.N.Z Autobank which is at the main A.N.Z Bank in Great South Road, Papakura.

I drove down Alma Crescent to the intersection with Shirley Avenue.

I turned left into Shirley Avenue and drove to the intersection of Shirley Avenue and Clevedon Road.

I stopped there to turn right into Clevedon Road.

I stopped to give way.

While I was stopped, I looked to my left and saw a person running across Clevedon Road (demonstrate on Street Plan) – Refer Exhibit '___'.

This person was a male, and he was "really motoring across the road".

He ran straight to the right-of-way which leads from Clevedon Road to Edmund Hillary Avenue which is behind Clevedon Road.

I would describe this male as being between 5'7" and 6'.

He was of average build, about the same build as Detective Constable HESKETH who interviewed me about this matter.

By his build and physical features, I estimated that he was in his twenties.

He was wearing a dark blue sweatshirt with a hood. (Refer Exhibit '___')

⁵⁷ The reference to exhibit 31 (the sweatshirt) was addressed by Mr Turner in his affidavit of 22 August 1988: see below at [188]. I also note that in the Supreme Court the Crown accepted that the statement should not have referred to this exhibit and Mr Turner's statement as read to the Court should not have suggested, as it did, that Mr Turner had identified the sweatshirt in the exhibit. However, that is not raised against the defendants in this case.

⁵⁸ Emphasis added.

The blue was not as dark as new jeans, but it was not a light blue either.

This person had the sweatshirt hood up over his head.

I did not notice any patterns or stripes on the sweatshirt.

He was also wearing jeans.

I did not notice any patches or marks on them.

They were the usual blue colour.

I did not see what he was wearing on his feet.

When he got to the right-of-way he stopped and looked around behind him.

He then walked down the right-of-way a bit and kept looking around, and then he ran off down the right-of-way.

It was dark in the right-of-way and I could not see his face when he looked around.

I did not see his facial features, and I would not be able to recognise him again.

After I lost sight of the person, I drove straight to the Bank.

I got out of my car outside the Bank, walked over, and put my card into the Autobank machine.

I now produce as Exhibit ‘___’ the receipt from the Autobank machine which shows my transaction took place at 8.10 p.m.

I believe that the total time it took me to drive from my mother's place to the bank would have been no more than five minutes.

It would have taken me no more than three or four minutes from the intersection of Shirley Avenue and Clevedon Road.

I remember that it had been raining on that Sunday night, 13 October 1985, and the road was wet.

Later that evening I heard a news broadcast about an incident that had happened in Papakura.

As a result of that and what I had seen at the intersection of Shirley Avenue and Clevedon Road, I telephoned the Papakura Police at about 9.45 p.m.

I told the Policeman I spoke to about what I had seen.

[129] In relation to the omission of the sentence “[w]hen he turned around I could see that he was [definitely] dark skinned, he was not white” which is found in Mr Turner’s 14 October 1985 statement, the Crown submitted it is possible that

Mr Turner was referring to the first of two occasions when the man looked around (when he got to the right of way) whereas he was referring to the second occasion (when the man then walked down the right of way a bit and kept looking around) when he said “I could not see his face when he looked around”. The s 173A statement does not provide for this potential distinction.

[130] Mr M said that Mr Turner’s s 173A statement was finalised according to Mr C’s advice at the pre-depositions meeting. I deal with this below after addressing that meeting.⁵⁹

[131] It is unclear whether Mr Turner was aware of the changes when he signed his s 173A statement. I deal with this below in the context of his 1988 affidavit.⁶⁰

Depositions hearing

[132] Mr Hall’s depositions hearing took place on 24/25 June 1986 in the District Court at Papakura. Mr Hall instructed Mr Peter Williams, an experienced defence lawyer, as defence counsel. Mr Williams instructed Mr Charles Cato, also an experienced lawyer, to appear for Mr Hall at the depositions hearing, about two days beforehand.

[133] It is unclear when Mr Turner’s s 173A statement was provided to the defence but it was likely only shortly before or even on the morning of the depositions hearing. Mr Cato gave evidence that he first received Mr Turner’s s 173A statement during depositions and that he had not previously received or been aware of Mr Turner’s previous statements. I accept that Mr Turner’s previous statements were not disclosed to Mr Hall’s defence counsel before or at depositions.

[134] Mr Cato also said it was not his decision to have witnesses called or their evidence provided through s 173A statements. He said it would have been Mr Williams’ decision, whether made directly with police or with Mr C.

⁵⁹ At [251]-[152].

⁶⁰ At [189].

[135] For whatever reason, Mr Turner's s 173A statement was admitted by consent at the depositions hearing and therefore he was not called to give oral evidence. A record titled "Depositions of Witnesses at Preliminary Hearings" signed by the District Court Judge lists the witnesses at depositions and records whether their evidence was given by consent. Of the 48 witnesses listed, the evidence of 44 was admitted by consent.

[136] The Easton brothers gave evidence at the depositions hearing rather than by way of s 173A statement. Each was questioned briefly about the race of the male intruder, specifically if the man was Māori:

XXD [of Kim Easton] BY MR CATO

...

Did you tell the police that you thought the intruder was a man of about six foot in height? Yes.

Did you tell the police that you thought the man was a Maori? I told Brendon and he told the police.

...

REXD BY [MR C]

You have just told Mr Cato here that you told Brendon the intruder was a [Māori]. Did you see that he was a [Māori]? No.

Can you tell us please why you told Brendon that? We have had past instances where people have entered our property and interfered with it, for example, stealing clothes off the clothes line. My father always referred to those people whom he considered responsible as Maoris and therefore I assumed that the intruder was Maori.

Did you in fact at any stage of this incident see the colour of the intruder's skin? No I did not.

XXD [of Brendon Easton] BY MR CATO

...

Did you ever tell the police that you thought the intruder was about six foot four? I don't know.

Did you ever tell the police that you thought the intruder was a Maori? No.

[137] As Mr Cato said, it appears that their initial statements had been disclosed.

[138] Following the depositions hearing, Mr Hall was committed for trial in the High Court.

[139] On 28 June 1986, a witness summons was served on Mr Turner, requiring his attendance at the trial.

Defence request for information before trial

[140] On 29 August 1986, Mr Williams made a disclosure request to [REDACTED]:

I would be obliged if you would treat this letter as formal notice that the defence require from the crown the following matters:-

1. a copy of any identikit picture and any other material relating thereto;
2. details of any statement obtained from a driver or witness relevant to a Mazda car that apparently almost collided with a person running from the scene of the homicide;
3. details of any other suspects;
4. any other information which be (sic) helpful to the defence.

[141] Mr M said in evidence that he was possibly aware of this request given his role [in the investigation].

[142] On 10 September 1986, Mr C replied to Mr Williams, supplying the identikit picture and copies of the statements of Mr Bungard and Mr Cossey (referred to above at [96] and [99]) relevant to paragraphs 1 and 2 of the request. In reply to paragraphs 3 and 4, Mr C wrote:⁶¹

3. I decline to supply you with a list of persons suspected at various times by the Police, because as you will be aware, this would cover a vast number of persons whose names have now been absolutely cleared. I can advise you, however, that all witnesses interviewed by the Police who saw any part of the incident are being called by the prosecution.
4. I do not consider there is any other information that may be helpful to you that I can now supply.

⁶¹ This letter was not available but was quoted in the 1987 Court of Appeal judgment: *R v Hall*, above n 2, at 626.

Trial

[143] On 15 September 1986, Mr Hall's jury trial commenced in the Auckland High Court. Mr C appeared as senior counsel for the Crown and Mr Williams appeared as senior counsel for Mr Hall. Officer M attended the trial. DCI Rowe also attended the trial, and arranged for a pathologist to give evidence in relation to left-handedness.

[144] Identification was the key issue in the trial.

[145] Although Mr Turner had been summoned to give evidence at trial, his s 173A statement was instead read by consent on 16 September 1986 (after the evidence of the dog handler). A blue jacket with a hood was produced as exhibit 31 and a receipt was produced as exhibit 8. The timing and circumstances of defence counsel's consent to have Mr Turner's evidence read are unclear. In a statement later taken from Mr Turner on 30 March 1988 by a Private Investigator, Mr Jack, engaged on behalf of Mr Hall, Mr Turner stated:⁶²

I did not attend the trial, although the Police had told me I would be required. I was at home waiting when they telephoned me and said that my affidavit (sic) would be sufficient.

[146] During cross-examination of each of the Easton brothers, Mr Williams asked one question about the intruder being Māori. He asked Kim Easton:

After the incident, did you describe the intruder as being a Maori yes.

[147] Mr C addressed this in re-examination:

Why did you describe the intruder as a Maori it was just a guess in the heat of the moment.

Did you see his face at any stage or his skin no.

Explain what led you to say that to guess that in the past we have had people interfering with our property, it has always been [relayed] to me that they were Maoris so I presumed that they were Maoris.

⁶² See further below at [181].

[148] At the conclusion of the evidence, the trial Judge, Prichard J, summed up to the jury on 24 September 1986. The Judge emphasised the Crown case was based on circumstantial evidence. The Judge said:

In the present case the Crown says, with regard to the identity of the person responsible for the death of Arthur Easton, that the [circumstantial] evidence is such as to exclude every reasonable possibility that it was anyone other than the accused Alan Hall. The question for you is whether the evidence satisfies you that there is no other reasonably possible explanation for all that evidence.

...

Now I must refer to the evidence, and in particular to the circumstantial evidence, which the Crown says identifies the accused as the person who inflicted those wounds and caused that death. The defence says that the evidence leaves room for at least a reasonable doubt as to the identity of the intruder.

[149] After referring to a number of evidential matters including Mr Hall's bayonet and his brother's hat which were left at the scene, Mr Hall's explanations for those items, and his evidence about his walk in the vicinity of the address on the evening of the homicide, the Judge referred to the evidence of the Easton brothers and Mr Turner:

Then still dealing with the points which were adverted to by Mr Williams, there is the fact that the Easton boys originally told the police that the intruder was about their own height - and they are six footers. There is the fact that the elder boy Kim originally said that the intruder was a Maori. Later on they both said that the intruder was about the same height as Constable Lamb and he is more like 5ft 8ins and about the same as the accused. Kim said that he was only guessing when he told the police that the intruder was a Maori. If the first description given by the boys was an accurate estimation of the height of the intruder, then obviously the intruder was not Alan Hall. That is what has been put to you. In criminal cases where identification is in issue the defence is always given access to the description first given by the witness to the police. That is because, for obvious reasons, the first description may well be more accurate than later recollections and it enables the defence to test the evidence relative to identity which is given by the witness later on. So they are always given this first report or statement by the witness and that is the reason for it, because it is more likely to be accurate than later recollections. ... Well, I'll say no more about that, but of course if this was an accurate measure of height that these boys gave as 6 foot and that the suspicion that he was a Maori was correct and he really was a Maori, then of course the intruder was not the accused.

...

Perhaps more significant than the fibres on this question of the colour of the shirt worn by the intruder, is the evidence of [Ronald] Turner, who says that shortly after 8 o'clock that night he saw a man run across Clevedon Road into a short-of-way leading from Clevedon Road to [Edmund Hillary Avenue].

He was one of the witnesses who wasn't called and his evidence was read to you and you had parts of it read to you during counsel's address. It is an important piece of evidence. I think I should read it to you because, it has quite a bearing here.

[Judge read Mr Turner's s 173A statement]

That's a pretty important piece of evidence really. But assuming that the man he saw running was the intruder, and he certainly saw a man running in suspicious circumstances in the right vicinity at the right time, then the intruder it would seem, was wearing a blue sweat shirt.

[150] It is fair to note that this part of the Judge's summing up was dealing with points raised by the defence, that Mr Williams' challenge to the evidence of the Easton brothers was more focused on the height discrepancy than on race, and that the focus on Mr Turner's evidence concerned the blue sweatshirt. Even so, the Judge's remark about disclosure of previous statements (in the context of discussing differences in the descriptions of the intruder initially given to police by the Easton brothers) was prescient.⁶³ Crown counsel at the trial, and the defendants if they were present during the summing up as Mr M accepted he was, could have been expected to take the Judge's comment about the defence always being given access to a witness's first description – albeit a comment made in relation to the Easton brothers – and applied it to Mr Turner.

[151] On 26 September 1986, Mr Hall was found guilty of the murder of Arthur Easton and the aggravated wounding of Brendon Easton. Mr Hall was sentenced to life imprisonment.

Defence request for information after trial

[152] On 1 October 1986, Mr Williams wrote to Mr C at [REDACTED]. The letter stated:

The defence is investigating any matters that may be helpful to Alan Hall, and in particular we require your co-operation pursuant to the Official Information Act and common law principles of discovery to supply us with any information that may be of assistance to the appellant.

⁶³ The Supreme Court referred to the Judge's observation and said it "neatly makes the point that although the trial predated the enactment of the Criminal Disclosure Act 2008, the Crown (as it accepts) did not meet its disclosure obligations": at [19].

In particular we are interested in the suspect Ringrose and we require copies of all documents on the police files relating to this suspect as we intend to re-interview the witnesses connected with this aspect of the case.

The defence also wishes to inquire as to whether the deceased said anything to anybody prior to his death that may have a bearing on the case, and again we would request copies of any documents relating to this aspect of the case.

In the interests of justice the defence require to interview the Easton brothers Kim and [Brendon] and again your co-operation is solicited in this regard.

[153] A copy of this letter was found on the police file. Although Mr M did not remember the letter, he was likely aware of it as he was aware of the request to interview the Easton brothers and he was sent Mrs Easton's response dated 18 October 1986 declining the request to interview them.

Appeal

[154] On 10 October 1986, an application for leave to appeal against conviction to the Court of Appeal was filed on behalf of Mr Hall.

[155] There is no record of a response from Mr C to Mr Williams' 1 October 1986 letter. However, on 26 November 1986, Officer S wrote to Mr C in relation to the request for further information, stating:

Correspondence from the defence counsel, Mr P A WILLIAMS, dated 1 October 1986 refers.

As discussed with you the request made in the first paragraph of Mr WILLIAM'S letter cannot be complied with as we are not aware of any information that could be of assistance to the Appellant.

Papers as requested in relation to RINGROSE are attached.

In relation to the request contained in the third paragraph of Mr WILLIAM'S letter, I have attached an extract from the statement of Jeannette KIDD which covers this area.

I believe that you have had communication from [Officer M] in regard to the request contained in the fourth paragraph of the same letter.

[156] On 10 April 1987, Mr Stainton, who had become Mr Hall's solicitor for his appeal, wrote to [REDACTED] with further disclosure requests, copying Officer S on the basis that the information was sought urgently. Albeit focused on Mr Ringrose, a

Māori man who Mr Hall's counsel considered to be the suspect killer, Mr Stainton's letter stated:

We have been advised that after the murder Police gave instructions to the military authorities at Papakura, to look for a 6 foot Maori who was the suspect murderer. Please provide copies of the bulletin put out within the Police and/or to others describing the suspect person, and if more than one bulletin, bulletins at each stage of the investigation.

A copy is forwarded to [Officer S], [REDACTED] as we seek this information urgently.

[157] On 27 April 1987, Mr C [REDACTED] responded to Mr Stainton's firm, copying Officer M. Mr C's letter indicated that the appeal would not proceed on the scheduled date of 14 May 1987. Relevantly, the letter also stated:

The Crown has never accepted that discovery of the Police file as such is available to you, but within the terms of both recent decisions in,

R. v. Wickcliffe (sic)

has co-operated with you to date in supplying a good deal of information and I do have instructions to comply with your requests dated 10 April 1987 insofar as this is possible. I should also tell you that I have taken steps to ensure that a representative of the New Zealand Police at Papakura is available at the Court of Appeal hearing to answer any further queries from the Police file directly should the Court of Appeal so order.

I now refer specifically to each of your requests as follows:

...

- (e) You then request information contained in bulletins put out by the Police either internally or to the Public at large. I now supply you with a copy of these bulletins, although I do recall that the previous instructing Solicitor, Mr A. Orme, had all of these available on his file prior to trial.

I do however also forward to you one bulletin relating to a shoe which as you will see is marked "confidential" and I trust you will respect the status of it. The salient feature of all these bulletins is that they appear to illustrate that you are misinformed to the extent that the Police never attempted to describe the person they were looking for in these bulletins. It was a case of trying to obtain information relating to the bayonet, hat and the shoe.

[158] Although the letter was said to be copied to Officer M, a copy of the final letter was not on the police file. However, a draft of the letter – in materially similar terms – was found on the police file. Thus, Mr M likely saw the request and Mr C's response

of 27 April 1987, at least in draft. There was likely a discussion between Mr C and Officer M and/or Officer S.

[159] Also on 27 April 1987, Mr C wrote to DCI Rowe, requesting the assistance of Officer M and Officer S at the Court of Appeal hearing.

[160] On 5 May 1987, Mr Stainton responded to Mr C's letter of 27 April 1987. Relevantly, the letter stated:⁶⁴

We regret the delay also, but in addition to Mr Williams Q.C.'s unavailability we note our grounds for appeal are expanded to include both fresh evidence and failure by the Crown to supply the defence prior to trial with exculpatory information. Your present stance does not allow us to proceed to fullest preparation of our Points on Appeal – a point no doubt you would appreciate.

I deal with each matter of reply in your letter as follows:–

- a) 1) We understand a Police file relating to evidence gathered against an accused is available under the Official Information Act 1982. We formally give notice by Alan Hall, through his Solicitors that all requests for documents and information held by the Police are pursuant to the Official Information Act 1982. We request you now deal with our letter 12th April as such an official request and such further requests contained herein.
- 2) We understand the Trial Solicitor made a request prior to the trial to provide names and addresses of witnesses not to be called. Why was the defence not advised at least of the existence of a person interviewed with possible exculpatory evidence as contained in Job Sheet 053/0/1.
- 3) The Police may have viewed the information as unreliable, but that is not the test for the Crown's obligation to the defence not to disclose information. We appreciate the Police view but must press for the Job Sheet to present to the Court of Appeal.

...

- c) Thank you for your information. *Our request as to Ringrose is now broadened to any job sheets containing information as to any person leaving the property or moving through an adjacent alleyway and across a road, in the neighbourhood of the property, and in particular containing information that a person running across a road was nearly run over by a passing motorist.*

⁶⁴ Emphasis added.

[161] On 8 June 1987, Mr Stainton wrote a further letter to Mr C:

I enclose herewith copy of further grounds for appeal and also a copy of an affidavit by Brett Douglas Young and a copy of a further affidavit by Gregory James Hall.

You will see by the further grounds of appeal that the defence wish to aver to any potential evidence that might be consistent with Ringrose being the murderer. It is vital, therefore, that you hand to us all information pertinent to that allegation. It is impossible for us to designate with specificity what police jobsheets we require or indeed what information we require as we have not had the advantage of perusing the Police file.

In the final analysis the defence must rely upon you[r] personal assurance that you have handed to us all information relevant to this subject. If you consider there is any legal reason for not handing to us particular information, then we would be obliged if you would have this information available for perusal by members of the Court of Appeal so that they can determine the validity of any legal basis you may claim for not handing such information over to the defence. This would include jobsheet no. 053/0/1, the Job Sheet described by you as identifying the Informant.

Can we please have a reply to our letter 5th May. Please treat the requests contained in this letter as urgent.

[162] Copies of all of the disclosure requests made in the period after trial and before the appeal were located on the original police file, including letters which were not on their face copied to any police officers.

[163] Mr Hall's further grounds for appeal relevantly included:

19. That if the prosecution had handed to the defence prior to trial all the information in its possession relating to Ringrose, the following submissions would have been made by the defence to the jury in support of the proposition that the Easton homicide was committed by Ringrose.

(i) Ringrose gave a false alibi to the police in relation to the Easton homicide.

(ii) Ringrose by his own admission had a previous criminal association with the deceased Easton, he Ringrose having supplied Easton with stolen property.

(iii) Ringrose, as a previous associate of Easton, would have known the layout of the Easton home and gardens.

(iv) Ringrose fits the description of the offender as given by the Easton brothers at their first interviews by the police.

(v) Ringrose is similar in appearance to the person depicted in the identikit picture.

(vi) Ringrose has a history of violent offending known to the police and also apparently a criminal history of convictions for violence and dishonesty.

(vii) Witnesses near the scene of the homicide at about the time of the homicide must have given information to the police which was later used by the police to form the identikit picture, and this information must have described a person similar in appearance to Ringrose.

[164] On 22 June 1987, Mr C responded to Mr Stainton's letters of 5 May 1987 and 8 June 1987, replying specifically to the various requests:⁶⁵

I refer to your letters of 5 May 1987 and more recently 8 June 1987 together with our brief discussion in the High Court at Auckland. I apologise for the length of time that has elapsed in these my replies to you but as I hope you will appreciate *the information you requested has meant a considerable amount of research between myself and the New Zealand Police. As you will appreciate I do not now have any access myself to the Police files which has compounded the difficulties.*

[REDACTED]

I now reply to your letter of 5 May 1987.

As to paragraph a(1) :- I have consulted with the Police on this matter and am in a position to advise you that all information you have requested at any time, available under the Official Information Act 1982 has been given to you. If there are any further queries however please do not hesitate to contact me and I will assist you further. However I do not know of any further information that can assist you.

As to paragraph a(2) :- The job sheet you speak of is the record of an interview with an informant as you now. This informant was repeating information that he had heard from someone else and was clearly of a hearsay nature. Prior to trial we advised the Crown Solicitor's office of the source of this information and the enquiries we had made to verify it. I can assure you there is absolutely no to use your words "exculpatory evidence" contained in this job sheet. As you will now know and contrary to certain statements in your correspondence you now have job sheet 053/0/1.

As to paragraph a(3) :- You state that the Police may have viewed the information as unreliable and quite correctly you state that this is not the test for the Crown's obligations to disclose information to the Defence. However the situation was a little different to that in that in that the matters involved in the job sheet were fully investigated and the information was found to be untrue. I can only reiterate what I have already said to you that you have in

⁶⁵ Emphasis added.

your possession the entire job sheet 053/0/1 and indeed all its surrounding job sheets. There is nothing further I can supply to you, as nothing further exists.

...

As to paragraph c :- I can advise you that there is no information on file as to the person seen leaving the property or moving through an adjacent alleyway. There is no-one that falls into this category. However as you will know you had available at trial the sworn evidence of a Mr Turner who was a witness to a person crossing the road between Shirley [Avenue] and Clevedon Road. I do not regard this to be within the geographical compass set out by you or indeed the available evidence at trial. In addition and in an effort to assist you I will also enclose for your information two other job sheets relating to sightings by a Mr Bungard and a Mr Cossey of persons again in the general area but not within the geographical compass that you again speak of.

I consider that you have available all job sheets requested and relevant to these matters. ...

[165] The written submissions on behalf of Mr Hall for the Court of Appeal referred to the evidence of Mr Turner. In support of the submission that the verdict was against the weight of evidence and a miscarriage of justice had occurred, the submissions included:

(bb) The witness Turner described a person running from the direction of the homicide house at the relevant time and said that person was wearing jeans and a dark blue sweatshirt. Blue fibres were found in the hedge at the gap referred to above. The Appellant's sister however deposed that when the Appellant returned from his walk he was wearing brown trousers and a bright red sweatshirt, and this accords with the descriptions of clothing that the Appellant himself gave as to what he was wearing on the night of the homicide when he was interviewed by the police.

[166] The submissions also referred to the evidence of Mr Turner alongside the Easton brothers' initial description of the intruder as Māori, in support of the submission that in combination the prosecutor and trial Judge denied Mr Hall a fair trial:

(n) At page 32 of his summing up His Honour refers to the evidence of Andrea Hall concerning inter alia the Appellant on his return from the walk wearing a bright red sweatshirt, and she thought brown pants, and that he appeared quite normal. This evidence conflicts with the suggestion by the Crown witness Turner that the intruder was wearing a dark blue sweatshirt consistent with the colour of the fibres found on the hedge.

...

(y) Six Foot Maori

The Easton brothers had both described the intruder originally as a six foot Maori. His Honour reminds the jury in reference to the word “Maori” that this was only a guess (page 45), and at page 46 he suggests to the jury that any estimation of height might well be inaccurate. Further at page 47 he attempts to rationalise the Easton brothers' evidence by inferring they were deceived as to height by the intruder wearing the cap.

...

(cc) Blue Sweatshirt

His Honour at page 49 read the evidence of Ronald Brian Turner who gave evidence that the person running across Clevedon Road which is proximate to the homicide house at about the time of the homicide was wearing a dark blue sweatshirt.

[167] [REDACTED]’s memorandum of submissions for the Crown in the Court of Appeal, dated 2 July 1987, referred to the evidence leading to the identification of the intruder before addressing the grounds of appeal. After quoting the description of the man seen by Mr Turner, as outlined in his s 173A statement, [REDACTED]’s submissions stated:

This witness did not however catch sight of the man’s face. A close perusal of the street map (Exhibit 44) indicates that this was not only around the time that the intruder left the house but was obviously in the close vicinity of the area.

Therefore the Crown case was that the intruder had a good knowledge of the area in question and in particular of the alleyway running beside Mr Easton's home and another alleyway leading into Edmund Hillary Avenue.

[168] Turning to the non-disclosure grounds of appeal, [REDACTED]’s submissions for the Crown included:⁶⁶

(ii) As to Ground 12

The Respondent acknowledges that most of the above information was only supplied to the Appellant after trial. *The Respondent acknowledges an obligation to supply the details of any evidence known to the Crown which may tend to exculpate an Accused from involvement in the crime with which he is charged.* However the only information in the possession of the Police regarding Mr Ringrose was

⁶⁶ Emphasis added. The point emphasised is consistent with Mr Cato’s advice to Mr Stainton in a letter of 17 June 1987, which considered “it may be argued that if the Crown has in its possession evidence exculpating the accused, it should be disclosed” – albeit the focus there too was on Ringrose.

from an unnamed informant who had received it from a third person.
...

(v) As to Ground 19

The Appellant here states that if the Prosecution had handed to the Defence all the information relating to Ringrose certain submissions could have been made to the Jury.

...

As to 6:- *The only witnesses to persons in the vicinity around the time of the attack were motorists travelling along Clevedon Road by the name of Mr Bungard and also a Mr Cossey. Neither of these persons gave descriptions which resembled Mr Ringrose and details of their statements to the Police have of course been supplied to the Appellant[.]*

Conclusion: In summary there was never any information to implicate Ringrose in the attack upon Mr Easton. At best an informant had repeated what he had heard from a friend and even this was fully investigated by the Police. In addition witnesses were spoken to who could clearly give an alibi for Ringrose around the time of the attack.

The Respondent has also further investigated the information given to Detective Tomoana in Job Sheet 053/0/1, relative to the identity of the informant and indeed the original source of his information. Should this Honourable Court so require affidavits are available which prove the information to be false.

[169] Mr M said he did not see the submissions.

[170] The Court of Appeal hearing took place on 7 July 1987. Officer M and Officer S travelled to Wellington for the appeal to assist [REDACTED] with requests for copies of documents from the police file, but Mr M said they did not attend the hearing itself. Mr Stainton did not recall seeing them at the hearing.

Appeal decision

[171] On 27 August 1987, the Court of Appeal dismissed Mr Hall's application for leave to appeal. It is evident from the Court's judgment that the grounds of appeal

relating to non-disclosure of information focused on Mr Ringrose being the perpetrator.⁶⁷

[172] When summarising the facts, the Court noted the Easton brothers could not describe the intruder's face but described him as a Māori about six feet in height. The Court also referred to Mr Hall being interviewed as a result of the inquiries relating to the hat and bayonet, his admission that he had owned the bayonet and had been in possession of the hat which belonged to his brother, and various explanations he gave for why they were not in his possession on the night of the murder.⁶⁸ The Court then outlined the weaknesses in the Crown case identified by Mr Williams, including that the Easton brothers' initial description of the intruder being a six foot Māori did not match Mr Hall, neither of the Easton brothers had identified Mr Hall as the intruder, and Mr Turner's description of the man he saw running from the direction of the Easton house, wearing a dark blue sweatshirt with a hood, was consistent with the blue fibres found at the gap in the hedge on the Easton property through which the intruder left the scene, whereas Mr Hall and his sister said he was wearing a red sweatshirt.⁶⁹

[173] Dealing with the non-disclosure grounds of appeal, the Court set out the relevant part of Mr Williams' letter of 29 August 1986 and Mr C's reply quoted above (at [140]-[142]). After referring to an aspect that is not relevant here, the Court said:⁷⁰

Mr Williams did not seek any information concerning Ringrose but he did ask in para 4 for any other information which might be helpful to the defence. From police jobsheets provided after the trial he has claimed that these revealed information concerning Ringrose which ought to have been made known to the defence prior to the trial. ...

...

The existence of Ringrose as a suspect had been made known to the defence. The defence was also aware before the trial that Ringrose was no longer a suspect as the police were satisfied with his alibi. Had the defence wished to

⁶⁷ *R v Hall*, above n 2, at 618.

⁶⁸ At 619.

⁶⁹ At 619.

⁷⁰ At 627-628. Emphasis added. I also note the Supreme Court recorded the Crown's concession that more information should have been disclosed and concluded that these omissions were obviously important in the context of what was largely a circumstantial case. Given they were not apparent on the earlier appeal, these omissions also provided a basis for differing from the position adopted in the Court of Appeal. Again, on the basis of this ground alone, the Supreme Court was satisfied that a substantial miscarriage of justice had occurred: at [32].

make further enquiries of the Crown why Ringrose had been a suspect they were at liberty to do so. This is not a case in which the prosecution has failed to make available to the defence a person who can give material evidence and has decided not to call him, nor is it a case in which the prosecution has a statement of a witness which tends to show the appellant to be innocent and has not called that witness nor made his statement available to the defence (see *R v Mason* [1975] 2 NZLR 289 (SC) and [1976] 2 NZLR 122 (CA)). *This is not a case in which the Crown has not disclosed to the defence that a witness has said something in conflict with evidence given at the trial (see R v Wickliffe [1986] 1 NZLR 4 as regards an allegation of that kind). ...*

...

It would be unreasonable to impose on the Crown an obligation to seek out from the extensive police enquiries facts which ultimately are not relevant to the case against the accused but which might assist some aspect of the defence case which has not been made known to the Crown. However, should the defence wish to pursue a particular inquiry which is made known to the Crown, then in the interests of justice the Crown should assist by supplying any information it has available relevant to that inquiry. The more co-operative the Crown is with reasonable and specific requests from the defence before the trial the less likely will there be problems after the trial when police jobsheets are inspected. If any difficulty arises, the circumstances may warrant the Court making an order for the information to be supplied. (See *R v Mason* [1976] 2 NZLR 122.) But a general enquiry by the defence for any information which may be helpful to the defence, as was made in this case, is too vague and requires no more of the Crown than to comply with the well-established principles requiring the Crown in certain circumstances to make available to the defence, witnesses or their statements as the case may be. *The Crown should also disclose any conflict that may be material between the evidence of a witness and other statements made by the witness and known to the prosecution. Apart from these principles the Crown should act with the utmost candour and fairness making a full, adequate and impartial presentation of the facts.* (see *Adams on Criminal Law* (2nd ed) para 3034).

Defence request for information after appeal

[174] On 15 December 1987, Mr Stainton wrote to Officer S. By this time, the Crown prosecutor was no longer instructed. Mr Stainton said they were circling back on what they might have missed. This request letter specifically included:

We would also be pleased if you would forward to us pursuant to the Official Information Act, all copies of the [Easton] boys' statements from the first statement given on the night of the homicide to any statement prior to final trial. We undertake to pay the photocopying costs of same. We also seek [copies] under the Official Information Act of the statements made by Ronald Brian Turner. These statements are part of the continuing inquiry by this office, and we undertake to ensure that there is no improper use of the same.

[175] Although defence counsel's files are no longer available, this request suggests that, to that point, neither the Easton brothers' initial statements nor Mr Turner's previous statements had been disclosed to Mr Hall's lawyers. However, as Mr Cato said, it appears that the Easton brothers' initial statements had been disclosed. Mr Williams cross-examined Brendon Easton at trial about his statement given on 14 October 1985. This perhaps highlights the incomplete record available in this trial.

[176] Even so, it is not disputed, and I conclude, that Mr Turner's previous statements were not disclosed to the defence until after the 1987 Court of Appeal decision. That is consistent with Mr Stainton's evidence that in preparation for the appeal he did not have Mr Turner's statements dated 14 October 1985 or 19 February 1986.

[177] On 10 February 1988, Mr Stainton wrote again to Officer S requesting an answer to his 15 December 1987 letter and enclosing a letter from Mr Hall's mother, Mrs Shirley Hall, requesting various statements and jobsheets.

[178] On 16 February 1988, Officer S responded to Mr Stainton. The response included:

In relation to your letter of 15 December 1987:

...

2. I enclose copies of the statement you requested.

[179] The available record does not include the statement or statements enclosed with this letter. However, a subsequent letter written by Mrs Hall to Mr Stainton, dated 3 March 1988, indicates that Mr Turner's statement of 14 October 1985 had been disclosed by that date. In identifying potentially useful documents, Mrs Hall referred to "[j]obsheet etc. on unlighted police-car, cruising up Alma Crescent from Shirely Road at 8.05- 8.06p.m, 13/10/85" – a description closely corresponding with a reference in Mr Turner's 14 October 1985 statement to "a Police car which was cruising very slowly up Alma Cres without its lights on" which indicates the statement had been disclosed.

Subsequent events

[180] Following the Court of Appeal's decision, Mrs Hall applied on Mr Hall's behalf for the exercise of the royal prerogative of mercy. In a letter dated 9 March 1988, the Official Secretary on behalf of the Governor General acknowledged Mrs Hall's application and declined it on the basis that the grounds advanced were considered to be the same as those in support of Mr Hall's appeal before the Court of Appeal and therefore no fresh evidence had been produced justifying a re-opening of the case.

[181] On 30 March 1988, the Private Investigator Mr Jack took a handwritten statement from Mr Turner, which was then typed. This signed handwritten statement said:

In relation to statements I made to the Police and the subsequent affidavit I signed, it has been pointed out that the description of a male person, that I saw running across Clevedon Road, Papakura on the 13th of October 1985 at about 8pm is inconsistent.

The person I saw was a Maori and I do not understand why the description in my affidavit does not include the word Maori in front of "male". I did not mean to exclude it, and the document was typed by the Police. The affidavit was signed by me at my home [address] after police came to my door.⁷¹

When I made my second statement on the 19th of February 1986 to Detective Sergeant J.R. WHITE I was questioned as to whether I was sure the man I mention was a Maori and as in my statement I said that I was 100% sure he was a Maori and I still hold that belief.

I did not attend the trial, although the police had told me I would be required. I was at home waiting when they telephoned me [and]⁷² said that my affidavit (sic) would be sufficient.

[182] This indicates that, by this date, Mr Turner's statements of 14 October 1985 and 19 February 1986 had been disclosed to Mr Hall's lawyers.⁷³ Mr Stainton did not know if he saw Constable Walker's 13 October 1985 jobsheet until later, but it was sought in Mrs Hall's letter of 3 March 1988.

⁷¹ This sentence was omitted from the typed version.

⁷² In the handwritten statement, this is recorded as "I", however it has been corrected to "and" in the typed version.

⁷³ See also Mr Turner's 22 August 1988 affidavit below at [188].

[183] Mrs Hall made a second application for the exercise of the royal prerogative of mercy. This application was based on statements and jobsheets obtained from police after Mr Hall's unsuccessful application for leave to appeal, including Mr Turner's previous statements describing the person he saw running as Māori, as well as statements from the Easton brothers related to the handedness of the intruder. In a letter to Mrs Hall dated 16 June 1988, the Official Secretary on behalf of the Governor General declined this second application. He said:⁷⁴

Your application demonstrates that there were certain inconsistencies between statements made to the Police and evidence given at your son's trial. Nevertheless, these inconsistencies, individually and collectively, do not have high probative value. Against the background of all the material placed before the court, the statements which have now been produced do not amount to fresh evidence of sufficient significance or cogency to place your son's conviction in doubt.

[184] Document 199 handwritten by Officer M was likely prepared around the time of disclosure of Mr Turner's previous statements or the second application for the exercise of the royal prerogative of mercy in 1988. It was likely prepared for a discussion about why Mr Turner's previous statements had not been disclosed earlier. I now set out Document 199 in full for completeness:

- 1 Initial Maori explanation

negated by Kim EASTON & Brendon EASTON night of Homicide.
Later expanded on by Kim
- 2 TURNER – Job sheet 13.10.85. 2145 hrs.

Subsequent to news report?

– Statement 14.10.85

19.2.86

Contradictions/ unreliable/ fleeting glimpse
- 3 Summary of evidence

Available evidence summarised by [Officer S]
Conference [REDACTED] attending
Self, B.J. ROWE, [Officer S]
[REDACTED]. [Mr C].

⁷⁴ I address the Crown's objection to the royal prerogative of mercy documentation below at [191] and its admissibility at [282]-[284].

Recollection – [REDACTED] – evidence thin – If we could prove that there was no burglary to Hall's room – no problem.

– [Mr C] more positive about evidence generally.

3 (sic) Experiment at Clevedon Rd

- What date?
- Done twice

4 Briefing file

Evidence of TURNER briefed to include details of maori words to effect "I feel / thought he was a maori, I could tell by his manner & stance"

5 Pre deps discussion [Mr C]

Briefs discussed for purpose of 173A. Aspect of how to include experiment to negate 'maori'

[Mr C] of view that TURNER's comments about Maori etc was an opinion he was expressing – not type of evidence that could/should be lead. He considered any attempt to include experiment would tend to discredit him. If raised in xexam – evidence of experiment could be called as rebuttal.

6 Pre trial requests by Defence – answered by [Mr C] – see C.Appeal judgment page 21

7 Defence tactics

Info from [name] that defence going to call perjured evidence, [name] & others going to say they saw Ringrose & [name] come out of Easton's house.

8 Above looked at. - other aspects of [name] subject to run around.

Ringrose interviewed – Denial once again. alleged admission he knew EASTON – verbal statement that HALL had coughed on remand. –

Above discussed with [Mr C]. decision not to call Ringrose – wait to see tac being taken by Defence.

9 Post trial appn by Defence & Notice of Appeal centering on Ringrose as [offender]. –

[...] submissions to Ct Appeal. – included as exhibit annexed copies of correspondence sent by [Mr C].

Aspect of correspondence referred by Ct Appeal pages 21 – 26.

[185] An unsigned and undated original handwritten document was also located in the Operation Easton police file, listing various points in relation to witnesses Mr Bungard, Mr Cossey and Mr Turner (Document 150). The Document Examiner, Ms Walsh, concluded the author of Document 150 was Officer S. Indentations indicated that Document 150 had been partly handwritten while resting on top of Document 199. Thus, Officer S created Document 150 after Officer M created Document 199. Document 150 stated:

1 Bungard + Cossey Supplied to Defence (not called.)
2 Called TURNER.
 Left out Police car too because knew WRONG.
3 after BROADCAST STATING MAORI.
4 VALUE OF EVIDENCE TO PROSEUTION OR Defence.

1 JOB [SHEETS] WHITE + HESKETH.
 re TURNER,
2 JOB SHEETS Ned RYAN RE EXPERIMENTS.
 094.
 TURNBULL.
 MASON.
 WICKLIFFE.

[186] Officer S's reference to "Left out Police car too because knew WRONG" suggests that Document 150 was created after he saw a copy Mrs Hall's letter of 3 March 1988 to Mr Stainton referred to above.

[187] There is no evidence as to how or when Officer S came to be made aware of the case names noted. It may have been after the Court of Appeal decision.

[188] On 22 August 1988, Mr Turner swore an affidavit prepared by Mr Stainton's firm which stated:

1. I saw a person running across Clevedon Road, Papakura, on the 13th October 1985, at about 8 p.m.
2. THAT when I heard on the radio of Mr Easton's murder, I telephoned the Police and advised them what I saw. I identified the person as a male Maori.
3. THAT on the 14th October 1985, I made a statement in writing to a Policeman. A copy of that statement is annexed hereto marked with the letter "A".
4. ON the 19th February 1986, I was further interviewed by Detective Sergeant I.R. White who wanted me to make a further statement. The Detective concentrated his questions on whether the man I saw was a Maori. He was questioning me as to whether I was certain the man was a Maori.
5. THE Detective was going over the matter of identity of race a number of times, and appeared to be trying to get me to be uncertain or change my mind as to whether I could say the man I saw was a Maori. I remained firm in my clear belief and recollection that the man I saw was a Maori, as noted in the statement attached hereto marked with the letter "B".
6. THAT on or about the 24th June 1986, a Policeman attended my house. He advised me that the Court required a written statement. He was holding papers and said they had written up my statement and asked me to sign it. I understand this statement was based on my previous statements to the Police.
7. THE statement annexed hereto marked with the letter "C" is a copy of that statement the Policeman asked me to sign for the Court. I understood I would be called to give evidence.
8. I was later told by the Police I would not need to attend the Court to give evidence.
9. I have now re-read my Court statement and compared it with my earlier statement to the Police. I now note the important point that I definitely identified the person as being of Maori race, has been omitted from my Court statement. I did not intend to exclude it and did not realise it had been omitted.
10. I am extremely surprised at this omission, not apparent to me before, particularly after the Police Sergeant had tested me at length on this very point, and made an issue of it.
11. I still believe that the person I saw that night was a Maori person and that would have been evidence if called to Court, and the Police certainly knew that I was definite in that identification.
12. I am now aware that my statement was read to the Jury in the trial of a European. I know that the person I saw running across Clevedon Road that night was not a European, not even a dark skinned European.
13. I am concerned if the Police having drafted and obtained my signature on the Court statement have used that statement as evidence to suggest it was

a European I saw running across Clevedon Road on the 13th October 1985, as that would be quite incorrect. It was definitely not what I saw, and the Police are aware of that.

14. THIS matter has been brought to my attention for the first time on the 30th March 1988, when I made a statement to L.S. Jack, Private Investigator, and wish to ensure the error is corrected.

15. I note that my statement refers to Exhibit 31. I was never shown any article, and so could not identify any exhibit as being worn by the Maori I saw that night.

[189] It appears the Supreme Court accepted Mr Turner's unchallenged affidavit evidence that when he signed his s 173A statement, he did not notice the omission of the description of the race of the man he saw. Mr Turner's evidence in this Court was to the same effect; however, in cross-examination he confirmed that he knew he was signing it for a murder trial and read through it, including the declaration it was true and then signed it. It is unnecessary for me to make a finding as to Mr Turner's understanding in June 1986. But the limited evidence about the circumstances of the signing of his s 173A statement does not permit an inference that he was deliberately misled by police when asked to sign it.

[190] There was a third application for the exercise of the royal prerogative of mercy on behalf of Mr Hall. This application argued that the advice tendered in respect of the previous application did not fairly assess the cogency and weight that could be attached to Mr Turner's previous statements. In a letter dated 7 July 1993, the Minister of Justice provided advice to the Official Secretary to the Governor-General on the third application. The Minister advised that the application be declined, as the evidence provided did not add anything new that was considered material. An earlier letter from the Secretary of Justice to the Minister of Justice dated 3 June 1993 appears to have formed the basis for the Minister's advice.

[191] In the cross-examination of both acting DSS Cleary and Mr Stainton, the defence drew attention to Mr Hall's unsuccessful second and third applications for the royal prerogative of mercy despite the disclosure of Mr Turner's previous statements. During the cross-examination of Mr Stainton, the Crown recorded an objection to the admissibility of the prerogative of mercy documentation (for determination in my

decision). I address this below in the context of whether non-disclosure had a tendency to prevent a court from doing justice.⁷⁵

[192] On 8 June 2022, the Supreme Court heard and allowed Mr Hall’s appeal against conviction.

Applicable legal principles

Admissibility of identification/description evidence in the relevant period

[193] Given the issue concerning the omission of the word Māori from Mr Turner’s statement, it is necessary to consider the admissibility of identification and description evidence during the relevant period.

[194] It is common ground that identification evidence is a species of opinion evidence. As an exception to the inadmissibility of opinion evidence, at common law (and now under the Evidence Act 2006) lay witnesses may state an opinion in evidence if it is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.⁷⁶ Lay witnesses were (and are) routinely permitted to give evidence concerning matters such as apparent age, identity and physical state.⁷⁷ Height is another example relevant in this case. Such opinions require an evidential foundation – in the case of an eye-witness, factual evidence as to the sighting itself with an observable physical foundation.

[195] Description or resemblance evidence falling short of identification evidence may or may not be opinion evidence.⁷⁸ For example, an eye-witness description of skin, hair or clothing colour is ordinarily a factual observation.

[196] Prior to the Evidence Act, there was no rule excluding any particular category of identification evidence. Admissibility was instead a matter of discretion,

⁷⁵ At [282]-[284].

⁷⁶ Downs, above n 17, at [EC14.08]; and Evidence Act, s 24.

⁷⁷ At [EC24.01].

⁷⁸ Downs, above n 17, at [EA4.44.01].

considered a manifestation of the broader judicial discretion to exclude evidence where its prejudicial effect outweighs its true evidential value.⁷⁹

[197] The Supreme Court in *Hall v R* did not explicitly state the law on admissibility of identification/description evidence as at 1986, but its conclusion on the facts before it indicated that it considered Mr Turner’s description of the man he saw as Māori was admissible.⁸⁰

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

...

[23] The Crown acknowledges that this key evidence at trial was unjustifiably altered in a material way...

[198] Mr Turner’s evidence in this case meant the facts are somewhat different from those that were before the Supreme Court. I address this below in the context of whether the alleged acts had a tendency to prevent a court from doing justice.

[199] In the context of s 7 of the Evidence Act, unreliability of evidence only justifies exclusion where it is considered the evidence is so unreliable that it could not be given any weight at all by a reasonable fact-finder.⁸¹ In *W (SC 38/2019) v R*, the Supreme Court considered that in the case of human testimony, an assessment prior to trial (by a judge) becomes much closer to what a fact-finder would, in the normal course of events, have to determine, as the fact-finder can accept some or all of the evidence and assess the evidence in the context of the trial as a whole.⁸² It was accordingly considered that there will only be relatively few cases in which evidence will be excluded pre-trial under s 7 on the basis of a lack of reliability.

⁷⁹ At [EC7.01], citing *R v Russell* [1977] 2 NZLR 20 (CA) at 27.

⁸⁰ As discussed above at [61], although the Supreme Court’s decision provides relevant factual and legal context for the present proceeding, its factual conclusions are not binding on the defendants in this case.

⁸¹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [41], considering *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 and *K (CA 26/2014) v R* [2014] NZCA 229.

⁸² *W (SC 38/2019) v R*, above n 81, at [40].

[200] In any event, as the Court of Appeal said in *R v Hall* (without knowing of the omission), “the Crown should act with the utmost candour and fairness making a full, adequate and impartial presentation of the facts”.⁸³

Disclosure requirements in the relevant period

[201] Given the issue concerning non-disclosure of Mr Turner’s previous statements until 1988, it is necessary to consider the legal disclosure requirements during the relevant period covered by the charges in this case (1985 to 1987).

[202] It is common ground that during the relevant period covered by the charges there was no comprehensive criminal disclosure regime in New Zealand.

[203] In the identification context, s 344C of the Crimes Act, introduced in 1982, required a prosecutor – on request – to supply the name and address of each known identification witness (a person who claims to have seen the offender in the circumstances of the offence) whether or not the prosecutor intended to call that witness to give evidence at trial. The prosecutor was also required to provide a statement of any description of the offender given by each identification witness to the police or the prosecutor, and a copy of any identikit picture or other drawing made by any such witness.

[204] In the absence of a comprehensive criminal disclosure regime, the Courts referred to disclosure obligations in various contexts.⁸⁴

[205] Relevantly, in 1936, the Privy Council held in *Mahadeo v R* that where witnesses changed the purport of their statements, the prior statements should be produced.⁸⁵

⁸³ *R v Hall*, above n 2, at 628.

⁸⁴ Outside the scope of the particular duties identified by the Courts, the more general duty of fairness remained but its application was decided by prosecutors in the exercise of their discretion in conducting the case, see Criminal Law Reform Committee, above n 29, at [14]-[15].

⁸⁵ *Mahadeo v R* [1936] 2 All ER 813 (PC) at 816-817. See also *Baksh v R* [1958] AC 167 (PC).

[206] In *R v Wickliffe*,⁸⁶ decided on 19 December 1985 but not reported until later in 1986, the Court of Appeal also addressed the issue of conflicting statements. Referring to Wellington Crown Solicitor Mr Larsen, who appeared for the Crown at the trial and on appeal, the Court's judgment delivered by Cooke J said:⁸⁷

He said that then and now the Crown acknowledges an obligation (whether in law or not) to disclose to the defence that a witness has said something in conflict with evidence given. We regard that as the proper practice whenever there is any conflict that may be material between the evidence of a witness and other statements made by the witness and known to the prosecution.

[207] I note the Court referred to the Crown's acknowledgment of "an obligation (whether in law or not)" and the disclosure of material inconsistencies as "the proper practice".⁸⁸ In any event, the matter arose again in the Court of Appeal a year later in relation to Mr Wickliffe on a reference by the Governor-General in Council under s 406(1) of the Crimes Act.⁸⁹ The Court's judgment delivered by Cooke P, dated 23 December 1986, stated:⁹⁰

As we have said previously, since there was a conflict between, on the one hand, Mrs Cameron's evidence at the trial and in the lower Court and her full, signed police statement made on the morning of the shooting and, on the other, the brief passage in the job sheet, the job sheet should have been disclosed to the defence.

[208] In *R v Hall*, the Court of Appeal again said that the Crown should disclose any conflict that may be material between the evidence of a witness and other statements made by the witness and known to the prosecution.⁹¹

[209] These statements of the law from the relevant period are also consistent with the trial Judge's reference in summing up to disclosure of the first description (at least where it materially differs) as it may well be more accurate and it enables the defence to test the evidence relative to identity which is given by the witness later on (see above at [149]).

⁸⁶ *R v Wickliffe* [1986] 1 NZLR 4 (CA). The Court concluded it had no jurisdiction to entertain a second application for leave to appeal against conviction for murder but referred to a possibility of a reference by the Governor-General in Council under s 406(1) of the Crimes Act.

⁸⁷ At 9.

⁸⁸ The context was that the Court unhesitatingly accepted from Mr Larsen that the relevant jobsheet was probably not brought to his attention. See further below at [217].

⁸⁹ *R v Wickliffe* [1987] 1 NZLR 55 (CA).

⁹⁰ At 58-59.

⁹¹ *R v Hall*, above n 2, at 628.

[210] Moreover, the Supreme Court in *Hall v R* confirmed the prevailing disclosure obligation:⁹²

The Crown accepts that in 1986, just as now, the Crown was obliged to disclose where there was any material conflict between the (anticipated) evidence of a Crown witness and any prior statement made by them and known to the prosecution,⁹³ and also to disclose any evidence which tended to show that the defendant might be innocent.⁹⁴ In particular the judgment in the high-profile case of *R v Wickliffe*, delivered nine months before Mr Hall's trial, made clear the police disclosure obligations.⁹⁵

[211] That is a binding statement of the law in 1986. I refer to the *Wickliffe* obligation for convenience.

[212] As Mr Wicks submitted, that statement of the law by the Supreme Court includes footnotes citing the cases of *Wickliffe* and *R v Mason* in support of the propositions and referring to the Criminal Law Reform Committee *Report on Discovery in Criminal Cases*. The Supreme Court's statement of the law therefore incorporates those footnotes.

[213] Given the relevance in this case of the extent to which the law was understood at the time by prosecutors and police and reflected in practice, it is worth referring to relevant paragraphs of the Criminal Law Reform Committee report including in full those specifically cited by the Supreme Court:⁹⁶

INTRODUCTION

...

3 The formal requirements for disclosure of information held by the prosecution are few. They comprise a collection of rules of law and practice and occasional statutory prescriptions. ... In brief, under our

⁹² *Hall v R*, above n 3, at [25].

⁹³ *R v Wickliffe*, above n 86, at 9; and the subsequent decision *R v Wickliffe*, above n 89, at 58–59.

⁹⁴ *R v Mason* [1975] 2 NZLR 289 (SC); aff'd [1976] 2 NZLR 122 (CA). The legal position in New Zealand as at December 1986 was discussed in Criminal Law Reform Committee *Report on Discovery in Criminal Cases Committee*, above n 29. The Report described the Supreme Court decision in *Mason* as the leading New Zealand case: at [16]. The Report also noted the requirement in s 344C of the Crimes Act for the prosecution to supply on request various material about any identification witness including a statement of any description of the offender given by the witness: at [20]. The Report said there was no general rule requiring the prosecution to supply defence counsel with copies of all statements made by witnesses but there were exceptions to that including a requirement to disclose statements “seriously at variance” with the intended trial testimony: at [22].

⁹⁵ *R v Wickliffe*, above n 86.

⁹⁶ Citations omitted.

present criminal procedure there is no guarantee of pre-trial disclosure, in all cases, of the substance of the case against an accused person.

...

BACKGROUND

...

- 15 Generally, it is for the prosecutor to determine whether fairness requires disclosure or information or elements of the Crown case. Not surprisingly, in an adversary system there is a diversity of opinion amongst prosecutors as to the scope and form of disclosure which should be allowed. There are, however, a minimal number of legal obligations with which the prosecution must comply.

FORMAL DISCLOSURE

- 16 The leading New Zealand case is R v Mason, which concerned the duty of the prosecution to disclose information which it did not intend to produce in evidence. In Mason, defence counsel, after depositions, sought production of copies of statements made by witnesses who were not to be called. Moller J applied English authority in finding that “if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him creditworthy or not, it must make his name and address available to the defence”. It is for the prosecutor to decide whether the evidence is “material” but that decision must be reached with “complete fairness” to the defence. It is not clear whether the rule in Mason applies prior to depositions.

...

- 20 There is one categorical exception to the general principle that there is no duty to disclose statements by persons interviewed but not to be called. The exception concerns identification evidence. Pursuant to section 344C of the Crimes Act 1961, the prosecution must supply to the accused, on request, the name and address of any identification witness, a statement of any description of the offender given by the witness, and a copy of any identikit picture or drawing made by such a witness or from information supplied by him or her. ...

Statements of Witnesses Called by the Prosecution

- 21 There is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence. One or two exceptions should be noted.
- 22 The first concerns previous inconsistent statements. Where the witness's statement is seriously at variance with his or her actual or intended testimony at trial, defence counsel is entitled to see the statement. Although production has been ordered in a number of

cases, the duty to disclose will not extend to statements which exhibit only minor discrepancies with oral testimony.

[214] Mr Cato's letter of advice to Mr Stainton of 17 June 1987 is also consistent with this – he said the law relating to pretrial disclosure was “in an unsettled and somewhat unsatisfactory state”. However, Mr Cato was aware of *Wickliffe* and *Hristov*, having argued them. I note the Criminal Law Reform Committee report does not mention *Wickliffe*, likely because the first *Wickliffe* decision had only just been reported and the second was decided at around the same time as the report was published.

[215] I also note for completeness that in 1988 (after the relevant period), the Court of Appeal allowed an appeal in *Commissioner of Police v Ombudsman*,⁹⁷ restricting the withholding of personal information requested under the Official Information Act 1982 by a person facing criminal charges. In doing so, the Court referred to the Criminal Law Reform Committee report in some detail and considered it a valuable report that fully discussed the uncertainty of the existing law of criminal discovery.⁹⁸ This decision substantially enlarged the prosecution duty to disclose information. As Cooke P said:⁹⁹

... once a case has progressed beyond the investigatory stage to the point where criminal proceedings are actually under way, I think that the Act gives the person who happens to be the defendant a prima facie right to all the information held by the police which can truly be said to be personal information about that person and which contains or bears on the evidence of the offence charged.

Whose obligation?

[216] There is a dispute in this case as to whether the disclosure obligation in Mr Hall's prosecution sat with the Crown and/or the police.

[217] In *Wickliffe*, the Crown acknowledged a disclosure obligation and the Court simply referred to the “prosecution” in relation to this obligation. However, in speaking about fault, the Court considered “... no blame attaches to Crown counsel.

⁹⁷ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

⁹⁸ See, for example, 401 per Cooke P and 407 per McMullin J.

⁹⁹ At 397.

Nor, on the evidence before us, would we be warranted in concluding that any member of the police was at fault”.¹⁰⁰

[218] The Court of Appeal in *R v Hall* referred to the “Crown” and “prosecution”, although in the context of the obligation to disclose any evidence which tended to show that the defendant might be innocent,¹⁰¹ the Court referred to its earlier decision of *R v Hristov*,¹⁰² which contemplated the obligation in *R v Mason* as applying to police.¹⁰³

... we do not think that the police had any obligation to disclose to Hristov the fact that Lofthouse or others were regarded for a time as suspects. ... We would be quite unwilling to extend the obligation upon the police as discussed in such cases as *R v Mason* [1975] 2 NZLR 289; [1976] NZLR 122 to a situation such as this, and to require the Crown to supply to the defence information that they had once held other persons under strong suspicion as the perpetrators of the particular crime charged.

[219] The Supreme Court in *Hall v R* referred to the Crown not meeting its disclosure obligations and to “the police disclosure obligations”,¹⁰⁴ but the issue was not specifically addressed.

[220] In considering who was responsible for disclosure in Mr Hall’s case, the expert evidence extended from practice into law at times. The Crown submitted that the disclosure obligations fell on the police who were preparing the case against Mr Hall for the conduct of the preliminary hearing, independently of any subsequent obligations of Mr C when he was instructed to represent the prosecution at trial [REDACTED]. The Crown also referred to the defence evidence of practice given by Mr Morgan KC. Mr Morgan explained that the briefing of s 173A statements was conducted by police and disclosure beyond the brief at the drafting stage was carried out by police on an individual case-by-case basis. The Crown submitted it made sense for police to handle this aspect of disclosure, as through drafting s 173A statements, they knew what had been included or omitted. However, Mr Morgan appears to have been referring to the period before a case was picked up by the Crown Solicitor’s

¹⁰⁰ *R v Wickliffe*, above n 86, at 9.

¹⁰¹ *R v Hall*, above n 2, at 627-628.

¹⁰² At 627-628.

¹⁰³ *R v Hristov* (1985) 8 CRNZ 158 (CA) at 167.

¹⁰⁴ *Hall v R*, above n 3, at [25].

office. After that point, he said responsibility for disclosure rested with the Crown prosecutor assigned.

[221] In any event, it was not disputed that, at the relevant time in the 1980s, police were responsible for summary prosecutions and cases that could be tried summarily or on indictment. Those proceedings were only taken over by the Crown after committal. However, the evidence indicated that the Crown assumed responsibility for homicide prosecutions from an early stage. In such a case, the Crown was the party responsible for any disclosure albeit it was dependent on the police to identify relevant material and assist the Crown with the execution of disclosure to the defence (as directed by the Crown). This is not a case where there is evidence the Crown directed disclosure and the police failed to execute.

[222] Thus, in the context of this case in 1986, the disclosure obligation sat with the Crown. That is consistent with the fact that all the disclosure request letters in this case were directed to the Crown prosecutor. But I consider the police also had an obligation to identify relevant material to the Crown to ensure the Crown could meet its disclosure obligation, albeit this was not an independent or separate obligation to disclose material directly to the defence without reference to the Crown prosecutor.¹⁰⁵ Here, therefore, the police were obliged to identify materially conflicting previous statements to the Crown prosecutor so that the Crown could meet its disclosure obligation. This was an ongoing obligation on the police even after the Crown took over the prosecution although disclosing the relevant material to the Crown would discharge that obligation unless the particular circumstances subsequently indicated to the police that the Crown had failed to meet its disclosure obligation. In those circumstances, the police would be obliged to raise the issue with the Crown.

Disclosure practice in the relevant period

[223] The 1986 Criminal Law Reform Committee report also provides insight into disclosure practice at the relevant time:

¹⁰⁵ That is not to say police could ignore a concern that a Crown prosecutor was breaching the Crown's disclosure obligation, but there is no evidence of such a concern in this case.

Conclusions In Brief

- 10 ... The second reason for our recommendation relates to perceived deficiencies of existing law and practice. In the absence of legal requirements as to what categories of information are to be disclosed, we have found the practice of disclosure to be variable.

...

DISCLOSURE IN PRACTICE

- 43 We have observed that for most practical purposes, considerable discretion resides with the prosecutor as to what information shall be disclosed. Where there is a legal requirement to disclose, it is invariably for the prosecutor alone to determine any question of “materiality” or “relevance”. Further disclosure may be made, but that is entirely a matter for the judgment of individual prosecutors. The practical importance of retaining good relations with prosecuting counsel has been noted. The extent of disclosure will also be governed by notions of “fairness” and the prosecutor's view of the compatibility of disclosure with the adversary system of justice.

...

- 46 Almost without exception, the respondents affirmed that they revealed the names and addresses of witnesses to the defence but did not make available signed statements. The prosecutors also replied that they regularly disclosed the “substance or summary” of statements by witnesses to be called at trial. While the replies indicate that Crown prosecutors appear to follow the case law, Hodge acknowledged that a similar survey of defence counsel may be necessary to confirm or qualify that assumption.

...

The Institute's Survey¹⁰⁶

...

- 53 While we do not propose to discuss Dr Stace's findings in great detail here, a number of general matters should be mentioned. The study confirmed that the range of disclosure varied considerably between individual prosecutors. ...

...

- 56 It is at least clear that the exercise of prosecutorial discretion presently holds the key to disclosure between the parties. This observation is

¹⁰⁶ This referred to a survey, written by Dr M Stance and undertaken by the Institute of Criminology at Victoria University, where a series of questionnaires were distributed to Crown Solicitors, defence counsel in jury trials, police prosecutors, and defence counsel in summary hearings. The questionnaires focused on disclosure at various stages of the trial process and were designed to obtain information on the extent of disclosure in practice at the time and canvass opinion as to the scope and form of disclosure which should be required.

particularly important in respect of material which the prosecution is legally required to disclose. ...

- 57 Moreover, the responses from both prosecutors and defence counsel indicate that the notions of “materiality” and “relevance” are susceptible to differing interpretations. ...

...

CURRENT PRACTICE

...

- 86 The present arrangements for disclosure, both legal and informal, are not susceptible of consistent interpretation. ...

...

- 88 The nature of the prosecutor's current role confirms our view. Where there is a legal requirement to disclose, it is the prosecutor who must determine issues of “materiality” or “relevance”. Any further disclosure is entirely within the prosecutor's discretion. ...

- 89 We do not doubt the difficulty, at times, of balancing these responsibilities. It is not always easy, as some prosecutors have testified, to estimate what information will be useful to the defence nor to assess what material, in all fairness, ought to be disclosed. At the same time, the defence rarely has recourse to procedures for challenging the prosecutor's decision not to disclose information, or ascertaining what information the prosecution holds which may be of use.

[224] Several legal professionals gave expert evidence about disclosure practice during the relevant period.

[225] Mr Toogood KC said that there was no comprehensive criminal disclosure regime during the relevant period. While he was at Luke Cunningham Clere (the Wellington Crown Solicitor’s firm), responsibility for disclosure in a jury trial prosecution rested with the assigned prosecutor, although the police usually managed disclosure issues prior to the preliminary hearing. Although the practice at Luke Cunningham Clere was to err on the side of fairness and caution in disclosing information to defence counsel and take a “liberal interpretation” of s 344C of the Crimes Act, he acknowledged that this potentially differed between prosecution firms and that disclosure was a matter of judgment and assessment by individual prosecutors.

[226] Mr Morgan considered the disclosure regime today and in the 1980s to be “utterly different” and “lightyears apart”. He recalled the routine non-disclosure of witness statements was the practice well into the 1980s at [REDACTED]. Disclosure was generally dealt with on a case-by-case and witness-by-witness basis. Statements containing any description of the offender, whoever that was and whether it was thought to be the accused, were only provided in response to a request.

[227] A number of retired police officers also gave evidence about disclosure understandings and practices within the police during the relevant period.

[228] Mr Thompson said that the Crown prosecutor had the disclosure responsibility and largely decided what defence would receive, [REDACTED]. He said normally prior to depositions, the defence would receive the prosecution evidence (essentially the s 173A statements) and any discussion relating to further disclosure would be between the defence and the prosecutor. He recalled as part of a detective qualifying course he attended, case law and legal changes surrounding disclosure were discussed, including *Wickliffe*.

[229] Mr Cook gave evidence that he would only carry out the disclosure obligation to the defence when the police were the prosecuting agency, whereas if a Crown prosecutor was engaged, they would make the disclosure decisions. In that context, he said that prior to depositions, he would only provide s 173A statements to the defence if so directed by the Crown.

[230] Mr Whitham gave evidence that before depositions, generally only copies of the charges, summaries of facts, lists of exhibits and s 173A statements were provided to the defence. He gave an example of his involvement in the Rainbow Warrior deposition in December 1985. He recalled that until *Commissioner of Police v Ombudsman*,¹⁰⁷ police would generally oppose the release of other information before depositions under s 6(c) of the Official Information Act, which provided police were not obliged to disclose material where it could affect the ongoing investigation or detection of crime or the right to a fair trial. He said decisions about disclosure were made by the Crown, although the police were responsible for releasing the information

¹⁰⁷ *Commissioner of Police v Ombudsman*, above n 97.

to the defence. He said once the prosecution was in the hands of the Crown, the police had no separate obligation of disclosure to the defence. He was not aware of the *Wickliffe* obligation before giving evidence.

[231] The preponderance of the expert evidence suggests there was no consistent approach to disclosure during the relevant period. Rather, in practice, disclosure was approached on a case-by-case basis and the extent of information disclosed was often dependent on the decisions and practices of individual Crown prosecutors.

[232] The evidence indicated it was considered that the responsibility for disclosure ultimately rested with the Crown prosecutor, although the police were responsible for releasing the material directed to be disclosed. Disclosure requests were ordinarily made directly between counsel, with the prosecutor making the decisions about what information should be disclosed, informed by police as to any relevant issues.

Further factual conclusions

[233] Before turning to the specific charges, it is necessary to set out some further factual conclusions beyond the findings in the chronology.

Mr Turner's s 173A statement

[234] It is not disputed, and I have already concluded, that the signed version of Mr Turner's s 173A statement admitted by consent at depositions omitted any reference to Mr Turner's description of the man he saw running across Clevedon Road on the night of 13 October 1985 as Māori or dark skinned.¹⁰⁸ The Crown submitted (as the Supreme Court had concluded) that Mr Turner's evidence was unjustifiably altered in a material way. It submitted the evidence was changed to make the facts fit the offender, and that bolstering or removing evidence are just different sides of the same coin.

¹⁰⁸ Above at [128].

[235] The defence disputed the characterisation of the omission as an alteration of Mr Turner’s evidence. Rather, they submitted the omission was from Mr Turner’s previous statements, which were not evidence, and reflected Mr C’s advice at the pre-depositions meeting that Mr Turner’s reference to the man he saw being Māori was inadmissible. The defence did not seek to uphold the correctness of that advice.

[236] Accepting that Mr Turner’s previous statements were not technically “evidence”, I have no doubt that the omission should not have occurred. Independently of the Supreme Court’s conclusion that referring to the man Mr Turner saw as Māori was admissible,¹⁰⁹ I consider that Mr C’s advice was wrong. Concern about the reliability of Mr Turner’s description of race was not a sufficient justification for excluding it. As indicated, the Crown was required to act with the utmost candour and fairness making a full, adequate and impartial presentation of the facts.¹¹⁰ Mr Turner’s s 173A statement could have been drafted in a way that fairly recorded his description and its (limited) factual basis.

Pre-depositions meeting

[237] I now address how Mr Turner’s 173A statement came to omit reference to the man being Māori or dark skinned, beginning with Mr C’s 2022 statements about the pre-depositions meeting.

[238] Mr C was interviewed by Ms Nicolette Levy KC on 6 September 2022 as part of an investigation following the Supreme Court appeal. In that interview, Mr C said he had no memory of a meeting with police pre-depositions but accepted that he did so in light of a letter sent by Mr M to investigative journalist [REDACTED] [in] 2018. He also accepted that he likely expressed the view that Mr Turner’s reference to Māori was not evidence.

[239] An issue arises as to the admissibility of Mr M’s 2018 letter. The Crown objected to its admissibility for any purpose other than as context for Mr C’s interview with Ms Levy, as part of the material he had been provided prior to the interview and

¹⁰⁹ *Hall v R*, above n 3, at [18].

¹¹⁰ Above at [200].

was being asked to respond to. Mr M sought its admission also for the truth of its contents. Little turns on this issue given the other documents referring to the meeting and Mr M's evidence. However, I will address its admissibility in conjunction with Mr C's responses to Ms Levy.

[240] Mr M's 2018 letter was in response to a series of questions from [REDACTED] relating to Operation Easton. In relation to the brief of evidence of Mr Turner, Mr M's letter stated:

I cannot comment on what the current practice may be but throughout my career, all decisions around what briefs of evidence were read to a jury and the form they took were decisions for the Crown Prosecutor.

I do recall the aspect of Mr Turner's sighting of the man running across the road being discussed with the Crown Prosecutor and the Crown Prosecutor deciding ultimately that Mr Turner's opinion that the man was Maori should not be included in the brief of evidence. My recollection is that the Crown Prosecutor relied on a number of factors in this regard;

(i) If the reference was to remain in the brief (the reference to his belief that this man was Maori), the Crown Prosecutor would then need to call Detective Inspector Ryan and the other officers involved in the Suspect Sighting Experiment conducted on the instructions of Detective Chief Inspector Rowe. As I think you know, this experiment was almost completely unsuccessful in supporting the ability of someone to identify the ethnicity of an individual in the circumstances Mr Turner had described.

Equally, had Mr Turner described the offender as a Caucasian, the Crown Prosecutor would not have been able to realistically rely upon this as he would still have needed to call Detective Inspector Ryan and the other participants in the experiment.

The Crown Prosecutor was of the view that there was no point leaving in Mr Turner's no doubt honestly held view of the ethnicity of the person, when the Crown would then need to lead evidence of the experiment which showed that his evidence on that issue simply could not be relied upon. His view was that this risked creating unnecessary confusion on the part of the jury.

(ii) Related to the above was the fact that, although Mr Turner at one point indicated he was 100% sure that the person he saw was Maori, his various descriptions were not consistent with that level of positivity. To Constable Walker he described the man as having the hood of his top up at the time he saw him and he was therefore unable to get a good look at his face. For at least part of this time, the person was running away from him albeit looking over his shoulder continually.

To Detective Constable Hesketh he described the person as "really motoring" across the road. When he got to the right-of-way, he stopped and looked around behind him. He walked down the right-of-way a bit and kept looking around and then he ran off down the right-of-way. It was dark in the right-of-way and he couldn't see the person's face when he looked around. Although

he was certain that this person was dark skinned he could not see his facial features so as to be able to recognize him again. He had the hood up over his head.

To Detective Sergeant White he said that he “still feels” the person he saw was Maori because “his features seemed Maori” and his “stance seemed to be a Maori”. He said he was 100% sure he was a Maori. That was his immediate impression. “I do not feel he was a pakeha, not even a dark skinned one”.

There was never any question that Mr Turner was other than a truthful witness who was doing his best to help the enquiry team. I recall however that a number of the team were influenced by his statement to Detective Sergeant White that the man’s “features seemed Maori” and his “stance seemed to be Maori”. This coupled with the man having his hood on, the fleeting nature of the contact, his inability to describe any facial features, the darkness of the right-of-way and the Suspect Sighting Experiment led us, but more importantly the Crown Prosecutor, to believe that this part of his evidence was unreliable.

(iii) Any Police Detective with any reasonable level of experience knows that identifications/descriptions of the sort provided by Mr Turner, in the circumstances in which he was making them, are notoriously unreliable. It is common for a number of witnesses viewing the same event from the same vantage point to give completely different accounts of the people involved and even, what event they saw happening.

(iv) To the extent the defence wished to suggest the offender was of Maori ethnicity, the evidence of the Easton brothers was potentially more significant than that of Mr Turner. There was no uncertainty around whom they were dealing with (the offender). They were at very close quarters with the offender and it was for more than a fleeting moment. They had more reason to note identifying features than Mr Turner given the circumstances they found themselves in (Mr Turner did not know a terrible crime had just been committed). The Sighting Experiment had no relevance to the Easton brothers. To the extent that the defence thought it relevant, they could explore with the Easton brothers the ethnicity of the offender.

[241] The transcript of Mr C’s interview with Ms Levy relevantly included:

NL Okay. So, do you accept from [Mr M’s] letter that you did have a meeting with Police pre-depositions?

[C] From his letter, yes but I have no memory of it independently, so.

...

[C] As I recall it, the decision on hand ups – as we used to call them – were for us, although all statements were taken by the Police and we had no say in formulating them, that I remember, for the reason I’ve said. ...

...

[C] All I can say... is that it looks like I spoke with the Police. It looks like I discussed the question of Mr Turner in some way, the rules then,

though, regarding disclosure were that, as I recall this, we were obliged to disclose evidence that was helpful to the defence.

...

[C] But the key word was evidence. Now, what it looks like here is that I was of the view, that the statement of Mr Turner about the Māori, was not evidence, it would be now. But then it was evidence of opinion, perhaps impression. I wouldn't have been able to lead it in chief, in my view. Again, looking back now, I wouldn't have been able to lead it in chief, neither would the defence and if it had been led in chief by someone, then I would have sought leave to, just reading this, call the evidence of the reconstruction. In other words, what was admissible in those days as evidence, not impression, not opinion, that changed with the introduction of the changes to the hearsay rule. ... It couldn't be opinion, impression or anything like that. So, I don't recall the discussions but I've tried to put together what it seems the Police were saying. That I met them, I spoke to them about the evidence and so on – if we just go up a bit, no, to number 2, roman (ii).

There is however, in that last paragraph Nicolette, before roman (ii).

NL Yes.

[C] A statement, the Crown prosecutor was of the view there was no points in needing Mr Turner's honestly held view, etc etc. I would never, I have never, directed the Police to alter statements, to leave things out or to put things in. I took no part in that and I don't think any of us did. It was something that [REDACTED] drilled into us, you do not enter the fray as far as evidence is concerned. I'm not saying that [Mr M] didn't honestly think that that's what I was indicating, if that's what happened. But I never told him to do that. As I recall, and tell me please if I'm going off track, but as I recall the situation, Turner's evidence, and this is just from the papers, was about a Māori with a hood up, a face he hadn't seen. Nor was there any evidence of seeing any other parts of his torso or skin colour. Of much more importance, just again reading your notes, I emphasise that, was the presence of the sweatshirt, the item of clothing, the jumper and the bayonet – of much more importance.

There is a last thing I'd like to say which may not help, but it's just that in support of what I'm saying about not dictating to the Police the content of statements in any way, we did have a certain mantra, I suppose, with regard to visual identification of someone who was observed in the circumstances of committing an offence.

NL Yes

[C] I think it came from one old case of *Fleeting No.2* and it was reproduced in all of the texts. And essentially it said that if a jury's looking at visual identification like this, maybe poor quality, maybe good quality, they had to decide from such things as the lighting, the distance away, whether the person was moving, facial characteristics, clothing characteristics and so on. One or two of those may not have

suited the identification but at the end of the day, it was the putting together of those they accepted, you see. So, in fact, putting in that phrase about being a Māori wouldn't have mattered, it would have made no difference at all and I think anyway, didn't the two boys mention Māori?

...

[C] I don't know whether that helps but it wouldn't have helped me. But the main point is, you don't go there.

NL By that you mean, you don't lead that?

[C] You don't direct the Police to alter statements, taking things out or putting things in.

NL So why were you having this conversation? It reads to me, as if Police are seeking your advice about what to do with this aspect of Mr Turner's evidence.

...

NL He says, "I do recall the aspect of Mr Turner's sighting of the man running across the road, being discussed with the Crown prosecutor".

...

NL Why was that discussion being held if it was, if they weren't seeking your advice about that?

[C] I have no idea. I know that I certainly didn't carry out what they're suggesting.

NL Right. Do you accept then, from what [Mr M] has said, that you were alerted to the Māori issue pre deps?

[C] Yeah, from what he says, yes. Again, I'm not saying that that's correct. I mean he was dictating in 2018.

NL Well if you're saying it's not correct, then now is ...

...

[C] I'm just interpreting it.

...

NL Well, from my perspective, if you, so you're not accepting that it happened this way but if it did happen this way, then your explanation is what you've told me?

[C] What parts happened that way? Do you mean discussing?

NL Discussing Turner's evidence.

[C] Discussing Turner's evidence in some way, must have done.

NL So what, what part of it then do you not accept?

[C] The suggestion – where are we – that I would tell the Police to leave out, I would tell the Police to leave out ...

...

[C] So, it's the second part of roman (i).

[242] As to the admissibility of Mr M's 2018 letter, the Crown submitted it is a previous consistent statement given the significant degree of overlap with Mr M's evidence at trial. Accordingly, the letter is captured by s 35 of the Evidence Act 2006 and is inadmissible since none of the exceptions in s 35(2) apply. Specifically, it does not "respond to" a challenge to Mr M's veracity or accuracy, or to a claim of invention. Nor does it form an integral part of the events before the court (beyond passing reference in Mr C's interview) or consist of the mere fact that a complaint was made in a criminal case.

[243] Mr Jones submitted the letter does form an integral part of the events, as Mr C's interview cannot be properly understood without reference to its contents. Further, the letter is not "consistent" in that it is not a repetitive statement of the trial evidence captured by s 35(1) and therefore its admissibility is governed only by ss 7 and 8 of the Evidence Act. In any event, it responds to a challenge to Mr M's veracity and accuracy based on a claim of invention, arising from specific allegations put to Mr M and the context of the Crown's case as a whole. Mr Jones further submitted the "fairness principle" recognised in *R v Felise* supports admission of the letter given the admission of the transcript of Mr C's interview, at least the relevant part of which is built around the letter.¹¹¹

[244] I consider the letter dated 27 February 2018 is admissible for the truth of its contents, for the following reasons:

- (a) First, I do not consider the letter is a previous "consistent" statement within the terms and purpose of s 35 of the Evidence Act. As the Court

¹¹¹ *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010; and *R v Felise (No 3)* HC Auckland CRI-2008-092-8864, 15 February 2010, endorsed in *Frew v New Zealand Police* [2022] NZHC 1961.

of Appeal said in *Hitchinson v R*,¹¹² s 35 was not intended to exclude relevant and probative evidence which is not repetitive and which can be characterised as a previous consistent statement only in the sense that it is consistent with the general tenor of the witness's evidence. This is bearing in mind the purpose of s 35 – to prevent the parties from inundating the Courts with voluminous amounts of repetitive material in order to shore up a witness's consistency.¹¹³ I accept Mr M's memory has deteriorated to some degree in the years since he wrote the letter in 2018. [REDACTED]. The letter was written well before the Supreme Court decision and subsequent investigation and therefore provides evidence of a quality and level of detail that Mr M is now unlikely to be able to provide.

- (b) Secondly, even if the letter is a previous consistent statement, I consider the Crown case would likely amount to a sufficient challenge for the purpose of s 35(2)(a). The Courts take a “liberal” approach to what amounts to a claim of invention and a general challenge to the truth of a witness's testimony will usually qualify,¹¹⁴ without the cross-examiner needing to directly accuse the witness of lying.¹¹⁵ The Crown challenged Mr M on his reference to relying on advice from Mr C as to the omission of Māori (as reflected in Document 199), and similarly disputed a key aspect of Mr M's 2018 letter concerning discussion “with the Crown Prosecutor and the Crown Prosecutor deciding ultimately that Mr Turner's opinion that the man was Maori should not be included in the brief of evidence”. The Crown case is that Mr M deliberately participated in omitting admissible evidence and declining to disclose material statements, and in that context that his exculpatory account is a contrivance.

¹¹² *Hitchinson v R* [2010] NZCA 388 at [26]; *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [26]; and *McCall v R* [2022] NZCA 510 at [17].

¹¹³ Law Commission *Evidence Code and Commentary* (NZLC R55, vol 2, 1999) at [C167].

¹¹⁴ *S v R* [2019] NZCA 169 at [22], citing *Hart v R*, above n 112; and *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

¹¹⁵ *Body v R* [2019] NZCA 378 at [19].

- (c) Thirdly, if necessary, there is also some merit in Mr Jones' fairness submission given the admission of the transcript of Mr C's interview, Mr C's unavailability and Mr C's dispute of part of Mr M's account in the letter, saying he would never have directed the police to alter statements – albeit the letter is in any event admissible as context for Mr C's interview.

[245] The Crown submitted that Mr C's interview with Ms Levy did not corroborate Mr M's position for three reasons. First, Mr C expressly disclaimed any recollection of what actually happened in this case. Secondly, Mr C's position that disclosure was not required at the time because Mr Turner's description of race "was not evidence" should also be viewed in light of his reliance on Document 199 to reconstruct his memory of events. Thirdly, Mr C was adamant that he would not have told the police what to include in the s 173A statement and did not even accept that he would have offered the police "advice" on this subject. Albeit he was prepared to acknowledge: "I'm not saying that Mr M didn't honestly think that that's what I was indicating, if that's what happened. But I never told him to do that." The Crown also submitted that the meeting appeared to have concerned whether to call evidence of the sighting experiment to "negate 'maori'" in relation to Mr Turner's evidence.

[246] I accept that, as Document 199 indicates, Mr C gave advice at the pre-depositions meeting to the effect that Mr Turner's reference to the man he saw being Māori was inadmissible, for the following reasons.

- (a) Given Mr M created Document 199 before the police file was archived around 1996 and long before Mr C was interviewed by Ms Levy in 2022, it strongly indicates that Mr C had expressed the view stated.
- (b) Mr M gave evidence to that effect which is consistent with Document 199. While the passage of time and Mr M's memory have likely affected his recollection of some details, including details of the pre-depositions meeting, Mr M presented as an honest witness and I accept that the key purpose of the meeting was to seek advice from Mr C. I also accept Mr M's evidence that the meeting discussed both the

content of the s 173A statement and whether to call evidence about the sighting experiment. The phrase in Document 199 “how to include experiment to negate ‘maori’” appears to be in the latter context.

- (c) Mr M’s note reflects a legal view on admissibility rather than something Mr M would likely have originated. Mr Morgan said consultation on what evidence could be included was commonplace. He recalled multiple instances of police calling in on Mr C [REDACTED] to ask questions about upcoming cases, including whether evidence they described to him was admissible and what should or should not be included in witnesses’ briefs. Mr C’s 21 October 1986 letter to Crown Law said that he “advised the police as to the preparation of the usual Deposition Statements”.
- (d) The advice is consistent with Mr C’s view expressed to Ms Levy and Mr M’s 2018 letter (I place little weight on the latter).
- (e) Accepting that the Supreme Court has now determined that there was no basis for removing the word “Māori” from the statement and that without this description the statement should not have been read to the jury,¹¹⁶ and Mr Toogood had a similar view as to removing the word Māori based on his understanding of the facts, Mr Morgan acknowledged that there was debate about this issue of admissibility among counsel at the time.
- (f) Mr C’s separate comment to Ms Levy that he would never direct the police to alter statements was likely referring to making factual alterations rather than properly omitting material considered inadmissible. This is consistent with one of Mr C’s other statements to Ms Levy that if Mr Turner was called as a witness, he would tell him not to mention the impression of Māori.

¹¹⁶ See *Hall v R*, above n 3, at [18].

[247] The Crown also submitted that Mr Turner’s previous statements may not have been provided to Mr C prior to or during the pre-depositions meeting, and that the defendants may have misleadingly paraphrased Mr Turner’s evidence to Mr C, similar to the paraphrasing in Document 199, which resulted in Mr C incorrectly characterising Mr Turner’s comments about Māori as an opinion. The Crown pointed to two examples of paraphrasing in Document 199:

- (a) the reference in section 2 to Mr Turner’s previous statements being “Contradictions/ unreliable/ fleeting glimpse”;¹¹⁷ and
- (b) the reference in section 4 (Briefing file):

Evidence of TURNER briefed to include details of maori words to effect “I feel / thought he was a maori, I could tell by his manner & stance”

[248] Mr M said the Crown would get underlying statements in the normal course. He could not recall whether that occurred in this case but said there was no reason not to provide them. He acknowledged that Officer S may have paraphrased what Mr Turner had said in his statements. Mr C said he could not remember whether he would have seen Mr Turner’s previous statements, when asked by Ms Levy. He acknowledged the prosecution file should have included the full suite of materials in relation to Mr Turner.

[249] It is unclear from the available evidence whether Mr C had Mr Turner’s previous statements prior to or at the pre-depositions meeting. The practice of providing underlying statements to Crown prosecutors at the time was inconsistent. Mr Toogood considered the information in the file given to the Crown prosecutor may depend on the nature of the case, and whether a s 173A statement had been produced by consent, although it was entirely possible the Crown prosecutor would be given the underlying statements. This frequently occurred in his experience (particularly in an identification case) but did not necessarily occur all the time. Mr Morgan said that the file might include the witness statements prepared as part of the police investigation in a separate folder but rarely every document generated by the police in the course of

¹¹⁷ Document 199 is set out in full above at [184].

their investigation. Mr Thompson said that normally the file prepared for the Crown would contain the original statement from which the s 173A statement had been prepared, as required by the Manual,¹¹⁸ but not necessarily jobsheets from which the original statement would be generated. Mr Cook could not recall whether original statements would go to the Crown prosecutor with the s 173A statements automatically or only if the Crown prosecutor wanted them.

[250] I cannot be sure that Mr Turner's previous statements were not provided to the Crown as required by the Manual (although it is less likely the initial 13 October 1985 jobsheet was provided). In any event, I do not infer from Document 199 or otherwise that at the pre-depositions meeting Officer M or Officer S deliberately misled Mr C when seeking advice by inaccurately paraphrasing Mr Turner's statements. Document 199's account of the earlier steps is unlikely to be a full account of the meeting with Mr C. It is also likely that Mr C was aware of the tenor of Mr Turner's description of the person he saw being Māori given the discussion, and the earlier Summary of Available Evidence document prepared for the discussion at the pre-charge meeting Mr C and [REDACTED] attended referred to above at [107]-[109] even though the documents did not set out the previous statements verbatim. Although the pre-depositions meeting followed the sighting experiment concern which was not predicated on Mr Turner's specific wording, Mr C would not likely have expressed a view on admissibility without understanding the relevant context. He also did not suggest to Ms Levy when questioned in 2022 that he was unaware of Mr Turner's previous statements at the time of the pre-depositions meeting. Further, the suggestion Mr C was misled contradicts the Crown's separate suggestion that there was an arrangement or understanding with the Crown prosecutor that Mr Turner's previous statements would not be disclosed.

Finalisation of Mr Turner's s 173A statement

[251] The Crown submitted that Mr M's explanations for his conduct appear to be a convenient hindsight justification for something which he had been part of that was clearly troubling him. It submitted that, even if Document 199 is an accurate record of a discussion between the defendants and Mr C, it records an attempt to arrive at a

¹¹⁸ Above at [118].

basis for excluding relevant evidence, which each person knew would damage the prosecution case against Mr Hall.

[252] However, I accept that Mr Turner's s 173A statement was likely finalised according to Mr C's advice to Officer M and Officer S at the pre-depositions meeting. Mr Toogood said that after the Crown had taken over as prosecutor and the police asked for advice on legal issues, he would expect that advice to be accepted and acted upon. Mr Cook said ordinarily, police would follow the advice of the prosecutor as to admissibility issues. Mr Whitham said the Crown's expertise on matters of admissibility was understood and generally accepted by the police. The statement would have been finalised by Officer S and Officer M would also have been aware that it would omit reference to the person Mr Turner saw being Māori.

Concurrence of defence counsel

[253] Mr Jones also submitted that the admission of Mr Turner's s 173A statement at both depositions and trial must have been done with the concurrence of defence counsel. He submitted there must have been interaction between Mr C and Mr Williams in this respect of which we have no evidence, and that we do not know what evidence was discussed between the two, nor do we know what information Mr C may have provided to Mr Williams directly. I acknowledge there is no evidence as to why defence counsel consented to Mr Turner's s 173A statement and did not seek to question him at depositions. Mr Wicks submitted that one possible explanation is that Mr Williams wished to have Mr Turner restrict himself to being a reliable witness when it came to the blue sweatshirt (which was addressed by Prichard J in the summing up). As Mr Morgan said based on his experience of Mr Williams, it is entirely likely that Mr Williams had a view about what the Crown could prove and who else might have been the offender and that this drove his strategy.

[254] However, in the absence of disclosure of Mr Turner's previous statements, defence counsel were not in a position to make an informed tactical choice whether to require Mr Turner to be called at depositions or to consent to admission of his s 173A statement and cross-examine him at trial about his previous statements. I acknowledge that the consequence of the omission from Mr Turner's s 173A statement would have

been relieved if his previous statements had been disclosed to the defence together with the s 173A statement. The defence could then have made an informed tactical choice.

[255] I deal with the separate questions of the defendants' involvement in the omission and reliance on Mr C's advice below.

Non-disclosure of Mr Turner's previous statements

[256] It is not disputed, and I have already concluded, that Mr Turner's previous statements were not disclosed to the defence until after the 1987 Court of Appeal decision.¹¹⁹ Independently of the Supreme Court conclusion, I consider they should have been disclosed to the defence. I make four points.

[257] First, while there was no general duty to disclose all statements and jobsheets at the time, the *Wickliffe* obligation – in particular to disclose prior statements where there was any material conflict with the (anticipated) evidence of a Crown witness that was known to the prosecution – arose in this case once Mr Turner's s 173A statement omitted any reference to his description of the man he saw being Māori. Irrespective of whether the reference to Māori was considered unreliable, its omission was material. Even accepting that Mr Turner's previous statements were considered by the police (and Mr C) to be unreliable insofar as they referred to the man he saw as being Māori and dark skinned, those previous statements were potentially exculpatory and had to be disclosed. That was the position in 1986/1987 and it is not affected by Mr Turner's subsequent evidence in this trial which added doubt to the reliability of his description.¹²⁰

[258] Secondly, the *Wickliffe* obligation applied in June 1986 even though it would have been apparent to defence counsel, as soon as they were aware of Mr Turner's s 173A statement, that underlying previous statements and/or jobsheets would exist and there is no evidence of a specific request for them. This would have been apparent because, as Mr Cato acknowledged, a witness would normally have made at least one

¹¹⁹ Above at [175]-[176].

¹²⁰ See [292] below.

underlying previous statement to the police if a s 173A statement was prepared for them. Mr Stainton accepted there would have been underlying statements and an assumption otherwise would be quite wrong. He also acknowledged there was no request under s 344C in relation to Mr Turner's description. As to why a specific request was not made, he said he probably deferred to Mr Williams' expertise. In any event, the *Wickliffe* obligation – unlike some other disclosure obligations – was not dependent on a specific request.

[259] Thirdly, accepting the very short time between finalisation of Mr Turner's s 173A statement and it being adduced ("handed up") at the depositions hearing, Mr Turner's previous statements should have been disclosed to the defence at the same time as his s 173A statement was provided.

[260] Fourthly, and in any event, Mr Turner's previous statements should have been disclosed to the defence before Mr Hall's trial and in particular before Mr Turner's s 173A statement was adduced as evidence at trial. Given the nature of the *Wickliffe* obligation, this should have occurred irrespective of Mr Williams' request dated 29 August 1986 which I acknowledge was, insofar as it is relevant, a general request for "any other information which be helpful to the defence".

[261] This is consistent with Mr Morgan's evidence that as a prosecutor, if he had read Mr Turner's s 173A statement and been aware of the witness's previous statements, he would have wanted to know the reason for the change and if the earlier statements had not already been disclosed to defence by police, he would have directed it to occur.

[262] I deal below with the separate question of each defendant's involvement in the non-disclosure of Mr Turner's previous statements, including in response to the several requests after depositions and trial. At this point, it suffices to say that given the nature of the disclosure obligation,¹²¹ and that the Crown no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal), an obligation on the defendants arose in one of two ways. First, an obligation to disclose Mr Turner's previous statements to Mr C if that had not already occurred. Secondly,

¹²¹ Above at [222].

even if the statements had previously been disclosed to Mr C, an obligation following the defence requests after depositions to raise the issue at least with Mr C.

[263] Although the Crown no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal), some of its submissions were still directed at Mr C. In particular, the Crown submitted that Mr C, who was involved almost from the outset, was aware that the Turner evidence (as summarised in the Summary of Available Evidence) was evidence which would tend to exculpate Mr Hall, and [REDACTED] disclosure was therefore required. Notwithstanding his knowledge of that obligation and his knowledge of the evidence, Mr C conducted a case from start to finish that kept that evidence from the defence, the District Court Judge at depositions, the Judge and jury at the High Court trial [REDACTED]. Given that Mr C is not a defendant and the Crown no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal), the relevance of such a submission is limited to consideration of the Crown case that the defendants failed to meet their obligations in the ways identified in the previous paragraph and thereby created and facilitated a situation in which Mr C failed to meet his legal obligations.

Approach to the charges

[264] As indicated earlier, the Crown case developed late in the trial so that, while the two (alternative) acts identified in the question trail – the omission of Māori from Mr Turner's s 173A statement and the non-disclosure of his previous statements – can be viewed separately, they are inextricably interrelated.

[265] Acknowledging that these two acts are interrelated, I still address the acts separately in accordance with the question trail but in doing so also consider the Crown's reference in closing to the two acts being interrelated and a course of conduct.

Charge 1 – Mr M

First alleged act – s 173A statement

Mr M's knowledge of the legal proceeding against Mr Hall

[266] Mr M accepts, and I am sure, that from at least 2 April 1986, when Mr Hall was charged, Mr M knew of the legal proceeding against Mr Hall.

Mr M's involvement as a principal or party in directing or arranging for Mr Turner's s 173A statement to be prepared and signed

[267] The question trail reflected the Crown's first particular alleging the act of directing or arranging for Mr Turner's s 173A statement to be prepared and signed, in circumstances and with contemporaneous knowledge (distinct from the offence's separate element of intention to prevent a court from doing justice) that:

- (a) the statement would deliberately exclude that the man Mr Turner had seen running across Clevedon Road on the night of 13 October 1985 was Māori;
- (b) the statement was intended to be admissible as evidence in the legal proceeding against Mr Hall; and
- (c) Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers (up to committal for trial).¹²²

[268] As the last knowledge component in particular is forward-looking (especially if the timeframe extends beyond the committal hearing to trial and appeal as part of the Crown's position that the two acts are interrelated and part of a course of conduct), it is better characterised as an intention and I will deal with it in the context of the separate intention element of the offence below.

¹²² This timing cut-off reflected the need for contemporaneous knowledge and that the second alleged act was non-disclosure of the previous statements thereafter.

[269] I deal first with the act itself – directing or arranging for Mr Turner’s s 173A statement to be prepared and signed. As indicated, there is no doubt that the statement was prepared and signed on or before the depositions hearing on 24 June 1986.¹²³ There is also no doubt that it excluded or omitted reference to the man Mr Turner had seen running across Clevedon Road on the night of 13 October 1985 being Māori.¹²⁴

[270] I am sure that Mr M was involved in directing or arranging for Mr Turner’s s 173A statement to be prepared and signed. In accordance with the Manual, [Officer M was involved in] the case including the s 173A statements even though [REDACTED] Mr S was directly responsible for their preparation. Mr M attended the pre-depositions meeting with Mr C to discuss Mr Turner’s s 173A statement.¹²⁵ This was sufficient involvement to constitute a positive act.

[271] I am also sure that Mr M knew at the time that Mr Turner’s s 173A statement would exclude or omit that Mr Turner described the man he had seen running across Clevedon Road on the night of 13 October 1985 as Māori.

[272] First, Mr M knew of Mr Turner’s previous statements and in particular that Mr Turner had described the person running across Clevedon Road as Māori. This is clear given his role [REDACTED], his attendance at investigation briefings such as the one recorded on 15 October 1985 when at least Mr Turner’s initial statements were discussed,¹²⁶ his media briefings, his attendance at the pre-charge meeting with the Crown where Mr Turner’s statements were referred to¹²⁷ (indeed he may well have read the Summary of Available Evidence document in preparation for that meeting) and his attendance at the sighting experiment which he knew was carried out to see whether race could be identified.¹²⁸

[273] Secondly, Mr M knew Mr Turner’s s 173A statement would omit reference to Māori given his role [REDACTED] and his attendance at the pre-depositions

¹²³ Above at [126]-[128].

¹²⁴ Above at [128].

¹²⁵ Above at [121] and [246](b).

¹²⁶ Above at [92].

¹²⁷ Above at [108].

¹²⁸ Above at [111].

meeting.¹²⁹ In evidence, Mr M accepted that as a result of the sighting experiment and given the total circumstances, he was concerned the explanation given by Mr Turner may not have been accurate. He accepted the purpose of the pre-depositions meeting with Mr C was to discuss the uncertainty surrounding the identification of race in the sighting experiment and “that we were of the view that given the circumstances that Mr Turner was in, it may have been similar”. Mr M also accepted in evidence that there was no reference to Māori in the statement as Mr C gave advice that it was inadmissible and “it necessarily followed that it wouldn’t be in the s 173A statement”. He accepted that he and Mr S “took license” of what Mr C told them and “were acting on the instructions of Mr C” in preparing the s 173A statement. Thus, Mr M was party to Mr S finalising Mr Turner’s s 173A statement with no reference to the man Mr Turner saw being Māori following Mr C’s advice that it was inadmissible.

[274] I am sure that, at the time, Mr M knew the statement was intended to be admissible as evidence in the legal proceeding against Mr Hall. It was prepared for the purpose of depositions.

[275] As indicated, I will deal with Mr M’s knowledge (intention) that Mr Turner’s previous statements would not be disclosed to Mr Hall’s defence lawyers in the context of intention below.

Whether directing or arranging for Mr Turner’s statement to be prepared and signed in the manner identified had a tendency to prevent a court from doing justice

[276] Following the conclusion of the Crown case, Mr Jones and Mr Wicks both made an application to dismiss the charges against Mr M and Mr S respectively, pursuant to s 147 of the Criminal Procedure Act. One of the grounds advanced was that the evidence did not permit a finding that either of the two acts alleged in the particulars “had the tendency to prevent a court from doing justice”. On 14 July 2026, I declined the applications (with reasons to follow). In closings, the defence submitted (in reliance on the submissions in the earlier application) that in light of the evidence given in this trial by Mr Turner (and to a degree, Ms Burrows) the omission of the reference to Māori in the s 173A statement and the failure to disclose Mr Turner’s

¹²⁹ Above at [121].

previous statements could not be acts that had a tendency to prevent a court from doing justice.

[277] Mr Jones drew attention to Mr Turner's evidence in cross-examination that he could not see the face of the person running across Clevedon Road and that his assessment of the person's race was not based on skin colour but instead on the person's movements and mannerisms. Mr Jones submitted this evidence negates the words used in Mr Turner's previous statements and reveals that Mr Turner's assessment was based on illegitimate factors – namely, stereotypical conduct he associated with Māori – which lacked evidential relevance or weight. Accordingly, it could not be used as identification evidence, as it would be inadmissible and conclusory at best. No court would or could rely on what he said about the person's race. The only admissible evidence Mr Turner could have given was contained in his s 173A statement and therefore there was no difference between the evidence that could have been provided if his statements had been disclosed and the evidence adduced at Mr Hall's trial.

[278] Although accepting the disclosure of Mr Turner's previous statements may have engendered the interest of defence counsel, Mr Jones submitted Mr Turner's evidence in this trial provides the reality of what he would have said had he been called as a witness in 1986 and therefore there can be no suggestion that his evidence could have assisted the defence in terms of the race of the person he saw running, and may have even discredited Mr Turner's observation that the man he saw was wearing a blue sweatshirt – a point relied on by Mr Hall's defence counsel.

[279] Mr Jones submitted Mr Turner's evidence now clearly establishes how the advice given by Mr C about race not being admissible was available and undermines the expert evidence in this proceeding based on the face value of the description in Mr Turner's statements to the point of irrelevance.

[280] Mr Jones also referred to Ms Burrows' evidence at trial that she was the one to say "look at that Māori guy", not Mr Turner, alongside her recollection that she only saw the man's eyes (as he was wearing a balaclava). He submitted this evidence only

serves to reinforce the inadequacy of Mr Turner's evidence and undermines any suggestion that Ms Burrows' evidence would have reinforced Mr Turner's description.

[281] These submissions also need to be viewed in the context of the defence narrative that Mr Turner's evidence was peripheral – the bayonet and hat left by the offender at the homicide scene were of paramount importance – and that the sighting experiment as well as the circumstances of Mr Turner's sighting raised serious doubts about Mr Turner's description of the race of the person he saw.

[282] I mention too in this context the defence reference to Mr Hall's unsuccessful second and third applications for the royal prerogative of mercy despite the disclosure of Mr Turner's previous statements, and address the Crown's objection to the admissibility of the prerogative of mercy documentation (referred to above).

[283] The Crown submitted the documents are relevant only in relation to the issue of the timing of disclosure materials to the defence, as part of the general narrative, not in relation to whether the relevant acts of the current charge had a tendency to prevent a court from doing justice. It noted in the Supreme Court in *Hall v R*, the Crown accepted that to the extent the decisions on Mr Hall's second and third applications for the exercise of the prerogative of mercy indicated doubt or ambivalence about the disclosure obligations of the prosecution or an assessment that the difference between Mr Turner's statements and the evidence at trial was not material, those decisions were wrong.¹³⁰

[284] As indicated, the Supreme Court has determined the disclosure obligations as a matter of law, but I must make my own assessment of whether the difference between Mr Turner's previous statements and the evidence at trial in 1986 is material based on the further evidence I have heard in this case. I nevertheless accept that the authors' reasons for declining the prerogative of mercy applications in these documents is not admissible to prove the truth of the contents (the correctness of the reasons). These documents are only admissible to show the chronology and that the applications were unsuccessful despite the disclosure of Mr Turner's previous statements. This is relevant to the issue of when Mr Turner's previous statements were disclosed and the

¹³⁰ *Hall v R*, above n 3, at n 9.

general chronology given the further delay between disclosure in 1988 and the overturning of Mr Hall's conviction in 2022.

[285] The Crown submitted that any suggestion Mr Turner's cross-examination proved the defendants' acts did not prevent the course of justice conflicts with the expert evidence in this trial and the judgment of the Supreme Court in *Hall v R*. I summarise each:

- (a) The expert evidence included Mr Toogood's view that being shown Mr Turner's previous statements would inevitably have materially affected the way counsel conducted Mr Hall's defence and appeal. Mr Rapley KC similarly considered the undisclosed information to be crucial and said it would have made a significant difference to the defence case and put defence in a far stronger position. Mr Stainton said that Mr Turner's statements clearly would have been of assistance to Mr Hall, describing them as critical to the defence and saying they would have changed the balance of evidence before the jury. Mr Cato described the omission of Māori as "central, crucial", and said if he had seen the previous statements, he would have certainly consulted with Mr Williams for guidance, as Mr Williams could have made a great deal of it before a jury.
- (b) The Supreme Court clearly concluded on the evidence before it that the omission of Māori and dark skinned was material in the context of the trial.¹³¹ Similarly, the Court said there is no issue that Mr Turner's previous statements should have been disclosed.¹³² However, as indicated, I refer to the Supreme Court's factual conclusions for background context but they are not admissible evidence against the defendants in relation to the elements of the offence in this case.

[286] The Crown also submitted it was only by reason of a jobsheet completed by Detective Boyce dated 7 August 2025, in which he recorded a comment made by

¹³¹ *Hall v R*, above n 3, at [18]-[24].

¹³² At [25]-[26].

Mr Turner on 4 August 2025, together with a statement made by Ms Burrows in 2022, that the defence in this proceeding had prior statements which they could use to challenge Mr Turner's reliability in this case. Detective Boyce's note of Mr Turner's comment stated:

Think about it lots, maybe didn't see the right person. Person I saw maybe wasn't Maori. Didn't see his face. Maybe my fault.

[287] Ms Burrows' statement dated 24 August 2022 relevantly stated:

7. I actually saw the guy, [my] statement [of 23 June 1986] is correct in the details but, I was the one that saw him and said to "look at the Maori guy" to Ron, I know Ron is the one that has been named in the paper. I remember Ron and I laughed about Ron being quoted of (sic) what I saw. We weren't worried because the detail was correct, no point correcting it as it didn't matter as it was still the truth.

...

9. Ron did see him as well, but I saw him first because I was on the passenger's side and Ron was driving. We were at [Mr Turner's mother's address] Ron's [mother's] place and had just left there and I remember saying look at that Māori guy, and then he turned and sprinted off.

10. My assumption was that he looked like a Māori, I don't know why, but it was because he was reasonably tall and stocky and the way he walked and strutted that made me think that. It's hard to explain but back then Māori use[d] to walk in a specific way. I grew up with Māori and so did Ron, in fact Ron is a Māori.

[288] The Crown submitted the cross-examination of Mr Turner based on these statements demonstrated what can be done with prior statements, serving only to reinforce the crucial nature of Mr Turner's previous statements to the defence in Mr Hall's case. The Crown submitted it also ignores the fact that the present proceeding is about the non-disclosure of evidence required to be disclosed as a matter of law, as opposed to the reliability of that evidence viewed 40 years later.

[289] While accepting Mr Turner's evidence (in this trial) could be questioned, the Crown submitted an objective reading of Mr Turner's previous statements indicates the defence should have had the opportunity to see what use they could make of them. Further, the Crown submitted the evidence Mr Turner would have given at trial in 1986

is speculative and was more likely to be consistent with his previous statements, rather than the answers he gave in cross-examination 40 years post-event.

[290] Since this argument regarding the “tendency to prevent a court from doing justice” applies to both alleged acts, I deal with them together here.

[291] Although in the s 147 context I did not accept that Mr Turner’s (and Mrs Burrows’) evidence was determinative in permitting a finding that there was no case to answer, I acknowledge it is relevant to whether the acts had a tendency to prevent a court from doing justice.

[292] I accept that the evidence of Mr Turner and Ms Burrows in this trial added doubt to the reliability of Mr Turner’s description of the man he saw on 13 October 1985. Mr Turner’s evidence about the basis for his description was underwhelming. Ms Burrows was confused as to the inconsistency between her 1986 statement saying she did not see the man (at [126] above) and her 2022 statement saying she saw the man first and said to Mr Turner “look at the Maori guy” (at [287] above). Her 2022 statement indicated it was her description, not Mr Turner’s, although he saw the man as well. If she did see the man, her basis for describing him as Māori was also underwhelming. As one example, she said he had a balaclava on.

[293] Even so, I consider their evidence in this trial is of limited weight in my assessment of the materiality of the difference between Mr Turner’s previous statements and the evidence at Mr Hall’s trial and, more specifically, whether non-disclosure of Mr Turner’s previous statements had a tendency to prevent a court from doing justice.

[294] I also acknowledge that Mr Williams as trial counsel was well aware of the Easton brothers’ initial description of the offender as Māori, and it might be thought they were better placed to identify the offender given their proximity to him in the struggle than Mr Turner. Yet they did not maintain that initial description. As indicated, during cross-examination of each of the Easton brothers, Mr Williams asked only one question about the intruder being Māori.¹³³

¹³³ Above at [146].

[295] However, if Mr Turner's s 173A statement had not omitted reference to race (or the offender being dark skinned) or his previous statements had been disclosed, it may well have affected the defence strategy, as Mr Rapley said in evidence. Mr Turner may have had to give evidence about his description of the man he saw being Māori and dark skinned. His evidence in 1986 may have been underwhelming as it was in 2026 but he may have been better placed to remember the basis for his description. Mr Williams may have had more success with Mr Turner than with the Easton brothers. Moreover, irrespective of speculation as to what Mr Turner might have said in evidence in 1986, the omission and non-disclosure were material and precluded the defence from making an informed tactical choice as to the conduct of the defence. In the context of the case, the omissions evident from Mr Turner's previous statements had some likely evidential significance,¹³⁴ which is sufficient to conclude that the acts had the tendency to adversely influence the course of justice. I am sure that both the omissions from Mr Turner's s 173A statement and the non-disclosure of his previous statements had the tendency to prevent a court from doing justice.

Mr M's intention in directing or arranging for Mr Turner's statement to be prepared and signed in the manner identified

[296] Before addressing whether Mr M's intention, in directing or arranging for Mr Turner's statement to be prepared and signed, was to prevent a court from doing justice, I deal with Mr M's knowledge (intention) that Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers.

[297] As indicated, I am sure that, at the time, Mr M knew of Mr Turner's previous statements and in particular that Mr Turner had described the person running across Clevedon Road as Māori.¹³⁵

[298] The Crown submitted that an intent to pervert the course of justice in relation to the omission from the s 173A statement can be inferred from the surrounding circumstances and, in particular, the timing of the key decisions made in relation to Mr Turner's evidence: the re-interview of Mr Turner on 19 February 1986 (and the substance of this re-interview, as criticised by Mr Turner in his 22 August 1988

¹³⁴ *Meyrick v R*, above n 19, at [46] and [48].

¹³⁵ Above at [271]-[273].

affidavit); the sighting experiment; the pre-depositions meeting with Mr C; and the late interview of Mrs Turner.

[299] While I accept that Mr M would have known that Mr Turner's previous statements had not already been disclosed to Mr Hall's defence lawyers, knowledge that they would not be disclosed to Mr Hall's defence lawyers thereafter – in circumstances where disclosure would have been within the control of the Crown prosecutor – would depend on Mr M being party to or at least knowing of an arrangement or understanding with the Crown prosecutor that Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers at any time after the s 173A statement was finalised and provided (at least unless and until there was a specific request for them).

[300] Such an arrangement or understanding involving Mr C contradicts the Crown's position that it no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal). It is also directly inconsistent with the Crown's alternative case that Mr C was misled. In any event, the Crown has not proved such an arrangement or understanding. Document 199 does not indicate that there was any discussion with Mr C at the pre-depositions meeting (or otherwise) about disclosure of Mr Turner's previous statements to the defence. There is no other evidence of such a discussion at that meeting or otherwise when the s 173A statement was being finalised. It cannot properly be inferred from the available evidence. It is largely speculative.

[301] For these reasons, I cannot be sure Mr M knew that Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers. This applies in the short time before committal (the temporal scope for this alleged act in the question trail) or thereafter (which merges into the second alleged act addressed below). It also therefore applies to the characterisation of the alleged offending as a course of conduct.

[302] Turning to whether Mr M's intention, in directing or arranging for Mr Turner's statement to be prepared and signed, was to prevent a court from doing justice, I address this briefly given my previous conclusion.

[303] The defendants did not seek to uphold the correctness of Mr C’s advice at the pre-depositions meeting that Mr Turner’s reference to the man he saw as Māori was inadmissible. Nor did they seek to suggest they were following superior orders – it is common ground that the mere fact a defendant was obeying an order will not negate mens rea. Rather, the defence position was that Mr C honestly held the view that Mr Turner’s reference to the man he saw as Māori was inadmissible and that Mr M and Mr S were entitled to rely on Mr C’s advice. The defendants also relied on the observation of acting DSS Cleary, from his review of the police file and other documents, that Operation Easton was a very well-run investigation for its time.

[304] As indicated, “perversion” of the course of justice extends to conduct intended to bring about what the defendant believes to be the correct or just result by the use of improper means.¹³⁶ However, the offence requires an intention to use improper means. There is no such intention if Mr M had an honest belief that the means were proper. Knowledge that an act enhances the prosecution case does not suffice.

[305] I cannot be sure that Mr M, insofar as he was involved in directing or arranging for Mr Turner’s statement to be prepared and signed in the manner identified, intended to prevent a court from doing justice, rather than reasonably relied on Mr C’s advice.

Second alleged act – non-disclosure of Mr Turner’s previous statements

Legal obligation to disclose Mr Turner’s previous statements or comply with a request for disclosure of those statements

[306] The question trail reflected that the Crown’s second particular of the charge concerned the period after committal. By then – indeed from the time the s 173A statement was finalised – the Crown prosecutor was conducting the prosecution. As indicated, given the nature of the disclosure obligation, an obligation on Mr M arose in one of two ways:¹³⁷

- (a) an obligation to disclose Mr Turner’s previous statements to Mr C if that had not already occurred; or

¹³⁶ Above at [29].

¹³⁷ Above at [262].

- (b) even if the statements had previously been disclosed to Mr C, an obligation following the defence requests after depositions to raise the issue at least with Mr C.

Mr M's involvement as a principal or party in declining to disclose Mr Turner's previous statements

[307] The question trail reflected the Crown's second particular alleging the act of declining, in the period between Mr Hall's deposition hearing and the determination of his conviction appeal, to disclose Mr Turner's previous statements in circumstances where he knew:

- (a) there was such a legal obligation;
- (b) Mr Turner's s 173A statement omitted that the man Mr Turner had seen running across Clevedon Road on the night of 13 October 1985 was Māori;
- (c) Mr Turner's s 173A statement was evidence in the legal proceeding against Mr Hall; and
- (d) Mr Turner's previous statements had not yet been disclosed to Mr Hall's defence lawyers.

[308] As indicated, it is not disputed, and I have already concluded, that Mr Turner's previous statements were not disclosed to the defence until after the 1987 Court of Appeal decision.¹³⁸ I have also already addressed Mr M's knowledge of the omission from Mr Turner's s 173A statement,¹³⁹ which must have extended through the relevant period between committal and appeal determination. It was not suggested, and would be implausible to suggest, that Mr M had forgotten about Mr Turner's previous statements or the omission. I have also already addressed Mr M's knowledge that the s 173A statement was evidence in the proceeding against Mr Hall.¹⁴⁰

¹³⁸ Above at [175]-[176].

¹³⁹ Above at [271]-[273].

¹⁴⁰ Above at [274].

[309] Reference in the question trail to “declining” to disclose, together with knowledge of the legal obligation to disclose or in response to a request for the previous statements, reflects the need for a positive act, rather than a mere omission. As with the first alleged act, this second alleged act also incorporates knowledge components (distinct from the offence’s separate element of intention to prevent a court from doing justice).

[310] Approaching the act according to the way in which the obligation arose, I deal first with whether Mr M declined to disclose or explain Mr Turner’s previous statements to Mr C in the period after committal if that had not already occurred. As indicated already,¹⁴¹ given the lack of available evidence from the Crown file and Mr C, I cannot be sure that Mr Turner’s previous statements had not already been disclosed to Mr C. If they had been disclosed to Mr C, Mr M and Mr S might reasonably have assumed in 1986 that Mr C would consider whether and when the previous statements needed to be disclosed to the defence – at least until the officers became aware of a disclosure issue (which transitions into the second obligation).

[311] I turn to the second obligation, that is the obligation following the defence requests after depositions to raise the issue at least with Mr C, even if the statements had previously been disclosed.

[312] The Crown submitted that a consideration of what was disclosed demonstrates beyond doubt a deliberate decision not to disclose Mr Turner’s previous statements. It submitted Mr M was a party to Mr S’s response to requests for disclosure (which said there was nothing to assist the defence) having discussed the matter with Mr C. It submitted the persistent disclosure requests must have made it clear that the statements had not been disclosed. In those circumstances, the Crown submitted both Mr M and Mr S would have been aware of what had and had not been disclosed in the post-trial period.

[313] The Crown submitted the failure to ensure that Mr Turner’s previous statements were disclosed was a positive act, in the sense that the defendants knew the defence did not have this information, which put them in a position where they had a

¹⁴¹ Above at [250].

duty, and the ability, to act to rectify this injustice. It submitted that “ensuring” disclosure in this sense involved a series of escalating steps: (1) draw the material to Mr C’s attention, as being in a similar category to the Bungard/Cossey material (and with a much greater tendency to exculpate Mr Hall); (2) if Mr C did nothing, raise the matter with Police Legal, as Mr Cook advised he would do; and (3) if Police Legal considered disclosure was required (which it obviously and indisputably was, on an application of *Wickliffe*), raise the issue with Crown Law, who had engaged Mr C [REDACTED]. There is no record of the defendants taking any of these steps.

[314] Mr Jones submitted there was no positive act sufficient to satisfy this non-disclosure element. The “failure” as alleged by the Crown is not a positive act. Equally, there was no obligation on Mr M to make any disclosure. He did not make decisions about disclosure; that was for the Crown. It was also not something that he dealt with [given his role]. Disclosure in terms of police involvement was something [another officer] took care of.

[315] I acknowledge Mr M’s evidence that [given his role] he had an overview of what was happening but any disclosure from the police perspective rested with [REDACTED] Mr S. However, Mr M would have discussed the substance of the police response to disclosure requests with Mr S and likely given Mr S direction, even if Mr M left Mr S to decide which individual documents to draw to the Crown’s attention. Also, Mr M acknowledged that he had discussions with Mr C at various times – he could not be more specific. Such discussions would likely have included matters of disclosure. But I accept in general terms Mr M’s evidence that his understanding was that the Crown dealt with disclosure and the Crown’s view prevailed as the legal experts.

[316] Although Mr Hall’s defence counsel made no explicit request for Mr Turner’s previous statements during the relevant period, they did make several requests, all directed to the Crown prosecutor:

- (a) 29 August 1986 (pre-trial) – relevantly seeking “any other information which be (sic) helpful to the defence”;¹⁴²

¹⁴² Above at [140].

- (b) 1 October 1986 – relevantly seeking “any information that may be of assistance to the appellant”;¹⁴³
- (c) 10 April 1987 – seeking bulletins put out within the police and/or to others describing the suspect (following instructions to the military authorities at Papakura to look for a “6 foot Maori”);¹⁴⁴
- (d) 5 May 1987 (followed up on 8 June 1987) – broadening the Ringrose request to any jobsheets containing information as to any person leaving the property or moving through an adjacent alleyway and across a road, in the neighbourhood of the property, and in particular containing information that a person running across a road was nearly run over by a passing motorist.¹⁴⁵

[317] The first two of these requests were general in nature. Addressing the first request, the Court of Appeal considered the general enquiry was vague.¹⁴⁶ Mr C responded to the first request on 10 September 1986 saying “I do not consider there is any other information that may be helpful to you that I can now supply”. Mr M may have seen Mr Williams’ request to Mr C for information before trial, but I cannot be sure of that or that he was involved in Mr C’s response.

[318] As indicated, there is no record of a response from Mr C to Mr Williams’ 1 October 1986 letter. However, on 26 November 1986, Officer S wrote to Mr C relevantly stating:

As discussed with you the request made in the first paragraph of Mr WILLIAM’S letter cannot be complied with as we are not aware of any information that could be of assistance to the Appellant.

[319] It is not disputed that Mr S’s letter is admissible against Mr M. As indicated, Mr M likely saw the 1 October 1986 request after trial.¹⁴⁷ He would have been aware of Mr S’s letter, which said “we” are not aware of any information that could be of

¹⁴³ Above at [152].

¹⁴⁴ Above at [156].

¹⁴⁵ Above at [160] and [161].

¹⁴⁶ See above at [173].

¹⁴⁷ Above at [153].

assistance. However, given the general nature of the request and the lack of evidence in relation to any discussion with Mr C or his reply to Mr Williams, I do not draw an adverse inference from Mr S's letter.

[320] The 10 April 1987 request was more specific – it sought bulletins describing the suspect. As indicated, Mr M likely saw the request and Mr C's response of 27 April 1987 at least in draft.¹⁴⁸ The response supplied bulletins (noting that Mr Orme had all of these available on his file prior to trial). Mr C's response also referred to *Wickliffe* and said the Crown:

... has co-operated with you to date in supplying a good deal of information and I do have instructions to comply with your requests dated 10 April 1987 insofar as this is possible.

[321] It is unclear what Mr C was referring to when he said that in terms of *Wickliffe* the Crown had supplied a good deal of information. This also perhaps highlights the incomplete record available in this trial. But I accept from this letter, and from another judgment [REDACTED] in a case in which Mr C appeared for the Crown,¹⁴⁹ that Mr C was aware of the first *Wickliffe* decision at least by [REDACTED] and aware of the second *Wickliffe* decision at least by April 1987. In circumstances where he had been told of Mr Turner's previous descriptions, and may have received his previous statements, it is unclear why Mr C did not recognise that the *Wickliffe* obligation required their disclosure. But the Crown no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal). He may have made a (serious) mistake. Having advised that reference to the man Mr Turner saw being Māori was inadmissible, which meant it would be omitted from the s 173A statement, Mr C should at least have directed disclosure of Mr Turner's previous statements. In any event, there is no evidence about the content of discussions between Mr C and the defendants at that time. Mr C's letter does not explain his understanding of the *Wickliffe* obligation. The letter does not indicate that Mr M or Mr S understood the *Wickliffe* obligation specifically and it would be speculative to infer that.

¹⁴⁸ Above at [156]-[158].

¹⁴⁹ [REDACTED].

[322] The 5 May / 8 June 1987 request was also specific. It particularly sought information “that a person running across a road was nearly run over by a passing motorist”, which captured the Bungard and Cossey statements and jobsheets, but more broadly it sought information “as to any person leaving the property or moving through an adjacent alleyway and across a road, in the neighbourhood of the property”. Although this request focused on Mr Ringrose (who the police had ruled out as a suspect) and followed the expanded grounds of appeal, the request also captured Mr Turner’s sighting and therefore his previous statements.

[323] Mr C’s 22 June 1987 response indicates that the police were involved in answering the request, as it indicated the request had resulted in “a considerable amount of research between myself and the New Zealand Police” (albeit a copy of Mr C’s response was not on the police file). The response also indicates that Mr C was aware that unreliability was not the test for the Crown’s obligations to disclose information to the defence. In relation to the specific request, Mr C responded:

I can advise you that there is no information on file as to the person seen leaving the property or moving through an adjacent alleyway. There is no-one that falls into this category. However as you will know you had available at trial the sworn evidence of a Mr Turner who was a witness to a person crossing the road between Shirley [Avenue] and Clevedon Road. I do not regard this to be within the geographical compass set out by you or indeed the available evidence at trial. In addition and in an effort to assist you I will also enclose for your information two other job sheets relating to sightings by a Mr Bungard and a Mr Cossey of persons again in the general area but not within the geographical compass that you again speak of.

I consider that you have available all job sheets requested and relevant to these matters. ...

[324] Accepting the reference to Mr Turner in the response could have prompted a specific request for his underlying statements, Mr Turner’s previous statements should have been disclosed especially in response to this request, if they had not already been disclosed.

[325] Even if Mr C, Mr M and Mr S did not consider Mr Turner's evidence to be significant, Mr C's reference to Mr Turner in this response, alongside his reference to the research undertaken with police, indicates that he would have discussed Mr Turner with Mr M and/or Mr S. As a result, Mr M must have known that Mr Turner's previous statements had not been disclosed.

[326] It is not clear whether Mr M took any of the escalating steps set out in the Crown's submission. He and/or Mr S may have discussed Mr Turner's previous statements with Mr C.

[327] In any event, as indicated, involvement in this context requires knowledge of the Crown obligation to disclose that the Crown had failed to meet. Here, that is the obligation to disclose Mr Turner's previous statements. Further, in the circumstances of this case, such knowledge is also required to establish the element of intention to prevent a court from doing justice.

[328] Mr C's reference to Mr Turner in the response of 22 June 1987 is more consistent with a genuine view that Mr Turner's sighting was outside the scope of what was being sought, rather than a deliberate attempt to hide Mr Turner's previous statements. Further, that is likely how the letter would read to a police detective. In the absence of evidence showing that Mr M understood the *Wickliffe* obligation or that any discussion he (or Mr S) had with Mr C did not satisfy a concern, there is insufficient evidence to infer that Mr M knew that the Crown had failed to meet its obligation to disclose Mr Turner's previous statements.

[329] For these reasons, I cannot be sure that Mr M was involved in the positive act of declining to disclose Mr Turner's previous statements.

Whether declining to disclose Mr Turner's previous statements in the manner identified had a tendency to prevent a court from doing justice

[330] I have already addressed this element in the context of the first alleged act above.

Mr M's intention in declining to disclose Mr Turner's previous statements in the manner identified

[331] There is some overlap between this element and the positive act with knowledge, already addressed. Given my conclusions there, I deal with this element relatively briefly.

[332] The Crown submitted that this is a case where disclosure was clearly required and it is not plausible to suggest that anyone involved with the prosecution genuinely believed that reliability concerns meant disclosure was not required, either in accordance with a specific disclosure obligation or as part of the prosecution's duty of fairness. I interpolate that I am only addressing Mr C's intention insofar as it is relevant to the defendants.

[333] The Crown submitted there are two primary aspects to the question of intention in respect of the non-disclosure: the decision to disclose the Bungard and Cossey materials when the Turner materials were not disclosed; and the comments made in correspondence about not being aware of any further information which could be of assistance to Mr Hall. The Crown also submitted there is no foundation to the suggestion that the absence of a direct request for Mr Turner's statements undermines the Crown case.

[334] In conclusion the Crown submitted the documentary evidence shows that each defendant was involved in assisting Mr C with responding to the defence disclosure requests, and that they represented, on behalf of "the Police", that the defence had everything which might be "of assistance". The Crown submitted that this was wrong and that the making of this unqualified representation by the defendants, despite knowing what they did about the police file and the Turner statements, further supports an inference of intent.

[335] I accept there is an evident contrast between the disclosure of the Bungard/Cossey statements and the non-disclosure of Mr Turner's previous statements. However, the circumstances are somewhat different. Mr Bungard and Mr Cossey were not called as witnesses – disclosure of their statements was not on the

basis of the *Wickliffe* obligation. Their statements were disclosed before trial.¹⁵⁰ Disclosure of further jobsheets was provided by Mr C in response to a specific request by Mr Williams as indicated.¹⁵¹ I accept that shows the police were providing such information to Mr C. However, given the circumstantial differences between the Bungard/Cossey statements and Mr Turner's previous statements, and the response referring to Mr Turner, it is speculative to infer that Mr M had an improper reason for non-disclosure of Mr Turner's previous statements. As indicated, there is insufficient evidence to infer that Mr M knew that the Crown had failed to meet its obligation to disclose Mr Turner's previous statements. I do not accept that the non-disclosure of Mr Turner's previous statements, and the disclosure of Mr Bungard and Mr Cossey's statements (and jobsheets after trial), can only be reconciled with a deliberate intent to pervert the course of justice.

[336] Turning to the comments made in correspondence, the Crown submitted that a key piece of correspondence when considering the issue of intent is Mr S's letter to Mr C dated 26 November 1986 in response to Mr Williams' letter of 1 October 1986.¹⁵² I have already addressed that letter.¹⁵³ I have also addressed the Crown's suggestion that Mr S was prompted to complete his jobsheet on the sighting experiment by Mr Williams' letter to Mr C dated 1 October 1986.¹⁵⁴ This possibility does not materially add to the basis for drawing an adverse inference from Mr S's letter. I decline to do so.

[337] The Crown sought to draw a further contrast between non-disclosure of Mr Turner's previous statements in response to Mr Williams' 1 October 1986 letter and Mr S's helpful response in relation to "whether the deceased said anything prior to his decease that may have a bearing on the case". I do not consider that contrast is compelling. The request as to whether Mr Easton said anything before he died was specific whereas the other request was for "any information that may be of assistance to the appellant", which I have addressed. As the Court of Appeal said about this request in 1987 (without knowing of Mr Turner's previous statements), "a general

¹⁵⁰ Above at [142].

¹⁵¹ Above at [323].

¹⁵² Above at [152] and [155].

¹⁵³ Above at [318]-[319].

¹⁵⁴ Above n 51.

enquiry by the defence for any information which may be helpful to the defence, as was made in this case, is too vague”. That is not to go back in any way on my conclusion that Mr Turner’s previous statements should have been disclosed but merely to guard against drawing the adverse inference that the failure to disclose must have been a knowing breach of duty.

[338] The Crown also submitted it is telling that Mr S waited to disclose Mr Turner’s previous statements until he received a specific request for “the statements made by Ronald Brian Turner” on 15 December 1987. However, the alternative possible inference is that only then did Mr M and Mr S realise they were sought and had to be disclosed.

[339] Accordingly, I cannot be sure that Mr M, insofar as he was involved in declining to disclose Mr Turner’s previous statements, intended to prevent a court from doing justice.

Charge 2 – Mr S

First alleged act – s 173A statement

Mr S’s knowledge of the legal proceedings against Mr Hall

[340] Mr S accepts, and I am sure that, from at least 2 April 1986 when Mr Hall was charged, Mr S knew of the legal proceeding against Mr Hall.

Mr S’s involvement as a principal or party in directing or arranging for Mr Turner’s s 173A statement to be prepared and signed

[341] I address this element following the same approach and sequence as I did for charge 1.

[342] I deal first with the act itself – directing or arranging for Mr Turner’s s 173A statement to be prepared and signed. As indicated, there is no doubt that the statement was prepared and signed on or before the depositions hearing on 24 June 1986.¹⁵⁵

¹⁵⁵ Above at [126]-[128].

There is also no doubt that it excluded or omitted reference to the man Mr Turner had seen running across Clevedon Road on the night of 13 October 1985 being Māori.¹⁵⁶

[343] I am sure that Mr S was involved in directing or arranging for Mr Turner's s 173A statement to be prepared and signed. In accordance with the Manual, and as Mr M said in evidence, [REDACTED] Mr S was directly responsible for the preparation of the s 173A statements. This would have included Mr Turner's s 173A statement. Mr S attended the pre-depositions meeting with Mr C to discuss Mr Turner's s 173A statement.¹⁵⁷ Mr S took a statement from Mrs Turner at home on 23 June 1986 and would have arranged for Mr Turner to sign his statement directly or indirectly.¹⁵⁸ This was sufficient involvement to constitute a positive act.

[344] I am also sure that Mr S knew at the time that Mr Turner's s 173A statement would exclude or omit that Mr Turner described the man he had seen running across Clevedon Road on the night of 13 October 1985 as Māori.

[345] First, Mr S knew of Mr Turner's previous statements and in particular that Mr Turner had described the person running across Clevedon Road as Māori. This is clear given his role [REDACTED],¹⁵⁹ his attendance at investigation briefings such as the one recorded on 15 October 1985 when at least Mr Turner's initial statements were discussed,¹⁶⁰ his preparation of the Summary of Available Evidence document for the pre-charge meeting with the Crown where Mr Turner's statements were referred to,¹⁶¹ his attendance at that meeting, and his attendance at the sighting experiment which he knew was carried out to see whether race could be identified.¹⁶²

[346] Secondly, Mr S knew Mr Turner's s 173A statement would omit reference to Māori given his role [REDACTED] and his attendance at the pre-depositions meeting.¹⁶³ In evidence, Mr M accepted that as a result of the sighting experiment and given the total circumstances, he and others, including Officer S, were concerned the

¹⁵⁶ Above at [128].

¹⁵⁷ Above at [121] and [246](b).

¹⁵⁸ Above at [126].

¹⁵⁹ Above at [67].

¹⁶⁰ Above at [92].

¹⁶¹ Above at [107].

¹⁶² Above at [111]-[113].

¹⁶³ Above at [121].

explanation given by Mr Turner may not have been accurate. Mr M accepted the purpose of the pre-depositions meeting with Mr C was to discuss the uncertainty surrounding the identification of race in the sighting experiment and “that we were of the view that given the circumstances that Mr Turner was in, it may have been similar”. Mr M also accepted in evidence that there was no reference to Māori in the statement as Mr C gave advice that it was inadmissible and “it necessarily followed that it wouldn’t be in the s 173A statement”. He accepted that he and Officer S “took license” of what Mr C told them and “were acting on the instructions of Mr C” in preparing the s 173A statement. Thus, I am sure Mr S finalised Mr Turner’s s 173A statement with no reference to the man Mr Turner saw being Māori following Mr C’s advice that it was inadmissible.

[347] I am sure that, at the time, Mr S knew the statement was intended to be admissible as evidence in the legal proceeding against Mr Hall. It was prepared for the purpose of depositions.

[348] As with charge 1, I will deal with Mr S’s knowledge (intention) that Mr Turner’s previous statements would not be disclosed to Mr Hall’s defence lawyers in the context of intention below.

Whether directing or arranging for Mr Turner’s statement to be prepared and signed in the manner identified had a tendency to prevent a court from doing justice

[349] My analysis in relation to charge 1 applies equally to charge 2.¹⁶⁴

Mr S’s intention in directing or arranging for Mr Turner’s statement to be prepared and signed in the manner identified

[350] I address this element following the same approach and sequence as I did for charge 1. My analysis in relation to charge 1 has considerable application here.

[351] Before addressing whether Mr S’s intention, in directing or arranging for Mr Turner’s statement to be prepared and signed, was to prevent a court from doing

¹⁶⁴ Above at [276]-[295].

justice, I deal with Mr S's knowledge (intention) that Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers.

[352] As indicated, I am sure that, at the time, Mr S knew of Mr Turner's previous statements and in particular that Mr Turner had described the person running across Clevedon Road as Māori.¹⁶⁵

[353] As for charge 1, the Crown submitted that an intent to prevent the course of justice in relation to the omission from the s 173A statement can be inferred from the surrounding circumstances and, in particular, the timing of the key decisions made in relation to Mr Turner's evidence: the re-interview of Mr Turner on 19 February 1986 (and the substance of this re-interview, as addressed by Mr Turner in his 22 August 1988 affidavit); the sighting experiment; the pre-depositions meeting with Mr C; and the late interview of Mrs Turner.

[354] While I accept that Mr S would have known that Mr Turner's previous statements had not already been disclosed to Mr Hall's defence lawyers, as indicated knowledge that they would not be disclosed to Mr Hall's defence lawyers thereafter – in circumstances where disclosure would have been within the control of the Crown prosecutor – would depend on Mr S being party to or at least knowing of an arrangement or understanding with the Crown prosecutor that Mr Turner's previous statements would not be disclosed to Mr Hall's defence lawyers at any time after the s 173A statement was finalised and provided (at least unless and until there was a specific request for them).

[355] Such an arrangement or understanding contradicts the Crown's position that it no longer advances the case that the defendants were parties to Mr C's non-disclosure (as a principal). It is also directly inconsistent with the Crown's alternative case that the Crown prosecutor was misled. In any event, the Crown has not proved such an arrangement or understanding. It cannot properly be inferred from the available evidence. It is largely speculative.

¹⁶⁵ Above at [271]-[273].

[356] For these reasons, I cannot be sure Mr S knew that Mr Turner’s previous statements would not be disclosed to Mr Hall’s defence lawyers. This applies in the short time before committal (the temporal scope for this alleged act in the question trail) or thereafter (which merges into the second alleged act addressed below). It also therefore applies to the characterisation of the alleged offending as a course of conduct.

[357] Turning to whether Mr S’s intention, in directing or arranging for Mr Turner’s statement to be prepared and signed, was to prevent a court from doing justice, I address this briefly given my previous conclusion.

[358] As indicated, the defendants did not seek to uphold the correctness of Mr C’s advice at the pre-depositions meeting that Mr Turner’s reference to the man he saw as Māori was inadmissible. Nor did they seek to suggest they were following superior orders – it is common ground that the mere fact a defendant was obeying an order will not negate mens rea. Rather, the defence position was that Mr C honestly held the view that Mr Turner’s reference to the man he saw as Māori was inadmissible and that Officer M and Officer S were entitled to rely on Mr C’s advice. The defendants also relied on the observation of acting DSS Cleary, from his review of the police file and other documents, that Operation Easton was a very well-run investigation for its time.

[359] As indicated, “perversion” of the course of justice extends to conduct intended to bring about what the defendant believes to be the correct or just result by the use of improper means.¹⁶⁶ However, the offence requires an intention to use improper means. There is no such intention if Mr S had an honest belief that the means were proper. Knowledge that an act enhances the prosecution case does not suffice.

[360] I accept Mr M’s evidence that during the course of the investigation, prosecution, and appeal, there was nothing that caused him concern about the conduct of any of the police staff [REDACTED]. That includes [REDACTED] Mr S.

¹⁶⁶ Above at [29].

[361] I cannot be sure that Mr S, insofar as he was involved in directing or arranging for Mr Turner’s statement to be prepared and signed in the manner identified, intended to prevent a court from doing justice, rather than reasonably relied on Mr C’s advice.

Second alleged act – non-disclosure of Mr Turner’s previous statements

Legal obligation to disclose Mr Turner’s previous statements or comply with a request for disclosure of those statements

[362] My analysis in relation to charge 1 applies equally to charge 2.¹⁶⁷

Mr S’s involvement as a principal or party in declining to disclose Mr Turner’s previous statements

[363] I address this element following the same approach and sequence as I did for charge 1.

[364] As indicated, it is not disputed, and I have already concluded, that Mr Turner’s previous statements were not disclosed to the defence until after the 1987 Court of Appeal decision.¹⁶⁸ I have also already addressed Mr S’s knowledge of the omission from Mr Turner’s s 173A statement,¹⁶⁹ which must have extended through the relevant period between committal and appeal determination. It was not suggested, and would be implausible to suggest, that Mr S had forgotten about Mr Turner’s previous statements or the omission. I have also already addressed Mr S’s knowledge that the s 173A statement was evidence in the proceeding against Mr Hall.¹⁷⁰

[365] As indicated, reference in the question trail to “declining” to disclose, together with knowledge of the legal obligation to disclose or in response to a request for the previous statements, reflects the need for a positive act, rather than a mere omission. As with the first alleged act, this second alleged act also incorporates knowledge components (distinct from the offence’s separate element of intention to prevent a court from doing justice).

¹⁶⁷ Above at [306].

¹⁶⁸ Above at [175]-[176].

¹⁶⁹ Above at [344]-[346].

¹⁷⁰ Above at [347].

[366] Approaching the act according to the way in which the obligation arose, I deal first with whether Mr S declined to disclose or explain Mr Turner's previous statements to Mr C in the period after committal if that had not already occurred. As indicated already,¹⁷¹ given the lack of available evidence from the Crown file and Mr C, I cannot be sure that Mr Turner's previous statements had not already been disclosed or explained to Mr C.

[367] I turn to the second obligation, that is the obligation following the defence requests after depositions to raise the issue at least with Mr C, even if the statements had previously been disclosed to Mr C.

[368] As for charge 1, the Crown submitted that a consideration of what was disclosed demonstrates beyond doubt a deliberate decision not to disclose Mr Turner's previous statements. It relied on Mr S's response saying "we are not aware of any information that could be of assistance to the Appellant".¹⁷² It submitted the persistent disclosure requests must have made it clear that the statements had not been disclosed. In those circumstances, the Crown submitted both Mr M and Mr S would have been aware of what had and had not been disclosed in the post-trial period.

[369] The Crown submitted the failure to ensure that Mr Turner's previous statements were disclosed was a positive act, in the sense that the defendants knew the defence did not have this information, which put them in a position where they had a duty, and the ability, to act to rectify this injustice. It submitted that "ensuring" disclosure in this sense involved the same series of escalating steps referred to above.¹⁷³ There is no record of the defendants taking any of these steps.

[370] Relevant to Officer S, I acknowledge Mr M's evidence that any disclosure from the police perspective rested with [REDACTED] Mr S. I also accept in general terms Mr M's evidence that his understanding was that the Crown dealt with disclosure and the Crown's view prevailed as the legal experts.

¹⁷¹ Above at [250].

¹⁷² Above at [155].

¹⁷³ At [313].

[371] Although Mr Hall's defence counsel made no explicit request for Mr Turner's previous statements during the relevant period, they did make several requests, all directed to the Crown prosecutor, as set out above.¹⁷⁴

[372] The first two of these requests were general in nature. Addressing the first 29 August 1986 (pre-trial) request, the Court of Appeal considered the general enquiry was vague.¹⁷⁵ Mr C responded to the first request on 10 September 1986 saying "I do not consider there is any other information that may be helpful to you that I can now supply". Mr S may have seen Mr Williams' request to Mr C for information before trial, but I cannot be sure of that or that he was involved in Mr C's response.

[373] As indicated, there is no record of a response from Mr C to Mr Williams' 1 October 1986 letter. However, on 26 November 1986, Officer S wrote to Mr C relevantly stating:

As discussed with you the request made in the first paragraph of Mr WILLIAM'S letter cannot be complied with as we are not aware of any information that could be of assistance to the Appellant.

[374] The Crown submitted that given Mr S's intimate involvement with the investigation of the crime and the subsequent prosecution, he could not have believed the statement that "we are not aware of any information that could be of assistance to the Appellant" to be true.

[375] However, given the general nature of the request and the lack of evidence in relation to the discussion with Mr C or his reply to Mr Williams, I do not draw an adverse inference from Officer S's letter.

[376] The 10 April 1987 request was more specific – it sought bulletins describing the suspect. It was copied to Officer S. He also likely saw Mr C's response of 27 April 1987 at least in draft.¹⁷⁶ The response supplied bulletins (noting that Mr Orme had all of these available on his file prior to trial). As indicated, Mr C's response also referred to *Wickliffe* and said the Crown:

¹⁷⁴ At [316].

¹⁷⁵ See above at [173].

¹⁷⁶ Above at [156]-[158].

... has co-operated with you to date in supplying a good deal of information and I do have instructions to comply with your requests dated 10 April 1987 insofar as this is possible.

[377] As indicated, it is unclear what Mr C was referring to when he said that in terms of *Wickliffe* the Crown had supplied a good deal of information. This also perhaps highlights the incomplete record available in this trial. As indicated, I accept that Mr C was aware of *Wickliffe*. In any event, as indicated, there is no evidence about the content of discussions between Mr C and the defendants at that time. Mr C's letter does not explain his understanding of the *Wickliffe* obligation. The letter does not indicate that Mr M or Mr S understood the *Wickliffe* obligation specifically and it would be speculative to infer that.

[378] The 5 May / 8 June 1987 request was also specific. As indicated, it particularly sought information "that a person running across a road was nearly run over by a passing motorist", which captured the Bungard and Cossey statements and jobsheets, but more broadly it sought information "as to any person leaving the property or moving through an adjacent alleyway and across a road, in the neighbourhood of the property". Although this request focused on Mr Ringrose and followed the expanded grounds of appeal, the request also captured Mr Turner's sighting and therefore his previous statements.

[379] As indicated, Mr C's 22 June 1987 response indicates that the police were involved in answering the request (albeit a copy of the response was not on the police file).¹⁷⁷ The response also indicates that Mr C was aware that unreliability was not the test for the Crown's obligations to disclose information to the Defence. In relation to the specific request, Mr C responded:

I can advise you that there is no information on file as to the person seen leaving the property or moving through an adjacent alleyway. There is no-one that falls into this category. However as you will know you had available at trial the sworn evidence of a Mr Turner who was a witness to a person crossing the road between Shirley [Avenue] and Clevedon Road. I do not regard this to be within the geographical compass set out by you or indeed the available evidence at trial. In addition and in an effort to assist you I will also enclose for your information two other job sheets relating to sightings by a Mr Bungard and a Mr Cossey of persons again in the general area but not within the geographical compass that you again speak of.

¹⁷⁷ See above at [323].

I consider that you have available all job sheets requested and relevant to these matters. ...

[380] Accepting the reference to Mr Turner in the response could have prompted a specific request for his underlying statements, Mr Turner's previous statements should have been disclosed especially in response to this request, if they had not already been disclosed.

[381] Even if Mr C, Mr M and Mr S did not consider Mr Turner's evidence to be significant, Mr C's reference to Mr Turner in this response, alongside his reference to the research undertaken with police, indicates that he would have discussed Mr Turner with Mr S and/or Mr M. As a result, Mr S must have known that Mr Turner's previous statements had not been disclosed.

[382] It is not clear whether Mr S took any of the escalating steps set out in the Crown's submission. He and/or Mr M may have discussed Mr Turner's previous statements with Mr C.

[383] In any event, as indicated, involvement in this context requires knowledge of the Crown obligation to disclose that the Crown had failed to meet. Here, that is the obligation to disclose Mr Turner's previous statements. Further, in the circumstances of this case, such knowledge is also required to establish the element of intention to prevent a court from doing justice.

[384] As indicated, Mr C's reference to Mr Turner in the response of 22 June 1987 is more consistent with a genuine view that Mr Turner's sighting was outside the scope of what was being sought, rather than a deliberate attempt to hide Mr Turner's previous statements. Further, that is likely how the letter would read to a police detective. In the absence of evidence showing that Mr S understood the *Wickliffe* obligation or that any discussion he (or Mr M) had with Mr C did not satisfy a concern, there is insufficient evidence to infer that Mr S knew that the Crown had failed to meet its obligation to disclose Mr Turner's previous statements.

[385] For these reasons, I cannot be sure that Mr S was involved in the positive act of declining to disclose Mr Turner's previous statements.

Whether declining to disclose Mr Turner's previous statements in the manner identified had a tendency to prevent a court from doing justice

[386] I have already addressed this element in the context of the first alleged act above.

Mr S's intention in declining to disclose Mr Turner's previous statements in the manner identified

[387] With this charge too, there is some overlap between this element and the positive act with knowledge, already addressed. Given my conclusions there, I deal with this element relatively briefly.

[388] The Crown's submissions at [332]-[334] above apply equally here.

[389] I accept there is an evident contrast between the disclosure of the Bungard/Cossey statements and the non-disclosure of Mr Turner's previous statements. However, the circumstances are somewhat different. Mr Bungard and Mr Cossey were not called as witnesses – disclosure of their statements was not on the basis of the *Wickliffe* obligation. Their statements were disclosed before trial.¹⁷⁸ Disclosure of further jobsheets was provided by Mr C in response to a specific request by Mr Williams as indicated.¹⁷⁹ I accept that shows the police were providing such information to Mr C. However, given the circumstantial differences between the Bungard/Cossey statements and Mr Turner's previous statements, and the response referring to Mr Turner, it is speculative to infer that Mr S had an improper reason for non-disclosure of Mr Turner's previous statements. As indicated, there is insufficient evidence to infer that Mr S knew that the Crown had failed to meet its obligation to disclose Mr Turner's previous statements. I do not accept that the non-disclosure of Mr Turner's previous statements, and the disclosure of Mr Bungard and Mr Cossey's statements (and jobsheets after trial), can only be reconciled with a deliberate intent to prevent the course of justice.

¹⁷⁸ Above at [142].

¹⁷⁹ Above at [323].

[390] Turning to the comments made in correspondence, as indicated the Crown submitted that a key piece of correspondence when considering the issue of intent is Mr S's letter to Mr C dated 26 November 1986 in response to Mr Williams' letter of 1 October 1986.¹⁸⁰ I have already addressed that letter.¹⁸¹ I have also addressed the Crown's suggestion that Mr S was prompted to complete his jobsheet on the sighting experiment by Mr Williams' letter to Mr C dated 1 October 1986.¹⁸² This possibility does not materially add to the basis for drawing an adverse inference from Mr S's letter. I decline to do so.

[391] As indicated, the Crown sought to draw a further contrast between non-disclosure of Mr Turner's previous statements in response to Mr Williams' 1 October 1986 letter and Mr S's helpful response in relation to "whether the deceased said anything prior to his decease that may have a bearing on the case". As indicated, I do not consider that contrast is compelling. The request as to whether Mr Easton said anything before he died was specific whereas the other request was for "any information that may be of assistance to the appellant", which I have addressed. As the Court of Appeal said about this request in 1987 (without knowing of Mr Turner's previous statements), "a general enquiry by the defence for any information which may be helpful to the defence, as was made in this case, is too vague". As indicated, that is not to go back in any way on my conclusion that Mr Turner's previous statements should have been disclosed but merely to guard against drawing the adverse inference that the failure to disclose must have been a knowing breach of duty.

[392] The Crown also submitted it is telling that Mr S waited to disclose Mr Turner's previous statements until he received a specific request for "the statements made by Ronald Brian Turner" on 15 December 1987. However, as indicated, the alternative possible inference is that only then did Mr M and Mr S realise they were sought and had to be disclosed.

¹⁸⁰ Above at [152] and [155].

¹⁸¹ Above at [318]-[319].

¹⁸² Above n 51.

[393] As indicated, I accept Mr M's evidence that during the course of the investigation, prosecution, and appeal, there was nothing that caused him concern about the conduct of any of the police staff [REDACTED]. That includes [REDACTED] Officer S.

[394] Accordingly, I cannot be sure that Mr S, insofar as he was involved in declining to disclose Mr Turner's previous statements, intended to prevent a court from doing justice.

Result

[395] For these reasons, I returned verdicts of not guilty.

Gault J

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