IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 114/2024
[2026] NZSC 171

BETWEEN	RAYMOND IVEAGH JURY Appellant
AND	THE KING Respondent

Hearing:	5 August 2025
Further Submissions:	15 September 2025
Court:	Winkelmann CJ, Glazebrook, Ellen France, Kós and Miller JJ
Counsel:	C W J Stevenson KC and S J Parry for Appellant Z R Johnston and Z R Hamill for Respondent
Judgment:	11 November 2026

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
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Glazebrook and Kós JJ	[30]
Ellen France and Miller JJ	[413]
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Appendix A: tabulated CCTV evidence
Appendix B: map of Te Ngae Road adduced at trial
Appendix C: simplified diagram of Te Ngae Road

SUMMARY OF REASONS
(Given by the Court)

[1] This is a summary of the Court's reasons on the principal issues in the appeal and must be read alongside the full reasons.

Background

[2] In the early hours of 30 January 2019, Mr Te Aonui found a severely injured Mr Rikihana on his driveway and took him to hospital. Mr Rikihana was pronounced dead soon after his arrival at the hospital. The appellant, Mr Jury, was convicted of Mr Rikihana's murder.

[3] The Court of Appeal dismissed Mr Jury's appeal against conviction. This Court granted Mr Jury leave to appeal against the Court of Appeal decision. The main ground of appeal was that statements made by a Mr Maney were inadmissible hearsay.

[4] Mr Maney had made a statement to police (the first police statement) claiming he had no knowledge about Mr Rikihana's death. When police searched Mr Maney's house, they found a letter (the letter) that appeared to provide a contemporaneous account of Mr Jury bringing a severely beaten Mr Rikihana to Mr Maney's house and then leaving with Mr Rikihana to go to Mr Te Aonui's house. Mr Maney then made another statement to police (the second police statement) implicating Mr Jury.

[5] Mr Maney died before Mr Jury's trial. The three statements were admitted at Mr Jury's trial, the letter and the second police statement as hearsay statements. Both the Crown and Mr Jury agreed that the first police statement was false. It was thus not a hearsay statement as defined in s 4 of the Evidence Act 2006, because no party relied on it for the truth of its contents. The first police statement was only admissible if the two hearsay statements were admitted as it would be relevant to the jury's task of assessing the actual reliability and credibility of the hearsay statements.

Issues to be decided

[6] The appeal principally concerned whether or not the hearsay statements of Mr Maney should have been admitted at trial. This depended on the reliability test for the admissibility of hearsay statements under s 18(1)(a) of the Evidence Act — namely, when "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". The definition of "circumstances" is in s 16(1).

[7] A related issue was whether the trial Judge's omission to give a s 122 reliability direction with regard to Mr Maney's statements was an error. The Court also had to consider whether defence counsel erred by not adducing evidence of Mr Maney's prior conviction for attempting to pervert the course of justice.

[8] Assuming any errors were identified, the next question was whether any error gave rise to a miscarriage of justice as defined in s 232(4)(a) of the Criminal Procedure Act 2011 (that the error created a real risk the outcome of the trial was affected).

[9] The Court then had to decide whether any errors were so fundamental that they meant Mr Jury did not receive a fair trial. If Mr Jury did not receive a fair trial, the appeal had to be allowed.

[10] Assuming that any of the errors gave rise to a miscarriage of justice but the trial was fair, the Court had to consider whether it was nevertheless sure of guilt beyond reasonable doubt. If it was, then the outcome of the trial was not affected by the errors and there would therefore be no actual miscarriage of justice, meaning the appeal would be dismissed.

Legal test for the admission of hearsay statements

[11] A majority comprising Glazebrook, Ellen France, Kós and Miller JJ agreed with the following summary of the s 18(1)(a) test for the admission of hearsay evidence:[1]

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[1] See below at [115] per Glazebrook and Kós JJ and [438]–[445] per Ellen France and Miller JJ.

> [438] The statement in s 18(1)(a) of the Evidence Act, that hearsay evidence is admissible where "the circumstances relating to the statement provide reasonable assurance that the statement is reliable", means just what it says.
>
> [439] Recognising the gatekeeping responsibility of the court under s 18(1)(a), the judge will need to give the circumstances relating to the statement a hard look against the background of the dangers of hearsay.
>
> [440] The threshold test to be applied under s 18(1)(a) is a different exercise, and involves a different test, to that set out in s 7. But obviously the evidence has to be relevant and so the s 7 test, as well as that under s 8, must also be met.
>
> [441] The exercise involved is a threshold one and does not involve a general review of the overall evidence or of the Crown case.
>
> [442] Circumstances are widely and inclusively defined. The context in which the circumstances of reliability are being assessed may be relevant to the assessment of some of these circumstances. Further, some circumstances may call for a broader inquiry into other evidence.
>
> [443] As this Court said in *Gwaze*, all of the circumstances need to be considered, although that will not necessarily require a slavish examination under each of the separate headings in s 16(1)(a)–(e) in every case.
>
> [444] The exercise is an evaluative one dependent on the facts. This means it is difficult to be any more prescriptive about the test.
>
> [445] We add that the dangers of hearsay will also be relevant to the application of the s 8 test as the inability to cross-examine may impact on fair trial rights. The right in s 25(f) of the New Zealand Bill of Rights Act 1990 to examine the witnesses for the prosecution is also significant in this respect.

[12] The Chief Justice took a different view of the inquiry under ss 16(1) and 18(1)(a). In particular, she considered that reliability is assessed through reference to circumstances related to the statement and its maker, and that the sections do not contemplate a general review of other evidence or a search for corroboration in other evidence.[2]

[13] Glazebrook and Kós JJ, in agreement with the Chief Justice, made a number of other holdings as to the s 18(1)(a) test:

(a) the availability of a warning as to reliability under s 122 does not affect the s 18(1)(a) (nor the s 8) analysis;[3]

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2 Below at [483]–[484], [505] and [520].

3 Below at [113] per Glazebrook and Kós JJ and [481] per Winkelmann CJ.

(b) the approach of the High Court and Court of Appeal in the present case was wrong and would allow facially unreliable evidence to be admitted where a judge considered that any unreliability could be exposed for the jury's consideration through submissions or other evidence at trial;[4] and

(c) the s 18(1)(a) threshold is higher than that under s 7, and judges must satisfy themselves as to whether they are reasonably assured as to a statement's reliability.[5]

Admissibility of Mr Maney's statements

[14] The Court unanimously held Mr Maney's statements were not admissible.

[15] A majority comprising Glazebrook, Ellen France, Kós and Miller JJ held that the second police statement was false in a fundamental way: CCTV evidence of the car Mr Jury drove on the night in question showed that the events described in the second police statement could not have occurred in the manner described.[6] Given the two police statements were fundamentally inconsistent, no weight could be placed on them being made to police with an acknowledgement of the consequences of giving false evidence and under caution.[7]

[16] There were also inconsistencies between the letter and the second police statement.[8] Mr Maney also had a prior conviction for perverting the course of justice in not dissimilar circumstances and had a motive to lie given he himself was a suspect.[9] The circumstances provided fertile grounds for cross-examination, itself an indicator

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4 Below at [117] per Glazebrook and Kós JJ and [477]–[478] per Winkelmann CJ.
5 Below at [98] and [117] per Glazebrook and Kós JJ and [475] and [478]–[479] per Winkelmann CJ.
6 Below at [170]–[173] and [188(a)(ii)] per Glazebrook and Kós JJ and [454] per Ellen France and Miller JJ.
7 Below at [158]–[159] and [188(b)] per Glazebrook and Kós JJ and [451]–[452] per Ellen France and Miller JJ.
8 Below at [164]–[167] and [188(c)] per Glazebrook and Kós JJ and [452] per Ellen France and Miller JJ.
9 Below at [179]–[181] and [188(f)] per Glazebrook and Kós JJ and [453] and [456] per Ellen France and Miller JJ.

of low reliability. It was no answer to assert cross-examination would not have made a difference, or that the issues relating to reliability could be pointed out to the jury.[10]

[17] The Chief Justice considered that the majority were wrong to rely on conflict between the second police statement and the CCTV evidence, and Ellen France and Miller JJ were wrong to note areas of consistency between Mr Maney's statements and evidence of other witnesses.[11] However, she agreed that the statements were inadmissible.[12] Mr Maney's statements were contradictory of each other, and there is every indication Mr Maney lied to police.[13] Mr Maney's conviction for attempting to pervert the course of justice was a powerful indicator of unreliability.[14]

Section 122 reliability warning

[18] The trial Judge did not give a reliability warning about Mr Maney's statements under s 122 of the Evidence Act. The Chief Justice, Glazebrook and Kós JJ held that a reliability warning was required.[15] It was not necessary for Glazebrook and Kós JJ to consider whether the Judge's omission caused a miscarriage of justice.[16]

Evidence of Mr Maney's conviction at trial

[19] Mr Jury and the Crown were aware that Mr Maney had earlier been convicted of wilfully attempting to pervert the course of justice, but did not have the details of that conviction. Nor was evidence of the conviction adduced at trial.

[20] Glazebrook and Kós JJ held that Mr Maney's prior conviction for attempting to pervert the course of justice was significant, no matter the length of time that had passed since conviction. The Crown should have sought the summary of facts from the police and/or the sentencing notes and provided these to Mr Jury before the

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10 Below at [185]–[187] and [188(g)] per Glazebrook and Kós JJ. See below at [456] per Ellen France and Miller JJ.
11 Below at [527]–[531].
12 Below at [539].
13 Below at [533].
14 Below at [536].
15 Below at [225] per Glazebrook and Kós JJ and [549] per Winkelmann CJ.
16 Below at [232].

admissibility hearing. If the summary of facts was not available, the Crown should have searched any relevant databases for any further information on the conviction.[17]

[21] Defence counsel's advice to Mr Jury against introducing evidence of Mr Maney's conviction was based on an erroneous legal premise and given without having the details of the offending because of the failure by the Crown. Had these errors by Crown and defence counsel not been made, defence counsel would have placed evidence of the conviction before the jury or asked the Crown to do so. It was not, however, necessary for Glazebrook and Kós JJ to consider whether these errors caused a miscarriage of justice.[18]

[22] The Chief Justice agreed that the fact of the conviction, and the details of it, should have been before the jury.[19]

Miscarriage of justice?

[23] The Court was unanimous that the admission of Mr Maney's statements was an error that created a real risk the outcome of the trial was affected and thus caused a miscarriage of justice.[20]

Unfair trial?

[24] The majority comprising Glazebrook, Ellen France, Kós and Miller JJ did not consider that the wrongful admission of Mr Maney's statements was a fundamental error that meant his trial was unfair.[21]

[25] However, the Chief Justice considered that the threshold for unfair trial was reached in this case, meaning that the appeal had to be allowed.[22] She considered the trial was unfair because the evidence was significant to the Crown's case; the fact and

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17 Below at [249].
18 Below at [251].
19 Below at [548].
20 Below at [211] per Glazebrook and Kós JJ, [457] per Ellen France and Miller JJ and at [541] per Winkelmann CJ. Ellen France and Miller JJ commented, however, that the admission of the hearsay evidence would not have caused a miscarriage of justice had a reliability warning been given.
21 Below at [254] per Glazebrook and Kós JJ and [458] per Ellen France and Miller JJ.
22 Below at [546] and [551].

details of Mr Maney's prior conviction for attempting to pervert the course of justice should have been before the jury; and the trial Judge failed to give a reliability warning.[23]

Guilt

[26] Glazebrook and Kós JJ were satisfied that Mr Jury's account was false and that the Crown had proved Mr Jury's guilt beyond reasonable doubt.[24] Ellen France and Miller JJ concurred.[25] This meant that, despite the errors, the outcome of the trial was not affected and therefore no actual miscarriage of justice occurred.

[27] The Chief Justice considered the evidence admitted at trial was inconclusive as to the fact and degree of Mr Jury's culpability.[26]

Result

[28] The Court, by a majority comprising Glazebrook, Ellen France, Kós and Miller JJ, dismissed the appeal.[27]

[29] The Chief Justice would have allowed the appeal, quashed Mr Jury's conviction and ordered a retrial.[28]

GLAZEBROOK AND KÓS JJ
(Given by Glazebrook J)

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23 Below at [546]–[550].
24 Below at [407]–[409] and [411].
25 Below at [458].
26 Below at [552].
27 Below at [412] per Glazebrook and Kós JJ and [458] per Ellen France and Miller JJ.
28 Below at [554].

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Introduction

[30] Following a jury trial, Mr Raymond Jury was convicted of the murder of Mr Trevor Rikihana. He was sentenced in October 2020 to life imprisonment with a minimum period of imprisonment (MPI) of 17 years.[29]

[31] Mr Jury appealed to the Court of Appeal against his conviction on four grounds:[30]

(a) The High Court incorrectly allowed the Crown to adduce hearsay statements made by Mr Rex Maney. Mr Maney had died before trial.

(b) Mr Jury's trial counsel erred by not calling Mr Maney's whāngai son, Jason Maney, as a witness. Jason had earlier told an investigator that Mr Maney had told Jason that he (Mr Maney) was responsible for Mr Rikihana's death.

(c) The trial Judge should have cautioned the jury about the use they could make of Mr Maney's evidence and did not.

(d) Mr Jury's trial counsel erred by not adducing evidence of Mr Maney's conviction in 2009 for wilfully attempting to pervert the course of justice.

[32] Mr Jury's appeal against conviction was dismissed.[31] His appeal against sentence was allowed: the MPI of 17 years was set aside and an MPI of 14 years substituted.[32]

[33] On 17 March 2025, this Court granted Mr Jury's application for leave to appeal from the Court of Appeal decision with regard to the statements made by Mr Maney.

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29 *R v Jury* [2020] NZHC 2618 (Davison J).

30 *Jury v R* [2024] NZCA 320 (Cooke, Collins and Osborne JJ) [CA judgment] at [2]–[3].

31 At [131]. So too was his application for recall of the CA judgment: *Jury v R* [2024] NZCA 453 (Cooke, Collins and Osborne JJ) [CA recall judgment]; and see below at [142]–[143].

32 CA judgment, above n 30, at [132].

The application for leave to appeal was dismissed insofar as it related to Jason not being called as a witness.[33]

[34] In advance of the hearing, the parties were asked to make oral submissions on whether there was any obligation on the Crown, in offering the hearsay statements in evidence, to place before the jury the fact of Mr Maney's prior conviction for attempting to pervert the course of justice and/or whether there was any obligation on the trial Judge to require the Crown to do so by making this a condition of admissibility.[34]

[35] After the hearing, the Court sought additional submissions from the parties as to whether the Court could be sure of Mr Jury's guilt.[35] For the purposes of these supplementary submissions, the parties were asked to assume that the Court would hold that the statements of Mr Maney were inadmissible.

[36] The issues in the appeal are therefore:[36]

(a) the correct approach to the admissibility of hearsay statements;[37]

(b) whether the High Court erred by admitting the hearsay statements of Mr Maney in evidence;[38]

(c) if so, whether the error occasioned a miscarriage of justice;[39]

(d) whether the trial Judge's omission to give a reliability direction under s 122 of the Evidence Act 2006 with respect to those statements occasioned a miscarriage of justice;[40]

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33 *Jury v R* [2025] NZSC 14 (Glazebrook and Ellen France JJ) [SC leave judgment].

34 *Jury v R* SC 114/2024, 4 August 2025 (Minute of the Court) [SC pre-hearing minute]. At the Court's suggestion and with leave, counsel filed further short submissions on this topic after the hearing.

35 *Jury v R* SC 114/2024, 11 August 2025 (Minute of the Court).

36 Issues (a)–(c) reflect the approved leave questions: see SC leave judgment, above n 33. Issues (d) and (e) are related to those leave questions and are covered in the supplementary submissions.

37 See below at [74]–[119].

38 See below at [135]–[196].

39 See below at [197]–[211].

40 See below at [212]–[232].

(e) whether trial counsel erred in not adducing evidence of Mr Maney's conviction for attempting to pervert the course of justice,[41] and, if so, whether this occasioned a miscarriage of justice (this issue also includes consideration of the extent of any obligations on the Crown and the trial Judge relating to Mr Maney's conviction for attempting to pervert the course of justice);[42] and

(f) assuming we find an error that may have affected the outcome of the trial but are nevertheless satisfied that Mr Jury had a fair trial, whether we can be sure of guilt, in which case there was no *actual* miscarriage of justice.[43]

[37] Before examining these questions, we first:

(a) set out some very brief background;[44]

(b) set out the legislative provisions relating to the admission of hearsay statements;[45]

(c) summarise the legislative history;[46]

(d) summarise the submissions of the parties on the law;[47]

(e) outline the issues arising from the submissions;[48]

(f) deal with those issues;[49] and

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41 See below at [122]–[125].
42 See below at [233]–[251].
43 See below at [359]–[409].
44 Below at [38]–[43]. We provide more details on the background later in the judgment: see below at [122]–[134] and [257]–[358].
45 Below at [44]–[55].
46 Below at [56]–[73].
47 Below at [75]–[86].
48 Below at [87].
49 Below at [88]–[114].

(g) summarise the law relating to hearsay to the extent relevant to this appeal, before making some comments on the Chief Justice's reasons.[50]

Brief background

[38] At the time of his death, Mr Rikihana was 69 years old and 168 cm tall but weighed only 49 kg.[51] He was a member of the Mongrel Mob. He lived in a semi-rural property on the outskirts of Rotorua at the end of Pukepoto Road (off Te Ngae Road) with his niece, Ms Eketone, and her seven-year-old son.[52]

[39] Mr Jury was also a member of the Mongrel Mob and lived in Christchurch. In early 2019, he visited various towns in the North Island, and late at night on 29 January, he arrived in Rotorua.

[40] The Crown's case was that, in the early hours of 30 January 2019, Mr Jury went to see Mr Rikihana at his home.[53] While the initial interaction was friendly, they soon began arguing (apparently over a debt). The altercation turned physical and continued outside at the back of the property. Mr Rikihana was very badly beaten by Mr Jury, who then dragged Mr Rikihana to the front of the property, put Mr Rikihana in his car and went to Mr Maney's house, which was situated on Te Ngae Road, a few kilometres north of Mr Rikihana's residence. Mr Maney was also a member of the Mongrel Mob. Two statements by Mr Maney described events at his house and implicated Mr Jury in the assault on Mr Rikihana.

[41] The Crown alleged that Mr Jury then drove Mr Rikihana to the house of Mr Te Aonui,[54] another Mongrel Mob associate, at Reeve Road, a few kilometres south of Mr Rikihana's home.[55] He dumped him on the driveway. Mr Rikihana was found unresponsive by Mr Te Aonui. Mr Te Aonui drove Mr Rikihana to Rotorua Hospital, arriving at 3.15 am. Mr Rikihana was pronounced dead at

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50 Below at [115]–[119].

51 Mr Rikihana was also known as "Uncle", "Trev" and "Uncle Trev".

52 Mr Rikihana's address is formally on Te Ngae Road, but it is necessary to go to the end of Pukepoto Road to access his home. Pukepoto Road is a paper road, and this name appears to be the one used by locals.

53 Mr Jury was also known by various nicknames containing the word "Gooie".

54 Mr Te Aonui was also known as "Nini".

55 In 2019, the four men appear to have been part of the same chapter of the Mongrel Mob. They all knew each other from the 1970s and 1980s.

3.35 am.[56] He died either as a result of blunt force trauma to his head or sustained pressure on his neck.

[42] In support of its case in relation to the assault, the Crown relied primarily on forensic evidence, as well as the testimony of Ms Eketone about what she saw and heard at her home on the night of Mr Rikihana's death.[57] The Crown also relied on CCTV evidence showing the movements of the car Mr Jury admitted he had been driving that night.[58]

[43] Mr Jury gave evidence at trial.[59] His defence was that Mr Maney killed Mr Rikihana and that Mr Maney had fabricated the accounts in his statements the Crown relied on in order to place the blame on Mr Jury, thereby protecting himself.[60]

Relevant legislative provisions

[44] A hearsay statement is defined in s 4(1) of the Evidence Act as a statement that:

(a) was made by a person other than a witness; and

(b) is offered in evidence at the proceeding to prove the truth of its contents.

[45] A statement is defined in s 4(1) as "a spoken or written assertion by a person of any matter" or "non-verbal conduct of a person that is intended by that person as an assertion of any matter". A witness is also defined in that subsection as meaning "a person who gives evidence and is able to be cross-examined in a proceeding".

[46] Under s 17, a hearsay statement is not admissible except as provided by subpt 1 of pt 2 of the Act or by the provisions of any other Act.[61] This is defined in the Act as the "hearsay rule".[62]

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56 It is not clear when exactly Mr Rikihana died.
57 See below [258]–[269] and at [275]–[287].
58 See below at [293]–[311].
59 See below at [315]–[358].
60 It was also alleged that Ms Eketone fabricated parts of her evidence to protect Mr Maney.
61 The other exception to inadmissibility is where the Evidence Act 2006 provides that subpt 1 of pt 2 does not apply and the hearsay statement is relevant and not otherwise inadmissible under that Act: s 17(b).
62 Section 4(1) definition of "hearsay rule".

[47] Under s 18(1), a hearsay statement is admissible if, under para (a), "the circumstances relating to the statement provide reasonable assurance that the statement is reliable" and, under para (b), either the maker of the statement is unavailable as a witness or the judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[48] Under s 16(2)(a), a person is unavailable as a witness in a proceeding if that person is dead (as Mr Maney was).

[49] Section 16(1) defines the "circumstances" referred to in s 18 inclusively:

> **circumstances**, in relation to a statement by a person who is not a witness, include—
>
> (a) the nature of the statement; and
>
> (b) the contents of the statement; and
>
> (c) the circumstances that relate to the making of the statement; and
>
> (d) any circumstances that relate to the veracity of the person; and
>
> (e) any circumstances that relate to the accuracy of the observation of the person

[50] Veracity is defined in s 37(5) of the Evidence Act as meaning "the disposition of a person to refrain from lying".

[51] Section 22(1) precludes a party to a criminal case from offering hearsay evidence unless they give notice of their intention to do so, although the other parties may waive this requirement or the judge may dispense with it. Where s 18 is relied on, the notifying party must state the circumstances that provide a reasonable assurance of the hearsay statement's reliability.[63]

[52] The general admissibility sections of the Evidence Act are also of relevance:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—

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63 Section 22(2)(d).

(a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[53] Under s 9(1)(a), the court may admit evidence not otherwise admissible with the written or oral agreement of all parties.

[54] The phrase "reasonable assurance" is also used in s 90(7), which governs the admissibility of statements containing information a witness cannot recall.[64] For such statements to be admissible, "the circumstances relating to the statement [must] provide reasonable assurance that the statement is reliable". Unlike in s 18(1)(a), "circumstances" is not a defined term in s 90(7).

[55] Section 122 governs directions about potentially unreliable evidence. It provides:

122 Judicial directions about evidence which may be unreliable

(1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—

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64 The rule in s 90(7) was originally enacted in s 35(3): see below at [73]. The Law Commission's first review of the Act recommended that the rule sat better in s 90, governing refreshing memory, as opposed to s 35, governing the admissibility of prior consistent statements: Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [5.69]. Parliament effected that recommendation in 2017: Evidence Amendment Act 2016, ss 11 and 25(2).

(a) whether to accept the evidence:

(b) the weight to be given to the evidence.

(2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:

(a) hearsay evidence:

…

(c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:

…

(3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

…

(6) This section does not affect any other power of the Judge to warn or inform the jury.

Legislative history

Law Commission reports

[56] The Evidence Act was enacted in response to Te Aka Matua o te Ture | the Law Commission's 1999 report, *Evidence: Reform of the Law*.[65] Two earlier preliminary papers on hearsay were published: an options paper in 1989 and a discussion paper in 1991.[66]

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65 Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999) vol 1 [NZLC Report]; and Te Aka Matua o te Ture | Law Commission *Evidence: Code and Commentary* (NZLC R55, 1999) vol 2 [NZLC Draft Code and Commentary].

66 Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) [NZLC Options Paper]; and Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) [NZLC Discussion Paper].

[57] In the 1989 preliminary paper, the Law Commission was alert to "five possible dangers" associated with the admission of hearsay. Namely, a person's description of a past event might be incorrect because they lacked personal knowledge of the event, they did not accurately perceive the event, they could not accurately recall the event, they could not properly communicate their impression of the event or they were insincere in their account of the event. In the case of hearsay evidence, the party who did not call the evidence is denied the opportunity to explore, challenge and expose these issues through effective cross-examination.[67] The Commission considered, however, that the then-current hearsay rule, supplemented by its various exceptions, had "general deficiencies". Those deficiencies included cost and complexity, but also in particular the effect of withholding from the fact finder valuable material and the consequent injustice of the fact finder misapprehending the true state of the facts.[68]

[58] The Commission viewed the traditional exceptions to the rule against hearsay as essentially coming down to cases where the maker was unavailable and "there [were] circumstantial guarantees as to the reliability of the evidence".[69] It suggested that an evidence code might provide for a "residual judicial discretion" to admit hearsay evidence in cases where other, more narrowly circumscribed, exceptions would not save the likely reliable evidence from the rule against hearsay.[70]

[59] The Commission also contemplated that any reform might involve distinctions between civil and criminal proceedings, between statements sought to be admitted by prosecution and defence in criminal proceedings, and between those heard by judge and jury.[71] The Commission suggested matters such as the heightened seriousness, more burdensome onus and confrontational purpose of cross-examination in criminal proceedings might justify that first distinction. The "most radical approach" suggested was abolition of the rule, at least in civil proceedings.[72]

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67 NZLC Options Paper, above n 66, at [7] citing Law Reform Commission of Canada *Hearsay: a study paper* (Ottawa, 1974) at 5, in turn citing Edmund M Morgan "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177.

68 NZLC Options Paper, above n 66, at [13]–[14].

69 At [10].

70 At [74].

71 At [15], [16] and [36].

72 At [75]–[76].

[60] The Law Commission's 1991 discussion paper favoured that very option: the rule's abolition in civil proceedings. As to criminal proceedings, it favoured "rationalisation" of the hearsay rule coupled with safeguards.[73] The preferred mode of rationalisation of the exceptions to the rule against hearsay was the now-familiar "reliability" principle.[74] The Commission considered the alternative of rationalisation based on categories of excepted evidence "would be unduly restrictive".[75] It also considered that necessity (unavailability) should not be a condition of admissibility, but that an available witness should be required to be called if requested by any other party to the proceeding.[76]

[61] Under the Commission's preferred approach, the judge's role in deciding on the admissibility of the statement was "to assess the statement in the light of all its circumstances, and to determine whether it is sufficiently reliable to be admitted notwithstanding its hearsay nature".[77] The Commission considered the same question should be asked of every piece of hearsay evidence, with the aim of ensuring that "in every instance, only reasonably reliable evidence is admitted, not simply evidence which generally might be thought to be reliable".[78] It considered a test emphasising reliability struck a balance between the right of a defendant to present a defence and the need to restrict the admission of inappropriate hearsay.[79]

[62] The credibility of the person relaying the hearsay was considered to be irrelevant to its admissibility. So too was the statement's consistency with evidence not directly related to it. Those matters "should be canvassed before, and assessed by, the fact-finder".[80] Indeed, the Law Commission stressed a distinction between "the circumstances relating to the statement and all the other evidence in the case", including evidence corroborating and contradicting the hearsay statement.[81] First, it considered that, logically, the reliability of individual items of evidence did not depend

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73 NZLC Discussion Paper, above n 66, at [17]–[22].

74 At [23]–[37] citing John Henry Wigmore and James H Chadbourn *Evidence in Trials at Common Law* (4th ed, Little, Brown and Co, Boston, 1974) vol 5 §§ 1420–1422.

75 At [30].

76 At [27], [37], [43]–[45] and [59].

77 At [31].

78 At [34].

79 At [33]. The Commission pointed to the right to present a defence contained in s 25(e) of the New Zealand Bill of Rights Act 1990 [Bill of Rights].

80 At [34].

81 At [35].

on the general strength of the case. If the distinction between the circumstances and other evidence were not made, it considered that this could lead to the tendency for reliable hearsay to be excluded because other evidence was contradictory or neutral. Second, it thought excluding consideration of indirectly related evidence permitted the judge to make a decision on the admissibility of the hearsay statement at the appropriate time — namely, when it was offered in evidence.

[63] The Commission accordingly proposed an exception to the rule against hearsay that would apply where "the circumstances relating to the statement that is hearsay provide reasonable assurance that the statement is reliable".[82] The Commission gave "circumstances" an inclusive definition, expressly listing factors much the same as the Evidence Act now does:[83]

> … the "circumstances relating to the statement" include
>
> (a) the nature and contents of the statement; and
>
> (b) the circumstances in which the statement was made; and
>
> (c) any circumstances that relate to the credibility of the maker of the statement.

[64] The Commission also proposed a waivable, dispensable notice requirement.[84] This was because it considered parties should be able to investigate significant hearsay evidence before the commencement of a trial.[85]

[65] The Commission's final report in 1999 was split into two volumes, with the second containing a draft code and commentary. The Commission considered the rule against hearsay should apply to civil and criminal proceedings and be subject in both to a general exception based on reliability and necessity.[86] In criminal cases, the draft code provided that a party proposing to lead hearsay evidence needed to give notice of the proposal to all other parties, unless waived by all other parties or dispensed with

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82 At 34.
83 At 33.
84 At 34–35.
85 At [47].
86 NZLC Report, above n 65, at [60]; and NZLC Draft Code and Commentary, above n 65, at [C85] and [C87].

by the judge.[87] Further, the necessity requirement was deemed to be satisfied in the absence of any objection from other parties.[88]

[66] The reliability test in both civil and criminal proceedings was the same: that "the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable".[89] Those circumstances were as follows:[90]

> … **circumstances relating to the statement** include
>
> (a) the nature and contents of the statement; and
>
> (b) the circumstances in which the statement was made; and
>
> (c) any circumstances that relate to the truthfulness of the maker of the statement; and
>
> (d) any circumstances that relate to the accuracy of the observation of the maker of the statement.

[67] These were said to encompass, for example, the mental alertness of the maker and receiver of the statement, its contemporaneity to the events referred to and any motive the maker might have had to lie.[91] Further, hearsay evidence could be used to prove the facts constituting relevant circumstances provided it was itself excepted from the rule against hearsay.[92] The Law Commission maintained its 1991 position as to the truthfulness of the person relating the hearsay statement and the statement's consistency with evidence not directly related to it. It added that hearsay evidence should not be excluded on the basis it contradicted other evidence.[93] Indeed, Professor McDonald has noted that the Law Commission expressly considered and rejected including reference in the definition of "circumstances relating to the statement" to "the existence and nature of other evidence available on the issue".[94]

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87 Discovery processes and the possibility of costs sanctions were thought to obviate the need for notice in civil cases: NZLC Report, above n 65, at [68]; and NZLC Draft Code and Commentary, above n 65, at [C86].

88 See NZLC Draft Code and Commentary, above n 65, at 52 and 54.

89 At 50 and 52.

90 At 44 and 46.

91 At [C77]–[C78].

92 At [C81].

93 At [C75]. The Law Commission also noted that the person relating the statement will be before the court.

94 Elisabeth McDonald "Going 'Straight to Basics': The Role of Lord Cooke in Reforming the Rule Against Hearsay – from *Baker* to the Evidence Act 2006" (2008) 39 VUWLR 143 at 151.

[68] The Law Commission stated that the lack of an opportunity to cross-examine a witness was the most compelling reason to limit the admissibility of hearsay.[95] It also envisaged a judge discriminating between the prosecution and defence in criminal cases. Thus, assurance of reliability in respect of a hearsay statement crucial to proving the defendant's guilt would have to be such "that the defendant's right to a fair trial will not be jeopardised by his or her inability to cross-examine the maker of the statement".[96]

[69] Finally, the Law Commission expressly considered and rejected a proposal to abolish the rule against hearsay altogether. Two commentators had suggested just that, alongside a residual discretion to exclude hearsay evidence that is "unfairly prejudicial or misleading" or "not the 'best evidence' available regarding fundamental issues of proof".[97] In the Law Commission's view, the better approach was to keep, but liberalise, the hearsay rule.[98]

Parliamentary process

[70] Two exceptions became one in cl 18(1) of the Evidence Bill as introduced in 2005, with notice in criminal proceedings added in sub-cl (2). The substance of the provisions from the 1999 draft code remained mostly intact, but — as reflected in the Evidence Act — the necessity requirement could not be effectively dispensed with in the absence of any objection.

[71] The explanatory note stated that the definition of "circumstances" was cast in "wide, inclusive terms".[99]

[72] The requirement, now in s 22(2)(d) of the Evidence Act, that the party proposing to offer hearsay statements must include in their notice the circumstances relating to the statement that provide reasonable assurance of its reliability was introduced by the Justice and Electoral Select Committee.[100] This requirement was

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95 NZLC Report, above n 65, at [50].
96 NZLC Draft Code and Commentary, above n 65, at [C88].
97 Lynton L Stevens and Gregory P Olsen "Law Commission Preliminary Papers 13–15 — A commentary on the proposed reform of the Law of Evidence" [1992] NZLJ 30 at [4.1].
98 NZLC Report, above n 65, at [63]–[64].
99 Evidence Bill 2005 (256-1) (explanatory note) at 5.
100 See above at [51].

said to enable the other party to decide whether to object and the judge to decide whether to admit the evidence.[101]

[73] The Bill introduced, for the first time, the same reliability criterion as in s 18 when determining the admissibility of prior statements containing information a witness cannot recall.[102] However, the Bill did not extend to that provision the definition of "circumstances", which is now found in s 16(1).

Legal test for the admission of hearsay statements

[74] We turn now to consider the approach to admission of hearsay statements under the Evidence Act, starting with a summary of the parties' submissions.

Submissions

Mr Jury

[75] Mr Jury submits that the starting point is that hearsay evidence is inadmissible under s 17. In his submission, the exception in s 18 should be interpreted against that background and in light of the dangers inherent in hearsay evidence that the exclusionary rule historically recognised. Also of central importance is the defendant's right to confront an adverse witness, which is "basic to any civilised notion of a fair trial".[103]

[76] Section 18(1)(a) states that the circumstances, as defined in s 16(1), must provide "reasonable assurance that the statement is reliable". Mr Jury submits that the word "assurance" denotes a very high level of confidence in reliability, requiring something close to certainty. It certainly requires something more than a "possibility", a "likelihood" or a "probability". Mr Jury accepts that s 18 requires an assessment of threshold reliability by the court and that ultimate reliability is for the jury to assess in light of all the evidence.

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101 Evidence Bill 2005 (256-2) (select committee report) at 3–4.

102 See above at [54]; and Evidence Bill (256-1), cl 31(3)(a). The Law Commission did not recommend the condition in its draft code: see NZLC Draft Code and Commentary, above n 65, at 98–101.

103 *R v Hughes* [1986] 2 NZLR 129 (CA) at 148 per Richardson J.

[77] Mr Jury submits that the law in New Zealand aligns with the position in other common law jurisdictions. He says that Canada, Australia and the United Kingdom all treat hearsay as presumptively inadmissible and have each created an inclusionary rule based on the twin notions of necessity and reliability. In Canada, hearsay must either be so reliable that cross-examination would add little if anything to the process, or the statements must be able to be sufficiently tested by means other than contemporaneous cross-examination.[104] England and Wales have adopted a similar position.[105] In Australia, hearsay evidence may be admitted if it was made in circumstances making it "highly probable" that it is reliable.[106]

[78] In Mr Jury's submission, this Court should adopt the approach articulated by the Supreme Court of Canada in *R v Khelawon*. In that case, the Court held that a "reasonable assurance" of reliability can be established by showing either that the statement is procedurally reliable, in that there are adequate substitutes for testing truth and accuracy, or substantively reliable, such that there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy.[107]

[79] Relying on the 1991 Law Commission recommendation and the New Zealand Court of Appeal decision in *Mills v R*,[108] Mr Jury submits that extrinsic evidence is not relevant to the assessment of threshold reliability.[109] If that is not the case, then it is submitted that the test formulated by the Supreme Court of Canada in *R v Bradshaw* must be met: extrinsic evidence can be considered but only to the extent it shows "that

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104 *R v Khelawon* 2006 SCC 57, [2006] 2 SCR 787 at [49].

105 *R v Riat* [2012] EWCA Crim 1509, [2013] 1 WLR 2592 at [3].

106 Evidence Act 1995 (Cth), s 65(2)(c); Evidence Act 1995 (NSW), s 65(2)(c); Evidence Act 2001 (Tas), s 65(2)(c); Evidence Act 2008 (Vic), s 65(2)(c); Evidence Act 2011 (ACT), s 65(2)(c); and Evidence (National Uniform Legislation) Act 2011 (NT), s 65(2)(c). See also Evidence Act 1977 (Qld), s 93B(2)(b); and Evidence Act 2025 (WA), s 78(2)(c).

107 *R v Khelawon*, above n 104, at [61]–[63]. See also *R v Bradshaw* 2017 SCC 35, [2017] 1 SCR 865 at [27]–[31] per McLachlin CJ, Abella, Karakatsanis, Wagner and Brown JJ.

108 See above at [62]; and *Mills v R* [2010] NZCA 286 at [21].

109 As in Australia, to the extent such evidence only tends to prove the fact asserted in the statement: see *R v Ambrosoli* [2002] NSWCCA 386, (2002) 55 NSWLR 603 at [34]–[37]; and *Huici v R* [2023] VSCA 5 at [70]. See also *Sio v R* [2016] HCA 32, (2016) 259 CLR 47 at [69]–[70].

the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement".[110]

[80] Mr Jury submits that New Zealand courts have failed to interpret the "reasonable assurance" standard consistently and, in some cases, have failed to apply the standard with sufficient rigour.[111] It is submitted that the availability of a direction under s 122 does not lower the threshold under ss 8 or 18 of the Evidence Act.[112]

The Crown

[81] The Crown does not accept that the focus should be on the historically recognised dangers of hearsay evidence. This is because New Zealand's reform of the hearsay rules recognised "the need to have a rational basis for excluding otherwise probative evidence",[113] and it was expressly a liberalisation of the previous law.[114]

[82] In the Crown's submission, the distinction between threshold reliability (as a matter of admissibility) and ultimate reliability (a matter for the jury) is material. The "circumstances" enquiry goes to the threshold requirement that evidence must be sufficiently reliable to be admissible. But whether the evidence is ultimately reliable is a matter for the jury. In the Crown's submission, to interpret the "reasonable assurance" in s 18(1) as equating to near certainty is tantamount to

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110 *R v Bradshaw*, above n 107, at [44] per McLachlin CJ, Abella, Karakatsanis, Wagner and Brown JJ. Mr Jury notes that, while there is no explicit position on this point in the United Kingdom, the Court of Appeal of England and Wales has suggested that extrinsic evidence can be relevant to the assessment of threshold reliability, albeit not necessary in every case: see *R v Riat*, above n 105, at [5]–[6] and [25].

111 Citing Chris Gallavin "Reliability, Hearsay and the Right to a Fair Trial in New Zealand" in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, Oxford, 2012) 327 at 341–345.

112 Referring to *R v Kereopa* HC Tauranga CRI 2007-087-411, 11 February 2008 at [30].

113 Referring to *L (SC 80/2023) v R* [2024] NZSC 153, [2024] 1 NZLR 640 at [35] per Ellen France, Williams and Miller JJ. We note that these reasons in *L (SC 80/2023) v R* were not referring to the Law Commission's reports leading to the Evidence Act but to a 1967 report by the Torts and General Law Reform Committee relating to the expansion of the category of person unavailable to give evidence under the Evidence Amendment Act 1945, s 3(1): Torts and General Law Reform Committee of New Zealand *Hearsay Evidence* (Government Printer, July 1967) at [9(i)]. The recommended expansion led to the enactment of the Evidence Amendment Act (No 2) 1980, s 2(2).

114 *L (SC 80/2023) v R*, above n 113, at [38] per Ellen France, Williams and Miller JJ citing Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [42]. See also NZLC Report, above n 65, at [45]–[48] and see [64] and [66].

requiring the judge to be satisfied of ultimate reliability. This conflates the different constitutional roles of judge and jury.

[83] The Crown submits that "reasonable assurance" means that "the evidence is reliable enough for the fact finder to consider and draw conclusions as to its weight".[115] It accepts that, even if the threshold test is met, the evidence may still be inadmissible under s 8 if its unfairly prejudicial effect on the proceeding outweighs its probative value.[116] To determine whether this is so, a judge must take account of the right of the defendant to offer an effective defence and the interests of the prosecution.[117]

[84] The Crown points out that the Evidence Act recognises categories of admissible evidence that may nevertheless be unreliable and provides controls for this.[118] In the context of hearsay, this includes consideration of whether a reliability warning is needed under s 122 of the Act. Section 122 demonstrates that evidence can be both admissible and unreliable.[119] The Crown submits that Mr Jury's "close to certainty" formulation cuts across s 122.

[85] The Crown submits further that there is little to be gained from comparing the hearsay rules in the Evidence Act with the approach taken overseas. Other jurisdictions have struck the balance between competing interests differently. In Australia, the statutory threshold is expressly higher, rendering admissible hearsay evidence with a 'high probability' of reliability,[120] which the courts have interpreted as an "onerous" requirement.[121] The Canadian test for admissibility of hearsay evidence reflects its own principled exception to the rule against hearsay that has been developed judicially, not statutorily. In the Crown's submission, to read the Canadian

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115 *Anderson v R* [2020] NZCA 106, [2020] 3 NZLR 429 at [78]. See also *Rongo v R* [2023] NZCA 626 at [40]; *Adams v R* [2012] NZCA 386 at [25]–[28]; and *TK v R* [2012] NZCA 185 at [23].

116 *Rongo v R*, above n 115, at [35].

117 At [35]. See also *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [20].

118 The Crown notes the range of circumstances for which a judge must consider giving a reliability warning under s 122 of the Evidence Act. It also notes s 28, which provides a separate regime for exclusion of defendants' statements in circumstances that establish unreliability. The circumstances in s 28(4) are different than those in s 16(1) and cater for distinct concerns about reliability.

119 *Adams v R*, above n 115, at [27]; and *Taylor v R* [2010] NZCA 69 at [49].

120 See above n 106.

121 *Conway v R* [2000] FCA 461, (2000) 98 ALR 185 at [146].

test into the words "reasonable assurance" in s 18(1) would be to distort and overwrite the statutory wording.

[86] The Crown accepts that early jurisprudence in New Zealand following the enactment of the Evidence Act questioned whether corroborating evidence could be considered by the judge.[122] The Crown submits, however, that over time corroborating evidence has frequently formed part of the court's assessment of threshold reliability.[123] In its submission, there is no basis for this Court to depart from established jurisprudence in New Zealand regarding the role of corroborative evidence. This, the Crown says, is consistent with the approach taken by the Court of Appeal of England and Wales in *R v Riat*.[124]

Issues arising from submissions

[87] The issues that arise from the submissions on the legal test are:

(a) the extent to which the interpretation of s 18 should be informed by the dangers of hearsay evidence;[125]

(b) the extent to which overseas jurisprudence is of assistance;[126]

(c) the nature and extent of the "reasonable assurance" threshold in s 18(1)(a);[127]

(d) the role of extrinsic evidence, including corroborating and conflicting evidence;[128]

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122 See, for example, *R v Shortland* [2007] NZCA 37 at [34]–[35] and [43]–[44].

123 *H v New Zealand Police* [2021] NZCA 15, [2021] NZAR 63 at [47]; *Booth v R* [2013] NZCA 371 at [42]; *Nisha v R* [2015] NZCA 178 at [20]; *Kavanaugh v R* [2023] NZCA 316 at [43]; and *R (CA304/2017) v R* [2017] NZCA 341 at [21].

124 *R v Riat*, above n 105, at [25].

125 See below at [88]–[89].

126 See below at [90]–[95].

127 See below at [96]–[101].

128 See below at [102]–[107].

(e) the relevance of issues of fair trial (both for Crown and defence) and the right to cross-examine;[129]

(f) the role of s 8;[130] and

(g) the extent to which the possibility of a s 122 warning affects the s 18 standard or assessment.[131]

Our assessment

Dangers of hearsay evidence

[88] The "dangers of hearsay" refers to the possibility that hearsay evidence might be affected by insincerity or deficits in the statement-maker's perception, memory or narration. In the usual case, cross-examination allows the evidence to be tested, and the fact evidence is given on oath, with the threat of prosecution for perjury, is a safeguard against insincerity. But those protective measures do not apply to hearsay evidence.[132]

[89] We accept Mr Jury's submission that consideration of the dangers of hearsay forms necessary background to the interpretation of s 18 and in particular to the interpretation of the reliability threshold. The reliability threshold is designed to ensure that evidence helpful to the "truth determining process" is not excluded and that the fact finder is not deprived of reliable and relevant evidence through artificial rules, while protecting the fundamental rights of the defendant.[133]

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129 See below at [108]–[111].
130 See below at [112].
131 See below at [113]–[114].
132 See generally Morgan, above n 67. The same inability to cross-examine arises in relation to statements containing information a witness is unable to recall — hence the same reliability threshold in s 90(7) as in s 18(1)(a), as noted above at [54].
133 See NZLC Report, above n 65, at [45], [50], [52] and [64]. See also NZLC Draft Code and Commentary, above n 65, at [C88]; and NZLC Discussion Paper, above n 66, at [21]–[22] and [37].

Role of overseas jurisprudence

[90] We agree that overseas jurisprudence is not directly relevant. The main issue is the interpretation of the relevant provisions of the Evidence Act, which differ from the statutory provisions and common law tests overseas.

[91] For example, we accept the Crown's submission that the two-pronged ("procedural" or "substantive" reliability) test in Canada, summarised above at [78], is not appropriate in New Zealand.[134] The question in s 18(1)(a) is whether there is a reasonable assurance of "substantive" reliability only. The section does not contemplate that evidence not reaching this standard can be admitted if it is "procedurally" reliable.[135]

[92] Equally, the approach in England and Wales to hearsay in criminal proceedings differs from that in New Zealand. Hearsay statements are admissible if any provision of the Criminal Justice Act 2003 (UK) or any other statutory provision makes them admissible.[136] Under the Act, hearsay statements are admissible where a person is unavailable, including where that person is deceased, without any enquiry into reliability.[137] By contrast, New Zealand requires both unavailability and a reasonable assurance of reliability before hearsay statements are admitted.[138] Unlike New Zealand, England and Wales also preserved certain common law categories of exceptions to the old exclusionary hearsay rule without any express reliability requirement.[139]

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134 In Canada, hearsay that "may not be so cogent" may be admitted because "the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination": *R v Khelawon*, above n 104, at [49]. See also *R v Youvarajah* 2013 SCC 41, [2013] 2 SCR 720 at [30] per McLachlin CJ, Fish, Abella, Cromwell and Karakatsanis JJ; *R v Bradshaw*, above n 107, at [27]–[28] per McLachlin CJ, Abella, Karakatsanis, Wagner and Brown JJ; and *R v Charles* 2024 SCC 29, (2024) 496 DLR (4th) 581 at [45]–[46] per Karakatsanis, Martin, Jamal and Moreau JJ.

135 Gallavin, above n 111, at 344.

136 Criminal Justice Act 2003 (UK), s 114(1)(a). Certain parts of the Act apply to Northern Ireland and Scotland, but not the hearsay provisions in pt 11 ch 2: see s 337.

137 Section 116.

138 See above at [46]–[47].

139 Section 118(1)preserves hearsay exceptions relating to public information, reputation, family tradition, res gestae, confessions, admissions by agents, common enterprise and expert evidence.

[93] There is a residual "interests of justice" discretion in England and Wales to admit hearsay that is otherwise inadmissible.[140] The Court must take into account a number of relevant factors, including the probative value of the statement (assuming it to be true), how valuable it is for the understanding of other evidence in the case, what other evidence can be given on the matter, how important the evidence is in the context of the case as a whole, the circumstances in which the statement was made, how reliable the maker of the statement or the making of the statement appears to be, whether oral evidence on the matter can be given (and, if not, why not), the amount of difficulty involved in challenging the statement and the extent to which that difficulty would be likely to prejudice the party facing it.[141] There is no such residual discretion in New Zealand to admit hearsay evidence.[142] There is, however, a general discretion to exclude hearsay evidence under s 126 of the Criminal Justice Act (UK) as well as a power to exclude unfair evidence under the Police and Criminal Evidence Act 1984 (UK), which occupy a similar position in the analysis there as does s 8 of the Evidence Act here.[143]

[94] The approach in England and Wales therefore reflects a fundamentally different approach to hearsay from that in New Zealand, which specifically rejected establishing categories of hearsay evidence that are admissible.[144] In New Zealand there is instead a general rule under which the twin requirements of unavailability and a reasonable assurance of reliability must be met. Because the New Zealand approach is evaluative, we also consider the Australian approach of a set threshold of "high probability" to be of no assistance when interpreting or applying the s 18 test.

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140 Section 114(1)(d).

141 Section 114(2). Professor Choo has said that the residual discretion is "clearly aimed at securing the admissibility of hearsay evidence considered sufficiently reliable": Andrew L-T Choo *Evidence* (6th ed, Oxford University Press, Oxford, 2021) at 281. We doubt that this characterisation is completely accurate since reliability constitutes only one consideration among many.

142 In both jurisdictions, hearsay evidence can be admitted if both parties consent: Evidence Act, s 9; and Criminal Justice Act (UK), s 114 (1)(c).

143 See *R v Riat*, above n 105, at [21]–[25].

144 See above at [60]. We note the Evidence Act also recognises some limited categories of admissible hearsay, being hearsay contained in business records, hearsay in certain documents in civil proceedings and hearsay as a part of a conspiracy or joint enterprise: ss 19, 20 and 22A. These provisions are not relevant to this appeal.

[95] Given the common underlying theme of reliability which has been the touchstone of reforms in other jurisdictions as well as our own, we consider that some aspects of the overseas case law can nevertheless still be relevant.

Nature and extent of s 18 threshold

[96] The parties are agreed, and we accept, that the question of reasonable assurance of reliability is a threshold one. That reflects the distinct constitutional role of judge as gatekeeper and jury as fact finder.[145] A judge's role under s 18 is to decide whether, as a matter of law, the reliability test in that section is met. The constitutional function of the jury in criminal proceedings is to decide whether guilt has been proved beyond reasonable doubt on the basis of all the evidence.[146]

[97] The extent of the barrier provided by the reliability threshold in s 18 is a function of the place of s 18 in the scheme of the Act and the words "reasonable assurance".[147]

[98] In terms of the scheme of the Act, it is clear that the threshold of "reasonable assurance" must be higher than the reliability threshold in s 7 of the Act. Exclusion under s 7 for want of reliability relates "to those cases where the evidence is so unreliable that it could not be accepted or given any weight at all".[148] The Crown's submission, founded upon *Anderson v R*, that a reasonable assurance "simply means the evidence is reliable enough for the fact finder to consider and draw conclusions as to its weight",[149] is essentially the s 7 relevance test. That is not the correct test: the s 18 threshold is different from the s 7 relevance test. Were the two thresholds the same and only s 7 relevance required, s 18 would have provided only for necessity and not a reasonable assurance of reliability.

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145 See *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [73] per Glazebrook, O'Regan and Ellen France JJ citing *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [98] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ.

146 See *Taylor v R*, above n 119, at [64].

147 That threshold is also contained in s 90(7). This is understandable because introducing a statement in evidence that a witness is unable to recall has the same issues (such as lack of ability to cross-examine) as with hearsay statements. See above n 132.

148 *W (SC 38/2019) v R*, above n 145, at [41] per Glazebrook, O'Regan and Ellen France JJ. See also at [191], n 199 per Winkelmann CJ and Williams J.

149 *Anderson v R*, above n 115, at [78]. See above [83].

[99] In terms of the scheme of the Act, s 18 omits reference to any standard of proof in its reliability threshold. By contrast, s 28, governing the admissibility of defendants' statements, and s 45, governing visual identification evidence, specify a standard of proof.[150] If notions of standards of proof were meant to be imported into s 18, then it would have said so. Rather, s 18 is evaluative, requiring a reasonable assurance of reliability before admission.

[100] Turning now to the words of s 18(1)(a), an "assurance" involves being subjectively "sure" or "certain" of something.[151] It is, however qualified by the addition of the term, "reasonable". A reasonable assurance of reliability does not require indicia of unreliability to be completely absent.[152] Nor do all aspects of the statement have to meet the reliability threshold individually. Rather, the focus is on the statement as a whole.[153] But the term "reasonable" cannot be used to eviscerate the word "assurance" of its meaning. Reasonable assurance means just that: there must be reasonable assurance (in other words a court must be reasonably confident) that the circumstances show a statement to be reliable. A "hard look" at the circumstances is required in order to ensure that it would be safe for the fact finder to give weight to the statement, despite its hearsay nature and the associated dangers of hearsay evidence.

[101] It is difficult to give more guidance than we have outlined above. The decision as to whether the circumstances relating to the statement provide reasonable assurance of reliability is an evaluative one tailored to the individual circumstances of the case and the particular hearsay statements at issue.

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150 Grant Illingworth and Don Mathias "The Admissibility of Hearsay Statements and Opinion Evidence" (paper presented to the New Zealand Law Society Evidence Act 2006 Intensive, June 2007) 17 at 39–40. See also Gallavin, above n 111, at 329.

151 JA Simpson and ESC Weiner *The Oxford English Dictionary* (2nd ed, 1991 reprint, Clarendon Press, Oxford, 1989) vol 1 at 724.

152 We therefore do not accept the submission of Mr Jury that near certainty of reliability is required.

153 There may be circumstances where clearly unreliable statements or parts of statements can be severed and held inadmissible while admitting other statements or parts of statements that meet the s 18 threshold. This would only be appropriate where the unreliable statements or parts of statements are unrelated to, and do not or cannot possibly affect the reliability of, the statements or parts of the statements that are admitted in evidence.

Extrinsic evidence

[102] The Law Commission considered that consistency or inconsistency between a hearsay statement and other evidence in the case is not relevant for the purposes of assessing threshold reliability.[154]

[103] The wording of s 18 directs that reliability is assessed in terms of the circumstances as defined. Even though circumstances are defined inclusively there is nothing in that definition that suggests general consistency or inconsistency with other evidence is an overriding consideration. This is understandable for reasons both of principle and practicality. In terms of principle, s 18 contains a threshold question only and it is the constitutional role of the jury to assess reliability, credibility and weight of a particular piece of evidence in light of all of the evidence and in the context of the whole trial. In terms of practicality, decisions as to the admissibility of hearsay evidence will ordinarily be made pre-trial, when not all evidence (and particularly defence evidence)[155] is available and before any of the evidence has been tested at trial.[156] It may often not even be clear what the defence will be.

[104] That said, statements can be considered in context. As the Court of Appeal said in *Mills v R*, consideration of the circumstances does not preclude consideration of the facts of the case for contextual purposes, since "it is not possible to approach the reliability assessment in a complete vacuum".[157] In that regard, it may in some cases be helpful, in assessing threshold reliability, to have regard to general consistency with other evidence, while taking into account that the other evidence has not been tested and may be incomplete and also taking care not to usurp the role of the jury. Consistency with other evidence would be most useful as an indicator of reliability where that consistency relates to the core aspects of both the statement and the other evidence. It must be borne in mind, however, that this analysis is for context only and that the task is to assess whether the *circumstances* provide a reasonable

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154 See above at [62] and [67].

155 The disclosure obligations on the defence are far more limited than those on the Crown: see generally the Criminal Disclosure Act 2008.

156 Under s 101 of the Criminal Procedure Act 2011.

157 *Mills v R*, above n 108, at [21].

assurance of reliability. The context considered therefore must be relevant to one or more of those circumstances as defined in s 16(1).

[105] We comment that the court can obviously take into account (admissible) extrinsic evidence that relates directly to the statement, the circumstances as defined in s 16(1) or the statement maker, such as prior statements or evidence indicating a motive to lie.[158] In this regard, the history and context of s 16(1) means that veracity (para (d) of the definition of "circumstances") encompasses not only the general disposition to refrain from lying but also extends to any indications of lying or motive to lie in the context of the particular proceedings.[159]

[106] We do not consider the approach to extrinsic evidence taken in England and Wales to be of assistance, contrary to the submission of the Crown.[160] This is, as we noted earlier, because the statutory scheme there is different from that here.[161]

[107] Nor do we consider that the approach in *R v Bradshaw* to extrinsic evidence applies in New Zealand as it is a function of the higher reliability threshold for the admission of hearsay statements that applies in Canada.[162]

Rights to cross-examine and to fair trial

[108] The lack of an ability to cross-examine the maker of a hearsay statement may be relevant to the assessment of whether or not there is a reasonable assurance of the statement's reliability. If the circumstances show obvious avenues of cross-examination related to the reliability of the statement, this in itself may indicate that the statement fails to reach that standard. The inability to cross-examine will, however, be primarily relevant to s 8, which we discuss in the next section.

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158 The Law Commission made this point in NZLC Draft Code and Commentary, above n 65, at [C77]–[C78]. See above at [67].

159 Contrast s 37(5) of the Evidence Act; and *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [110]–[138] per McGrath, William Young, Chambers and Glazebrook JJ.

160 Above at [86].

161 Above at [92]–[94].

162 Professor Stewart describes the approach to extrinsic evidence in *R v Bradshaw*, above n 107, as requiring trial judges to conclude hearsay statements are "almost certainly true" before ruling them admissible: Hamish Stewart "The Future of the Principled Approach to Hearsay" (2018) 23 Can Crim L Rev 183 at 194.

[109] Turning to fair trial rights, the defendant's right to a fair trial is protected by the reliability threshold that hearsay statements are required to meet.[163] It is also protected by the possibility of directions being given under s 122 and of exclusion under s8.

[110] There is an issue as to whether hearsay statements that do not meet the required reliability threshold should nevertheless be admitted on fair trial grounds where necessary to allow a defendant to present a defence.[164] We do not need to decide this question, however, as it does not arise in this case.

[111] We do not need to express a view on whether there is also a possibility that a court might be less readily assured of the reliability of a statement sought to be adduced in aid of the Crown's case, which must be proved beyond a reasonable doubt, than the reliability of one sought to be admitted by the defence with the aim of contributing to reasonable doubt.[165]

Role of s 8

[112] Under s 8, evidence must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceedings. This hurdle must also be passed before a hearsay statement is admitted. We comment that, particularly where the hearsay evidence is central to the Crown's case, the importance of an ability to test evidence through cross-examination may be such that evidence must be excluded under s 8 to preserve an accused's fair trial rights, even

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163 See the discussion in Gallavin, above n 111.

164 Bill of Rights, s 25(e). It might be that the Crown could consent under s 9(1) of the Evidence Act to the admission of hearsay evidence not meeting the s 18 standard if that was necessary to afford an accused a fair trial: see *Exley v NZME Publishing Ltd* [2025] NZSC 90, [2025] 1 NZLR 184 at [94]–[96] as to the responsibility of the prosecution in relation to ensuring a fair trial.

165 The Law Commission appears to have thought so given its point in NZLC Draft Code and Commentary, above n 65, at [C88], and summarised above at [68]. It is helpful here to emphasise that the Law Commission suggested a judge "may be expected to take different factors into account, depending on whether the prosecution or the defence is offering the hearsay". It added that the "judge will want to ensure that the circumstances relating to the statement give *such assurance of reliability* that the defendant's right to a fair trial will not be jeopardised by his or her inability to cross-examine the maker" of a hearsay statement crucial to proving guilt (emphasis added).

where the circumstances provide a reasonable assurance of reliability.[166] The right in s 25(f) of the New Zealand Bill of Rights Act 1990 (Bill of Rights) to examine the witnesses for the prosecution is also significant in this regard.

Section 122 warning and admissibility

[113] We accept Mr Jury's submission that the possibility of a s 122 warning cannot affect the s 8 or s 18 analyses.[167] Section 122 does not lower the threshold for admissibility.[168] Nor does it tip the scales in favour of admission. The point of s 18 is to admit hearsay statements only if they meet the threshold of reasonable assurance of reliability.[169] Evidence can be both admissible and *ultimately* unreliable when considered in light of all the evidence at trial. It must be remembered too that, given there is only *reasonable* assurance of reliability, there may be residual reliability concerns even with hearsay evidence that meets the s 18 test.[170]

[114] The dangers of hearsay evidence remain, and the limitations of such evidence, such as that it was not given on oath and that there was no ability to cross-examine, may need to be pointed out to the jury. Further, there may be concerns about the reliability of the reporter of the hearsay statement. While that is not relevant for the threshold reliability question in s 18, it is important for the jury to assess this in coming to their view on ultimate reliability. In addition, there may be concerns about the ultimate reliability of the hearsay when considered in the context of the whole trial, which the judge needs to cover in any s 122 warning.

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166 See *Reynolds v R* [2017] NZCA 61 at [15]–[16] and [23]–[25]. The Fourth Section of the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 (ECHR) at [36]–[38] considered a trial would be unfair if it resulted in a conviction based solely or to a decisive degree on an untested statement of a witness the defendant had no opportunity to cross-examine. The United Kingdom Supreme Court in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 at [91]–[108] criticised that approach because, among other things, it would preclude convictions based on demonstrably reliable hearsay in circumstances where the declarant's absence is justified and there are other safeguards to address hearsay nature of the evidence. The Grand Chamber subsequently revisited the judgment of the Fourth Section Chamber and considered a trial would be unfair if it resulted in a conviction based solely or to a decisive degree on a hearsay statement *and* it lacked sufficient procedural safeguards: *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (Grand Chamber, ECHR) at [147].

167 See above at [80].

168 *R v Kereopa*, above n 112, at [30]. See also *R v Bradshaw*, above n 107, at [29], [69] and [89] per McLachlin CJ, Abella, Karakatsanis, Wagner and Brown JJ.

169 See above at [91].

170 See Illingworth and Mathias, above n 150, at 37–38.

Summary

[115] We agree with the summary of the legal test for the admission of hearsay in the reasons of Ellen France and Miller JJ below at [438]–[445].[171] For convenience, we repeat that summary here:

> [438] The statement in s 18(1)(a) of the Evidence Act, that hearsay evidence is admissible where "the circumstances relating to the statement provide reasonable assurance that the statement is reliable", means just what it says.
>
> [439] Recognising the gatekeeping responsibility of the court under s 18(1)(a), the judge will need to give the circumstances relating to the statement a hard look against the background of the dangers of hearsay.
>
> [440] The threshold test to be applied under s 18(1)(a) is a different exercise, and involves a different test, to that set out in s 7. But obviously the evidence has to be relevant and so the s 7 test, as well as that under s 8, must also be met.
>
> [441] The exercise involved is a threshold one and does not involve a general review of the overall evidence or of the Crown case.
>
> [442] Circumstances are widely and inclusively defined. The context in which the circumstances of reliability are being assessed may be relevant to the assessment of some of these circumstances. Further, some circumstances may call for a broader inquiry into other evidence.
>
> [443] As this Court said in *Gwaze*, all of the circumstances need to be considered, although that will not necessarily require a slavish examination under each of the separate headings in s 16(1)(a)–(e) in every case.
>
> [444] The exercise is an evaluative one dependent on the facts. This means it is difficult to be any more prescriptive about the test.
>
> [445] We add that the dangers of hearsay will also be relevant to the application of the s 8 test as the inability to cross-examine may impact on fair trial rights. The right in s 25(f) of the New Zealand Bill of Rights Act 1990 to examine the witnesses for the prosecution is also significant in this respect.

Comments on the Chief Justice's reasons

[116] We do not intend to comment extensively on the reasons of the Chief Justice as the areas of disagreement are obvious. We make just three comments.

[117] First, we agree with the Chief Justice that the approach of the High Court and Court of Appeal in this case was wrong and would allow facially unreliable evidence

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[171] In their reasons, Ellen France and Miller JJ only summarise the approach to reliability in s 18 and not necessity.

to be admitted where a judge considers that any unreliability can be exposed for the jury's consideration through submissions or other evidence at trial.[172] We agree this approach was wrong and we make similar points below at [192] and [194].[173] We also agree with the Chief Justice that the s 18(1) test is a higher threshold than that under s 7 and that the judge must be reasonably assured as to a statement's reliability.[174] As we explain above at [100], this does not require indicia of unreliability to be completely absent. The focus is on the statement as a whole and the circumstances as defined. There must be a "hard look" at the circumstances to ensure that it would be safe for the fact finder to give weight to the statement, despite its hearsay nature and the associated dangers of hearsay evidence. As we say above at [101], the decision under s 18(1)(a) is an evaluative one tailored to the individual circumstances of the case and the particular hearsay statements at issue. Our approach is therefore very different from the approach of the High Court and Court of Appeal, criticised by the Chief Justice below at [477]–[478].

[118] Second, the Chief Justice considers that it is not permissible for the judge, when undertaking the threshold reliability assessment, to have regard to the extent that other trial evidence supports or contradicts the contents of the statement.[175] We accept that general consistency with other trial evidence is not an overriding consideration for reasons of both principle (it being a threshold question only) and practicality (given decisions are usually made pre-trial where all the evidence will not be available and where it is untested).[176] We consider that the High Court in this case erred by treating consistency as overriding where the circumstances relating to the statements showed clear indications of unreliability.[177] In our view, however, this does not mean that statements can be considered in isolation from their context, including the proposed trial evidence, as long as that evidence is relevant to one or more of the circumstances as defined in s 16(1).[178] Extrinsic evidence directly related to those circumstances (for

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172 Below at [477]–[478].

173 See also our comments below at [186]–[187].

174 Below at [475] and [478]–[479]. See above at [98] and [100]–[101]. We do not, however, agree with her comment below at [479] that the enquiry under s 18(1)(a) is designed to support the assessment "with reference to the statement's own specific features and characteristics".

175 Below at [483].

176 See above at [103]. As we note below at [194], however, there would also be dangers in deciding a statement is unreliable simply because it is inconsistent with other evidence.

177 See below at [192]–[194]. The High Court and Court of Appeal also did not systematically examine the circumstances as defined in s 16(1): see below at [191].

178 See above at [104] and below at [193].

example, a motive to lie) can also be considered.[179] To deprive judges of relevant information (as the Chief Justice would do) does not accord with the inclusive definition of circumstances in s 16(1) and the nature of the judge's gatekeeping task in s 18(1). For example, we do not consider that the "contents of the statement" in para (b) of the definition of circumstances in s 16(1), to be constrained in the way the Chief Justice considers it is.[180] The provision does not say so, and it would not be logical for it to be so constrained: statements that are totally untrue can, when considered in isolation, provide what appears to be a reliable narrative.

[119] Third, the Chief Justice criticises our reliance in this case on the CCTV evidence.[181] It seems to us unsupportable that extrinsic evidence throwing plain doubt on the reliability of the hearsay statement should *not* be considered. Of course, the absence of testing of the other evidence at a pre-trial stage is a matter to be borne in mind by the judge at this threshold assessment, but the same uncertainties will apply as much to evidence directly relating to the statement as to more extrinsic evidence directly related to the circumstances. We see no need for hard, and rather arbitrary, lines when the judicial role is gatekeeping, and the test is one of reasonable assurance. It may be that the extrinsic evidence is of a kind that leaves little room for contest or doubt — such as the CCTV evidence in this case. To exclude it when it casts a clear light on reliability would be illogical.

Issues related to Mr Maney's statements

[120] We now turn to discuss the second through fifth issues identified above at [36].[182] For ease of reference, we repeat them here:

> (b) whether the High Court erred by admitting the hearsay statements of Mr Maney in evidence;[183]
>
> (c) if so, whether the error occasioned a miscarriage of justice;[184]

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179 See above at [105].
180 See below at [487].
181 See below at [525]–[527]. For our assessment on the CCTV evidence see below at [168]–[173] and [196].
182 The final question identified above at [36] of whether the Court can be sure of guilt only arises if the Court concludes that a miscarriage of justice has arisen.
183 See below at [135]–[196].
184 See below at [197]–[211].

(d) whether the trial Judge's omission to give a reliability direction under s 122 of the Evidence Act 2006 with respect to those statements occasioned a miscarriage of justice;[185] [and]

(e) whether trial counsel erred in not adducing evidence of Mr Maney's conviction for attempting to pervert the course of justice,[186] and, if so, whether this occasioned a miscarriage of justice (this issue also includes consideration of the extent of any obligations on the Crown and the trial Judge relating to Mr Maney's conviction for attempting to pervert the course of justice);[187] …

[121] Before discussing these issues, we first outline the circumstances of Mr Maney's prior conviction for wilfully attempting to pervert the course of justice.[188] We then summarise the three statements Mr Maney made about the night Mr Rikihana died.[189]

Mr Maney's prior conviction for wilfully attempting to pervert the course of justice

[122] In May 2006, police uncovered evidence relating to the possession of a precursor substance by Mr Maney during a search of a vehicle he had been driving.[190] In June 2006, one of his associates, Mr Moke-Amotawa, was arrested on an unrelated matter. When his bag was searched a handwritten note was found.[191] A document examiner identified the writing to be Mr Maney's.[192] The note was addressed to a person named "Babe" and instructed them to get "Mooks" (Mr Moke-Amotawa) to swear an affidavit before a Rotorua lawyer in relation to:[193]

> Pills found in maroon Ford Futura stationwagon under dash in front of console inside plastic bag wrapped in Asian newspaper and plastic property bag found under seat with parts of R Maney initials on it puts contents into that bag and puts up under dash. He will be at Spikes place. Give this to him to read and go to lawyer to make affidavit before tomorrow. … He owns car and has since January of this year brought from a friend. He doesn't wish to name as of personal circumstances. Dog (Contacts pills) (urgent Dog Heil) Seig [f…]en Heil).

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185 See below at [212]–[232].
186 See below at [122]–[125].
187 See below at [233]–[251].
188 Below at [122]–[125].
189 Below at [126]–[134]. Only two of Mr Maney's three statements are hearsay statements: see below at [156]. The non-hearsay statement is discussed here for context and because it is relevant to the reliability assessment: see above at [105].
190 *R v Maney* HC Rotorua CRI-2006-063-4598, 27 August 2008 at [5]–[6].
191 At [7].
192 At [9].
193 At [8].

[123] Police obtained an interception warrant.[194] Between October and November 2006, they intercepted a number of communications passing between Mr Maney and co-offenders relating to the manufacture and supply of methamphetamine.[195] The Crown charged Mr Maney and his co-offenders with the drug-related offending. The note was the basis for a charge against Mr Maney for wilfully attempting to pervert the course of justice.[196]

[124] The Courts below were aware of Mr Maney's convictions, but the details of the conviction for attempting to pervert the course of justice were not before them. The Crown told us at the hearing in this Court that Mr Jury's trial counsel was aware of the conviction but did not seek those details. Mr Jury said he had sought disclosure of the details in preparation for the first appeal but was told that they were not available.

[125] Before the hearing of the appeal before this Court, we located a publicly available pre-trial admissibility ruling of Gendall J which gave details of Mr Maney's offending. We referred it to the parties.[197] The Crown acknowledged at the hearing of the appeal before us that a fresh search of its files showed that it had located a decision containing the details of the offending before the Court of Appeal hearing. It had been misfiled. This error meant that the details of the offence had, despite requests, not been disclosed to Mr Jury before that hearing.[198]

Mr Maney's three statements

[126] Mr Maney was a Mongrel Mob associate of Mr Rikihana, Mr Te Aonui and Mr Jury. Mr Maney and Ms Eketone were good friends. After Mr Rikihana died, Mr Maney lived with her at the home she had shared with Mr Rikihana. Mr Maney had a long criminal history spanning four decades.

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194 At [12].
195 At [4].
196 At [10].
197 SC pre-hearing minute, above n 34, at [3]. The sentencing notes have since also been located: *R v Johnstone* HC Rotorua CRI-2006-63-4598, 5 February 2009 [Maney sentencing notes].
198 Mr Jury's appeal counsel acknowledged they should have performed searches on legal research databases before concluding details of the offending could not be found. Counsel said they did not search these databases, wrongly assuming that Mr Maney's sentencing would have occurred in the District Court and therefore that the Maney sentencing notes, above n 197, would not be available.

[127] Mr Maney died from cancer in July 2019, about five months after Mr Rikihana's death and 13 months before the trial. He had earlier made three statements. We set them out in the order in which police obtained the statements. We note, however, that the letter purports to have been written before Mr Jury's arrest on 7 February 2019:

(a) Mr Maney signed a police statement on 8 February 2019 (the first police statement).

(b) Mr Maney wrote a letter dated 30 January 2019 (the letter), the date Mr Rikihana died. Police found it during a search of Mr Maney's house on 14 February 2019.

(c) Mr Maney signed another police statement in the form of an interview on 18 February 2019 (the second police statement).

The first police statement

[128] In the first police statement, Mr Maney mentioned his forgetfulness occasioned by a car crash in 2014 or 2015. He asserted that the last time he had seen Mr Jury was "weeks ago" when Mr Jury visited Mr Maney's home unannounced for 10 minutes during the daytime. Because Mr Maney did not have a phone, he did not know Mr Jury was going to show up. While Mr Maney accepted that he knew Mr Rikihana, he said he knew nothing of Mr Rikihana's death. Nor did he want to.

The letter

[129] Despite the first police statement, police suspected that Mr Maney was involved in Mr Rikihana's death. In an application for a search warrant of Mr Maney's home, the police described Mr Maney as a suspect:[199]

> 6.32 … it is believed that at around 02:24am after assaulting RIKIHANA at [Mr Rikihana's address] JURY has placed him in [the car Mr Jury was driving] and driven him to MANEY'S actual address of residence … before taking him to TE AONUIS address …

[199] There is also reference in the application to an informant, but the information provided by the informant is redacted in the version provided to us.

> 6.33 … it is feasible that forensic material will still be present at [Mr Maney's address] such as blood and other such bodily fluids and DNA which will confirm RIKIHANA being taken to that address, JURY being at that address and MANEY'S involvement in his death.

[130] The application was granted, and police searched Mr Maney's home a week after he made the first police statement.

[131] Police located 7.5 g of white crystalline powder in a handbag and a quantity of ammunition. The letter, dated "Wednesday 30th", lay open on Mr Maney's kitchen table. It was addressed to his son, Haere Tawhiti, who was in prison at the time. The letter began with a discussion of Haere's predicament and rather abruptly turned to supposedly contemporaneous events related to Mr Jury's visit. It also discussed other matters, including whether there had been grounds for Haere's arrest, that Haere's "lady" had picked up Haere's car from Mr Maney's house, and that Mr Maney had been caught driving while disqualified or without a licence and was to appear in court on 22 March 2019.

[132] We reproduce the letter here in full with the pertinent parts italicised. The letter was largely written in red pen but a portion in the middle was in blue pen as noted below:[200]

> Wednesday
>
> Sieg [f…]in Heil Mighty Styles [Haere Tawhiti]. Waikato Bull Dog.
>
> I thought Id drop you a bark my Mighty Son. Well fukn Rat shit you got done. Hopefully for the Mightyest out come. for you When I'd got home late at night I'd seen your car where it was parked and thought that was abit strange it being there Thought you must have jumped on wif some one else and gone somewhere. [*The letter restarts on a new page*.]
>
> Wednesday 30th
>
> Sieg [f…]en Heil Styles.
>
> I thought Id drop you a bark my Mighty Son Styles Mongrel Mob Waikato Well [f…]en Ratshit you got done but I hope for you the Mightyest [*switch to blue pen*] out come. When I'd got home at night time I'd seen your car parked up the drive on the lawn and thought nothing of it Thinking you must have gone wif some body else and that you would be back later on. But then the night had gone and morning was on us I'd thought that was abit weird instead of having alook at the car I didn't left that morning and went down to Sis

[200] Emphasis added.

> faekies she didnt know or hadn't seen you but then your lady turned up later that day and said you had got done. So later that day me faekie and your lady come down here to [*switch back to red pen*] get the car for her to take back to Tauranga Thats when she said that you had got arrested and done for the hardware. [F…]en Bummer. But anyway hope that you walk over that charge my Mighty Son Styles Waikato Mongrel Mobster *The brother Gooie the Rogue [Mr Jury] just turned up wif Uncle Trev [Mr Rikihana] tied down in the back of his car Uncle had attacked the Mighty Gooie Dog with a hamer in the face. he's tyed up in the back of the Rogue Dogs car asking me what to do wif the Dude I dont want nothing to do wif this shit got enough problems my self wif out this I can hear Uncle yelling please no more Mongrel. and Gooies just giving him heaps of kickings his own fault thinking he can do that to a Mongrel thats been around ford eva.* Well I got done for driving and got me at the garage at TeNgae. I denied it but they got me on the cameras at TeNgae garage So im going up for it on the 22nd of March. I may see yous all over there which will be all Red. My Mighty Son Styles Waikato Bulldog. I miss you my son in evry way. *the Dogs just leaving wif Uncle tyed down in his Car going to Nini Rogues [Mr Te Aonui's]. [f...] No's whats gona be happening there The Mongrel is all geared up prepared for what ever and who eva.* Give our whanau a Mighty Bark from me son. When you going back to Court son. The arrest did they have any grounds to be able to do it. The [f…] wits The AT Dog Kayrass has been staying here wif me for about 3 weeks now and got rolled last night for non appearance at Court. he barked me earlier tonight and said hes got out on strict conditions and is staying at Tom Weniaras place wif his Mistress and kids Well thats about all thats bin happening out here [f…] all. Debbie Maney gets out must be Tuesday coming I could just see all the Bullshit thats gona be going down ova the farm wif Tai. he's a bit worried an lost shes getting out. Well my Mighty Son Styles Mighty BullDog Waikato I bark to you again in a few Aaarahs untill you take care love you ford eva my Mighty Son
>
> Rex Rogue.
> Mongrel ford eva and beyond.
> 13 XXX 13.
>
> Seig [f…]en Heil to da way we are Mighty Mongrel Mob ford ever!
>
> Mighty XMAN Rogue.

The second police statement

[133] Mr Maney was formally cautioned before giving the second police statement. In it, he claimed authorship of the letter and said he wrote it on 30 January 2019. He said he had already started writing the letter "but then wrote down the other stuff" after Mr Jury left. The interviewing police officer put to Mr Maney that he had earlier omitted to tell police that Mr Jury had visited on 30 January 2019.[201] Mr Maney acknowledged his omission in the first police interview but did not explain it.

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[201] See above at [128].

[134] Mr Maney then gave this version of events:

(a) Mr Jury visited Mr Maney's home twice on the night in question.

(b) Mr Jury first visited alone "pretty late". Mr Maney had to get out of bed, and the two men sat at the kitchen table. Mr Jury showed Mr Maney an injury on his face. He said Mr Rikihana had hit him in the face with a hammer over "something to do with a car" and that he was going to go back and "get the [c…]". He left after about 30 minutes.

(c) Mr Maney could not remember how long it was between the two visits.

(d) When he visited again, Mr Jury stayed outside at the front door. Mr Jury told Mr Maney he had "got the [c…]".[202] Mr Jury asked for a rope, and Mr Maney replied that there was one in the washhouse at the back of the property. Mr Maney then "just [f…]ed off back to bed" and heard what sounded like lots of kicks and someone (he assumed Mr Rikihana) yelling "please no more". He said he did not go out and help Mr Rikihana because he "didn't want nothing to do with it".

(e) Mr Jury did not say he was going to take Mr Rikihana to Mr Te Aonui's house, but Mr Maney assumed Mr Jury would do that, rather than taking him home, because Mr Te Aonui was Mr Rikihana's mate.

(f) Mr Maney denied that Mr Jury had used the washroom. He said Mr Jury could not have used the washroom without him knowing as it was inside the house.[203]

(g) Mr Maney's partner, Dee, was at home, but she was in bed and did not get up.

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202 It is unclear whether Mr Maney meant to say that Mr Jury said this on the second visit. Mr Maney had at this stage in the interview been talking about sitting at the kitchen table with Mr Jury (as in the first visit referred to above at (b)).

203 It is unclear whether the washhouse (where the rope allegedly was) referred to above at (d) and the washroom referred to in this subparagraph are the same room.

(h) Mr Te Aonui later visited Mr Maney[204] and told him he took Mr Rikihana to hospital and that Mr Rikihana had died. Mr Maney texted Mr Jury to inform him that Mr Rikihana had died.

(i) Mr Maney admitted that he and his partner owned phones but said he did not use his partner's phone.

Admissibility of Mr Maney's statements

Courts below

[135] We now summarise the approach of the Courts below in respect of the admissibility of Mr Maney's statements.

High Court

[136] The only issue before the High Court with regard to the admissibility of Mr Maney's statements was whether the letter and the second police statement were "reliable" in terms of s 18(1)(a) of the Evidence Act.[205] Powell J accepted that the evidence had some shortcomings in that respect.[206] First, it was difficult to attach significance to the fact the police statements were made to the police (with Mr Maney's signature verifying their truth and accuracy) because those two statements were fundamentally inconsistent. Second, knowledge his statements might be used in court proceedings and that it was an offence to provide false or misleading evidence did not stop Mr Maney from providing the police two fundamentally inconsistent stories. The inconsistencies did not stop here. The Judge said the second police statement was inconsistent with the letter but to a lesser extent than with the first police statement. Finally, there was no evidence as to when Mr Maney completed

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204 When asked by police when Mr Te Aonui visited, Mr Maney said he could not remember.

205 *R v Jury* [2020] NZHC 736 (Powell J) [HC hearsay ruling] at [12]. The Judge noted that the first police statement denying all knowledge of the events did not come within the definition of hearsay because the Crown did not propose to offer the statement as truth of its contents. However, he said the statement would become hearsay if the defence later relied on it for that purpose (which it did not). Nevertheless, the Judge said that the first statement provided "essential context to Mr Maney's other statements and would therefore have to be admissible in the event Mr Maney's other statements were admissible": at [10]. See also above n 189 and below n 224.

206 At [14].

the letter (except as stated in the second police interview) nor what motivated him to write it.

[137] The Judge noted that "many of the key matters" in Mr Maney's letter and the second police interview were corroborated by other evidence, including the formal statements of other witnesses:[207]

(a) There is no dispute that Mr Maney, Mr Jury, and Mr Rikihana knew one another and were all associated with the Mongrel Mob.

(b) Mr Maney's home was not far from Mr Rikihana's on Te Ngae Rd in Rotorua.

(c) Mr Jury (as Gooie) was identified by other occupants of the property as turning up at Mr Rikihana's home around 1 am on 30 January 2019. After apparently having food with Mr Rikihana an argument broke out between Mr Jury and Mr Rikihana, following which blows were heard and Mr Rikihana was heard moaning.

(d) Mr Jury's fingerprints and blood have been located in Mr Rikihana's home, as has Mr Rikihana's blood.

(e) A visitor to the property reported seeing legs sticking out of the back of a car at Mr Rikihana's home in the early hours of the morning.

(f) Mr Jury left the property and the other occupants of the property observed after he had left in his car Mr Rikihana was no longer present.

(g) Mr Rikihana's body was dropped off at the home of Nini (Nicolas Te Aonui) around 3 am on 30 January 2019.

(h) The autopsy report indicated that Mr Rikihana suffered multiple blunt force impacts, with head and neck injuries causing his death. The specific cause of Mr Rikihana's injuries could not be identified but the pathologist noted "kicking, stomping and punching is possible". The report also noted multiple bruises, lacerations, abrasions and other wounds to the rest of Mr Rikihana's body. This included in particular "multiple abrasions and bruises around both wrists, some of them appeared to have been wrapped around the entire circumference of the risk [sic] in keeping with the deceased being bounded".

(i) Mr Jury reported to the emergency department at Hawke's Bay Regional Hospital at 7:30 am on 30 January 2019 seeking treatment for injuries to his face. He is recorded as stating he had been hit by a hammer at 2 AM in Rotorua, and had subsequently driven back to Hastings.

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[207] At [15].

[138] In the Judge's view, the corroboration meant concerns raised by Mr Jury's counsel about Mr Maney's self-confessed memory issues were unfounded. He considered Mr Maney's conviction history did not impact on the reliability of the statements and added it was "equally difficult to see in the light of the other evidence available how either the letter or the [second police statement] could be seen to be self-serving".[208] He concluded that:[209]

> … viewed as a whole, the circumstances, and in particular the circumstances that relate to the accuracy of the observation of the person, relating to the background information in the statement, the letter and the [second police statement] provide reasonable assurance that those statements are reliable.

[139] As to s 8, the Judge accepted Mr Maney's evidence was of high probative value because it added to the factual matrix provided by other witnesses. Defence counsel could not point to any specific prejudice beyond his inability to cross-examine Mr Maney. He described that as a "standard consequence of every admission of hearsay evidence" and was "not of itself enough to warrant excluding the evidence".[210] Further, the Judge said the defence could point to the inconsistencies between the statements themselves.[211] He accordingly ruled the statements admissible.[212]

Court of Appeal

[140] The Court of Appeal said that its task was to assess the threshold reliability of Mr Maney's statements, as distinct from their ultimate reliability.[213] It noted the consistencies and inconsistencies within Mr Maney's three statements but said that "much" of the letter and second police statement was consistent with other evidence, including Ms Eketone's evidence and the pathological and forensic evidence.[214] Most significantly:

> [59] … the evidence on the CCTV footage is consistent with Mr Jury having driven to Rex Maney's home at about 1.33 am, with Mr Rikihana in

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208 At [16]. As we noted above at [124], Mr Maney's criminal history was before the Court but not the details of his conviction for wilfully attempting to pervert the course of justice.

209 At [17] (footnote omitted).

210 At [18] citing *Nisha v R*, above n 123, at [29] and *Adams v R*, above n 115, at [50]–[51].

211 At [18].

212 At [19].

213 CA judgment, above n 30, at [55]–[56] citing *Adams v R*, above n 115, at [26] and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV18.02].

214 At [58]. See below at [258]–[271] and [275]–[287].

> the back seat of his vehicle after Mr Rikihana had hit Mr Jury with a hammer and after Mr Jury had severely beaten Mr Rikihana and tightened a towel around his neck.
>
> [60] The CCTV footage is also consistent with Mr Jury driving back to Rex Maney's home, after having dropped Mr Rikihana's body in the driveway of Mr Te Aonui's property.

[141] It was submitted on behalf of Mr Jury that the failure of the police to investigate further into the ammunition and powder located during the search of Mr Maney's home was evidence that the police had induced Mr Maney to implicate Mr Jury in the second police statement. The Court of Appeal rejected that contention: the police claimed, and Mr Jury did not challenge, that the decision not to investigate possible ammunition or drug offending was driven by resourcing and public interest considerations.[215] The Court referred specifically to Mr Maney's prior conviction for wilfully attempting to pervert the course of justice as a factor weighing against admission.[216] It was prepared to place more weight on Mr Maney's conviction history than Powell J, but that did not by itself favour exclusion because of the general consistencies between the letter, the second police statement and other evidence.[217]

[142] Mr Jury advanced an application for recall of the Court of Appeal's judgement. He claimed that the Court failed to give sufficient reasons as to his argument on the appeal that the second police statement implicating Mr Jury in Mr Rikihana's murder could not be reconciled with the CCTV evidence showing the movements of Mr Jury's car the night Mr Rikihana was murdered .[218]

[143] The Court of Appeal refused the application. The Court said:[219]

> [3] In our judgment, we said:
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> (a) While there were inconsistencies between Mr Maney's letter and his statement to the police, there were also a number of consistencies between those documents. There were also

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215 CA judgment, above n 30, at [49] and [62]–[63]. Detective Senior Sergeant Mark van Kempen explained the reasons for not investigating further in an affidavit filed in the Court of Appeal.

216 As noted above at [124]–[125], the details of Mr Maney's conviction for attempting to pervert the course of justice were not before the Court of Appeal. These details were only located before the hearing in this Court. We discuss the details above at [122]–[123].

217 CA judgment, above n 30, at [64].

218 CA recall judgment, above n 31, at [1]–[2]. He repeats this argument before us. We explain his argument and deal with it below at [149], [166] and [168]–[171].

219 Footnotes omitted.

consistencies between Mr Maney's letter and second statement to the police and other evidence.

(b) The letter written by Mr Maney and his second statement to the police together with the CCTV footage supported the Crown case that Mr Jury had travelled to Mr Maney's home with Mr Rikihana in the back of his car after Mr Rikihana had been severely beaten.

(c) Contrary to Mr Stevenson's submissions, Mr Maney's letter and second statement to the police were not totally inconsistent with the CCTV footage.

[4] The argument put forward to recall our judgment is:

(a) based upon an erroneous reading of our judgment; and

(b) does not pass the test required for recall set out by the Supreme Court in *Uhrle v R* and *Jolley v R*. In those judgments, the Court emphasised that the test for recall recognises that the power to recall is an exceptional step that ensures the court is able to respond to circumstances "in order to avoid injustice".

Submissions

Mr Jury

[144] Mr Jury submits that Mr Maney's hearsay statements should not have been admitted into evidence under s 18 of the Evidence Act, as the circumstances surrounding the statement failed to provide a reasonable assurance of reliability. Indeed, it is submitted that there was a strong assurance that the statements — central to the Crown's case — were unreliable. In Mr Jury's submission, Powell J accepted that there were issues with the statements.[220] Mr Jury also points to the conviction for attempting to pervert the course of justice as bearing on reliability.

[145] Mr Jury submits that there are internal inconsistences between the three statements. Mr Maney's disclaimer of any knowledge of the events in the first statement is wholly inconsistent with the letter and the second statement. There are also inconsistencies between the letter and the second police statement, including that the letter records a single visit by Mr Jury, whereas in the second statement he says

220 HC hearsay ruling, above n 205, at [14].

that Mr Jury visited twice. The CCTV evidence is inconsistent with the two visits described by Mr Maney in the second police statement.

[146] Mr Jury further submits that the purported provenance of the letter is inherently implausible. It "strains credulity" to suggest that Mr Maney wrote a letter of this nature to his son in the early hours of the morning; that he resumed writing the letter immediately after Mr Jury came to his home with Mr Rikihana tied up in the back of his car; that he wrote about a serious crime to a serving prisoner knowing that it would be read by the authorities; and that the letter remained unsent, positioned prominently on Mr Maney's table some weeks after it was purportedly written.

[147] In addition, despite several illicit items (probable drugs and ammunition) being found by police in a search of Mr Maney's house, he was never charged. Mr Jury submits this can (at the least) be perceived as an inducement to give the second police statement. Mr Maney had been last released from prison only six months before and was presumably still under release conditions. Mr Maney likely knew that he was terminally ill during the early stages of the investigation, and he had powerful incentive to exculpate himself in order not to spend the final months of his life in custody.

[148] Mr Jury notes that Mr Maney appears to have been linked to the death of Mr Rikihana through a confidential informant.[221] He submits Mr Maney would have known that Mr Jury had been charged in relation to Mr Rikihana's death.[222] This, he submits, would also have provided a motive to lie. It is submitted that the corroborating evidence relied on by the Judge and Court of Appeal are consistent not only with the purported truth of the hearsay statements but also with Mr Maney fabricating a self-serving story based on details known to him from his own involvement in the events in question.

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221 Mr Jury refers to the application for a search warrant in relation to Mr Maney's home: see above n 199.

222 We know that Mr Maney cannot have known Mr Jury had been charged when he made any of the statements because Mr Jury was not charged until 22 February 2019, after all statements were made. We cannot locate anything on the record as to Mr Maney's knowledge of Mr Jury being arrested — that having occurred on 7 February 2019, the day before Mr Maney's first police statement.

[149] In Mr Jury's submission, the motive to lie, irreconcilable claims and previous conviction for attempting to pervert the course of justice would have created a potent combination for the cross-examiner to exploit. Mr Maney's claims may well have evaporated under skilful cross-examination. Mr Jury says he was deprived of this opportunity. Instead, the jury relied on Mr Maney's evidence and convicted him of murder.

The Crown

[150] The Crown says that Mr Maney's hearsay statements were not central to its case. It was Mr Jury who gave evidence implicating Mr Maney. Had the defence advanced that theory without Mr Maney's statements, there would have been considerable prejudice to the Crown and the overall fairness of the proceeding.

[151] The Crown submits that juries are able to weigh the inconsistencies within statements. Here, the differences between Mr Maney's three statements were obvious and ripe for submission notwithstanding his absence from the witness box. And, indeed, the differences were fully ventilated at trial. There was nothing, the Crown submits, in the underlying evidence to suggest that Mr Maney might have recanted under cross-examination or given responses favourable to Mr Jury.

[152] The Crown argues that little turns on the inconsistency between Mr Maney's evidence and the CCTV evidence. Whether it was one visit or two, Mr Maney's letter and second statement were consistent with Mr Jury travelling to Mr Maney's house with Mr Rikihana in the back of his car after he had been severely beaten. And they were consistent with other evidence.

[153] The Crown submits that the provenance of the letter is unremarkable. It is apparent that Mr Maney was writing to his son before the material events occurred. It is not implausible that he would use the writing materials already before him to record such a significant event. Further, the discovery of the letter was not convenient; it must be viewed against the background that search warrants are typically executed without notice. In any event, the provenance of the letter was covered at trial.

[154] The possibility or appearance of Mr Maney being induced to lie is, the Crown submits, untenable. The letter implicating Mr Jury was written before police located the powder and ammunition at Mr Maney's home. He could not be shown to have possessed the powder. Nor, the Crown says, did the amount appear to be for anything except personal use. In any event, and again, inducement was explored at trial.

[155] We understand the Crown to support the analysis of the Courts below treating Mr Maney's prior conviction for attempting to pervert the course of justice as just one factor that did not tip the balance against admission of the hearsay statements.

Our assessment

[156] We note first that s 17 placed no barrier in front of the admissibility of Mr Maney's first police statement because the Crown did not offer it as truth of its contents.[223] Nor did the defence rely on it as such. The contents of the first police statement are, however, obviously relevant to the reliability of the second police statement and the letter, given the proximity in time and subject matter.[224]

[157] We now turn to the admissibility of the letter and the second police statement in light of the factors set out in s 16.

Nature of the statements

[158] The second police statement was not given on oath, but police explained to Mr Maney what the consequences were if its contents were proved to be false. Mr Maney acknowledged as much when he signed it. The same applies to the first police statement which, as we note below at [162], was obviously untrue.

[159] We agree with Powell J that in this case the fact that the second police statement was given in a formal police interview and under caution is not an indication

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223 See above n 189.

224 The first police statement was itself admissible if the letter and second police statement were, as the High Court Judge found: HC hearsay ruling, above n 205, at [10]. We add that if the letter and second police statement were inadmissible, then the first police statement was inadmissible for want of relevance under s 7 of the Evidence Act.

of reliability given the fundamental nature of the differences between the first and second police statements.[225]

[160] The fact that the letter was private correspondence addressed to a member of Mr Maney's family and supposedly written on the night of the murder would normally be a factor pointing towards reliability, were it not for the fact the letter was not sent and the other circumstances discussed further below, including the motive Mr Maney had to lie in order to distance himself from the offending.[226]

Contents of the statements

[161] There was a fundamental difference between the first police statement and the other two statements. In the first police statement, Mr Maney disclaimed any knowledge of the events leading up to Mr Rikihana's death. In the letter and the second police statement, he gave a quite different account of the state of his knowledge.

[162] The first police statement was not true and neither party contends otherwise. Mr Maney was clearly trying to distance himself from the murder by falsely disclaiming all knowledge of it. The fact he was prepared to lie to police is, nevertheless, relevant to the reliability of the second police statement and the letter. Given that, at least by the time of the second police statement, Mr Maney knew he was a suspect, the motivation to lie in order to distance himself from the murder was even stronger than in his two earlier statements.

[163] In addition, we note that, as well as disclaiming all knowledge of the murder in the first police statement, Mr Maney said he did not have a phone. He admitted the opposite in the second police statement.[227]

[164] There are also inconsistencies between the letter and the second police statement that throw doubt on the reliability of both. In the letter, Mr Maney said that

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225 See above at [136].
226 See below at [175]–[178].
227 See above at [128] in relation to the first police statement and [134(i)] regarding the second police statement.

Mr Jury came to the house with Mr Rikihana tied down in the back of his car, asked Mr Maney what to do with him and then left to go to Mr Te Aonui's house.[228] Although Mr Maney did not say in the letter how he knew that destination, the implication from the question about what to do with Mr Rikihana is that possible destinations were discussed between them. In the second police statement, Mr Maney said that Mr Jury asked him for rope, and he just assumed Mr Jury was going to Mr Te Aonui's house, rather than taking Mr Rikihana back to his house, because Mr Te Aonui was a friend of Mr Rikihana.[229] Given there was not long between these two accounts (even assuming the letter was in fact written on 30 January 2019), these inconsistencies affect the assessment of reliability when considered alongside the other factors.

[165] The differences between the two accounts as to interaction with Mr Jury are also of significance. In the second police statement, Mr Maney recounted very minimal interaction with Mr Jury when he had Mr Rikihana in the car. This was limited to a doorstep conversation where Mr Jury told Mr Maney that he had "got" Mr Rikihana and asked him for a rope.[230] The letter recounts somewhat more interaction: a discussion about what to do with Mr Rikihana; and Mr Maney having either seen Mr Rikihana tied up in the car or been told about it by Mr Jury.[231] Whichever account is correct, Mr Jury would on the CCTV evidence have spent a long time at Mr Maney's — up to 51 minutes — for there to have been such minimal interaction between them.[232]

[166] The main inconsistency between the letter and the second police statement relied on by Mr Jury is between the two visits Mr Maney described in the second police statement and the fact that the letter mentioned only one visit. Further — and,

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228 See above at [132].

229 See above at [134(d)–(e)].

230 See above at [134(d)]. We note, however, that Mr Maney was not clear as to the order of events in the second police statement: see above n 202.

231 See above at [132].

232 The CCTV evidence means that he could have been there for 51 minutes: see below at [303], [307] and the table below at [310]. As we note below at [347], Mr Jury's explanation at trial was that he left Mr Rikihana with Mr Maney at the latter's house before heading further north to clear his head. If that did occur, then the point we make about Mr Jury having spent a long time at Mr Maney's loses some cogency. We are, however, highly sceptical of Mr Jury's self-serving explanation of going to clear his head for reasons we explain below at [402]. Mr Jury's evidence was not before the High Court when making its admissibility decision.

Mr Jury submits, fatally — the two visits, in the manner Mr Maney suggested they occurred in the second police statement, are inconsistent with the CCTV evidence.

[167] We agree that it is odd that Mr Maney did not recount in the letter the prior visit described in the second police statement if in fact it had occurred, especially because Mr Jury had allegedly threatened to go back and "get" Mr Rikihana and because Mr Maney was supposedly giving a contemporaneous account of the events of the evening.[233] Although Mr Maney said he did not know how much time elapsed between the two visits recounted in the second police statement,[234] it could not have been so long that the first visit had slipped his mind when writing the letter at the time when it purports to have been written. Further, the second police statement records Mr Jury on the second visit announcing that the alleged threat made at the earlier visit had been carried out.[235] It is very surprising in these circumstances that the earlier visit (if in fact it had occurred) and the threat were not mentioned in the letter, especially in light of the fact that the letter records that Mr Jury had been hit in the face with a hammer by Mr Rikihana,[236] but does not record the earlier visit mentioned in the second police statement where Mr Maney said he learned that information.[237]

[168] We now turn to the consistency (or otherwise) of Mr Maney's account with the CCTV evidence of Mr Jury's movements and assess Mr Jury's submission that the two alleged visits could not have occurred in the manner Mr Maney recounts in his second police statement.

[169] According to the CCTV evidence, summarised in more detail below, the car driven by Mr Jury could only have visited Mr Maney's once after an altercation at Mr Rikihana's house — not twice as claimed.[238]

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233 See above at [134(a)–(d)].

234 Above at [134(c)].

235 Above at [134(d)]. We again note that Mr Maney was not clear as to the order of events in the second police statement: above nn 202 and 230.

236 See above at [132].

237 See above at [134(b)].

238 The CCTV evidence showed three possible visits to Mr Maney's house: the first when Mr Jury first arrived in Rotorua (and before he had gone to Mr Rikihana's), the second after the altercation at Mr Rikihana's and the third after Mr Rikihana was dumped on Mr Te Aonui's driveway: see below at [302]–[310]. He could not have visited Mr Maney after being allegedly hit with the hammer and then visited a second time with Mr Rikihana injured in the back seat.

[170] We therefore accept Mr Jury's submission that the second police statement is inconsistent with the CCTV evidence in recounting two visits: the first where Mr Jury had been injured by Mr Rikihana and made a threat to get him and the second with Mr Rikihana in the car.

[171] We consider that this means that the second police statement is demonstrably false in a fundamental way. This is not a case where the statement-maker mistakenly recounted or fabricated a minor detail. It is a core aspect of the second police statement that there was a first visit to recount the threat to get Mr Rikihana after being injured by him and then a second visit with Mr Rikihana in the car after the threat was carried out.

[172] There is an inescapable inference that Mr Maney was lying when he added to the account in the letter an additional visit where a threat was made in order to distance himself further from the murder. As noted above, there was even more incentive for him to lie in the second police statement than in the first two as he knew he was a suspect, having had his house searched and been given a formal caution before the interview.[239]

[173] That Mr Maney was prepared to lie in such a fundamental way in the second police statement throws doubt on the whole of his account in both the letter and the second police statement and in particular his assertion of Mr Jury administering an additional beating in the car.[240]

Making of the statements

[174] We have no concerns that the letter and the second police statement did not accurately record what Mr Maney wrote or said. The police found the original letter which Mr Maney admitted authoring. With regard to the second police statement, Mr Maney adopted it by signing it.[241]

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239 See above at [162].

240 This is not a suitable case therefore for severance of the clearly false aspect of the second police statement holding that aspect alone to be inadmissible: see above n 153. In any event, it would be unfair to Mr Jury. Severing the clear falsehood from the second police statement would artificially boost the reliability of the remaining parts of the second police statement in the eyes of the jury.

241 This was not a case, for example, of multiple hearsay: see NZLC Draft Code and Commentary, above n 65, at [C76].

[175] We, however, accept Mr Jury's submission that there are issues as to the letter (apart from the inconsistencies between it and the police statements). It describes serious criminal offending and purports to have been written to a person in prison with full knowledge that it will be read by prison authorities.[242] It apparently remained unposted for two weeks. It was left in plain sight in circumstances where Mr Maney must have known he was a potential suspect and that his house could be searched.[243] In these circumstances, the strong inference is that the letter was left on the table so that it could be found by the police in the event of a search.

[176] It may even have been written with that in mind and not at the time asserted. The start of the letter is essentially repeated, with the day of the month, 30th, only appearing only on the recommenced letter. It is not clear on the face of the letter why Mr Maney would have restarted it. There is also a variation in the colour of the ink, suggesting a break in its writing.[244]

[177] We also note an inconsistency in Mr Maney's account in the second police statement as to the writing of the letter. He said at the beginning of the interview that he had been writing the letter when Mr Jury turned up with Mr Rikihana and that he "wrote down the other stuff" after Mr Jury had left.[245] Yet later in the interview he said that, after Mr Jury had knocked on the door on the second visit and been told where the rope was, he had gone back to bed.[246] The use of the word "back" implies that Mr Maney had been in bed and not writing the letter when Mr Jury came back for the second time. And, even if we cannot infer he had been in bed from the use of the word "back", Mr Maney clearly said that he had gone to bed after telling Mr Jury about the rope. Therefore, unless he got up again, he did not finish the letter immediately after Mr Jury had left.

[178] All this does not necessarily mean that the contents of the letter are untrue. It may have been left there as a way of communicating with the police without Mr Maney appearing to be a "snitch". But we accept Mr Jury's submission that the

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242 Mr Maney had himself spent time in prison.
243 Mr Maney had been interviewed by the police before the letter was discovered.
244 See above at [132].
245 See above at [133].
246 See above at [134(d)].

circumstances are strongly consistent with Mr Maney making up a story on the basis of facts known to him (in a progressive way, given the differences between the letter and the second statement) to cover up his involvement or, even if he was not involved, to divert suspicion elsewhere because he knew he was under suspicion.[247]

Mr Maney's veracity

[179] Despite the fact that Mr Maney's conviction for attempting to pervert the course of justice was more than 10 years old at the time Mr Rikihana died, that conviction is very relevant to whether Mr Maney was lying in his statements. We have the details of the offending that led to the conviction before us and are in a better position than the Courts below to assess its significance. The conviction demonstrates Mr Maney's willingness to blame another in the place of himself in a context where it was envisaged there would be perjured evidence should the matter go to court. Those features bear some resemblance to the current case and incline us to place much more weight on the prior conviction than was placed on it by the Courts below.

[180] Mr Maney also clearly lied when making the first police statement, showing he did not hesitate to lie to the police. He also had a motive to lie with regard to all three statements given he was himself a suspect. We know that he lied in his second police statement about the two visits by Mr Jury as described therein. As noted above at [173], this throws significant doubt on the other claims in the letter and the second police statement.

[181] We also accept Mr Jury's submission that Mr Maney may have been induced to lie when making the second police statement to avoid prosecution for the powder and ammunition found at his house. Police eventually chose not to charge him, but we do not know when that decision was made and when, if at all, Mr Maney was made aware of that decision. However, the significance of this factor is limited. Mr Maney's apparent desire to distance himself from Mr Rikihana's death and to place suspicion on someone other than himself is the most obvious source of a motive to lie.

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[247] The Court of Appeal accepted, in the context of whether the trial Judge had to give a reliability direction under s 122 of the Evidence Act, that Mr Maney may have had "a motive to give false evidence that is prejudicial to a defendant" (to use the words of s 122(2)(c)): see CA judgment, above n 30, at [91]; and below at [215].

Accuracy of observation and other circumstances

[182] Mr Maney claimed in his second statement that he went back to bed after telling Mr Jury where to find the rope. He said, however, that he could hear (presumably from his bed) the beating Mr Jury was administering in the car and the exact words Mr Rikihana uttered while being beaten.[248] For Mr Maney to report being able to hear that raises questions as to where Mr Jury's car was parked, the distance between there and Mr Maney's bedroom, and how soundproof (or not) the house may have been. Mr Maney claimed his partner was also in bed and did not get up while Mr Jury was at the property.[249] Whether his partner would also have heard the beating depends on whether she was asleep and, if so, how sound a sleeper she was. Either way, Mr Maney did not disclose whether she also heard the beating.[250]

[183] We comment that, in any event, the forensic evidence — in particular, the evidence that Mr Rikihana had been dragged to the front of his house — throws doubt on whether Mr Rikihana would have been in any condition to yell by the time he reached Mr Maney's house.[251]

[184] Mr Maney claimed to have memory difficulties.[252] We do not think they assume any significance in the context of the main concern that he had a motive to lie and did lie in crucial respects.

Cross-examination

[185] The inconsistencies between the various statements, the motive to lie, whether Mr Maney could have heard the alleged beating in the car and the circumstances regarding the letter all provide fertile grounds for cross-examination on the grounds of unreliability. This in itself suggests that the statements do not pass the threshold s 18 test.[253]

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248 See above at [134(d)].
249 See above at [134(g)].
250 There was no evidence from Mr Maney's partner as to the events of the evening. Such evidence may have addressed some of these uncertainties.
251 See below at [267]. See further below at [398].
252 See above at [128].
253 See above at [108].

[186] It is no answer to assert that cross-examination would not have made a difference. We cannot assume that Mr Maney would not have retracted or modified any of his assertions under cross-examination. Even had he not done so, the jury would have been able to assess the validity of any explanations given for the discrepancies we have outlined, and also to assess any further matters that may have arisen.

[187] Nor is it an answer to suggest that the fact that there were clear avenues of cross-examination means that these could be pointed out to the jury who would then understand the reasons for caution in relying on the evidence. This is akin to saying that the more obvious the problems with reliability are, then the more likely it is that hearsay evidence will be admitted, and quite contrary to the reasonable assurance of reliability test in s 18.

Summary and conclusion

[188] In summary:

(a) Both police statements are false in fundamental ways:

(i) The first police statement was a complete fabrication. By lying, Mr Maney sought to distance himself from Mr Rikihana's murder. This impugns the reliability of the letter and the second police statement where the same motive is strengthened by the fact Mr Maney knew he was a suspect, at least at the time of the second police statement,[254] and where he had grounds to suspect he was a suspect at the time he left the letter in plain view.[255]

(ii) The second police statement is false in a fundamental way. The CCTV evidence shows that two visits did not occur in the manner described in the second police statement. The inescapable inference is that Mr Maney fabricated the first visit where the threat was allegedly made in order to further

[254] Above at [162] and [180]–[181].
[255] Above at [175].

distance himself from the murder.[256] That he lied in such a fundamental way throws doubt on the other assertions in the second police statement and the letter, including the alleged additional beating in the car.[257]

(b) Because the two police statements are fundamentally inconsistent and Mr Maney lied in both, we do not place any weight on the second police statement being one given to the police with an acknowledgement of the consequences of giving false evidence and under caution.[258]

(c) It is significant that only one visit is described in the letter and that, despite mention of the hammer in the letter, there is no mention of a threat (or indeed of any threat having been carried out).[259] This contrasts with the account of the two visits in the second police statement. There are other inconsistencies between the letter and the second police statement which are also of some significance.[260] In both the letter and the second police statement, Mr Maney also minimised his interaction with Mr Jury during the visit while Mr Rikihana was in the car even though that visit lasted up to 51 minutes.[261]

(d) The letter recounted serious criminal offending. Mr Maney would have known it would be read by prison authorities had he sent it. It apparently remained unposted for two weeks and was left in plain view at a time when Mr Maney had grounds to fear that the police suspected him of involvement in Mr Rikihana's murder. There are indications that the letter was not written at the time of the events of the evening of 29–30 January 2019. The strong inference is that Mr Maney left it out to be found by police in the event of a search to cover up his involvement or, in any case, to throw suspicion elsewhere.[262]

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256 Above at [171]–[172].
257 Above at [173].
258 Above at [158]–[159].
259 Above at [167].
260 See above at [164]–[165].
261 Above at [165].
262 Above at [175]–[178].

(e) There are issues as to whether Mr Maney could have overheard what he claimed in the second police statement to have happened in Mr Jury's car.[263]

(f) Mr Maney's prior conviction for attempting to pervert the course of justice is very relevant to whether Mr Maney was lying in the letter and the second police statement.[264] He also had a motive to lie given that he was a suspect of the crime and possibly, in relation to the second police statement, because of inducements following the discovery of powder and ammunition at his house.[265]

(g) The circumstances also provide fertile grounds for cross-examination, itself an indicator of low reliability.[266] It is no answer to assert that cross-examination would not have made a difference, or that the issues relating to reliability could be pointed out to the jury.[267]

[189] We therefore agree, for reasons which differ in some respects from those in the reasons of Ellen France and Miller JJ, that the letter and the second police statement do not meet the s 18 test of reasonable assurance of reliability. In fact, we consider that there were very strong indications the statements were unreliable in material respects. Neither statement should have been admitted. Nor, therefore, should the first police statement.[268]

[190] For completeness, we record that we would in any event have excluded the letter and the second police statement under s 8. We accept the submission that their probative value is low because of the clear indications of unreliability and the lies. The probative value is outweighed by the prejudice caused to the proceedings by Mr Maney's absence and the inability to cross-examine him on what were significant and damaging allegations relating to the alleged events at his house. We also note that,

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263 Above at [182]–[183].
264 Above at [179].
265 Above at [180]–[181].
266 Above at [185].
267 Above at [186]–[187].
268 See above n 224.

had Mr Maney survived and been charged alongside Mr Jury,[269] Mr Maney's statements would not have been admissible as hearsay offered by the Crown against Mr Jury.[270] This strengthens our conclusion as to exclusion under s 8.

Comments on the decisions in the Courts below

[191] Section 18 requires consideration of the circumstances in assessing reliability. Powell J in this case did not, in a systematic manner, examine each of the circumstances as defined in s 16(1). The same is true of the Court of Appeal's analysis.

[192] Powell J recognised that there were indications of unreliability, yet held that these were overridden by the consistency of Mr Maney's statements with the other evidence in the case. The Court of Appeal agreed. As we noted above, even though circumstances are defined inclusively, there is nothing in the definition that suggests general consistency or inconsistency with other evidence is an overriding consideration.[271]

[193] Context may, however, be relevant.[272] In this respect, consistency between the core aspects of the statement and other evidence is the most helpful indicator of reliability.[273] In this case we accept that Mr Maney's statements were broadly consistent with the Crown case that Mr Rikihana was badly beaten at his house by Mr Jury and transported first to Mr Maney's house before being dumped in Mr Te Aonui's driveway. However, there was no other evidence consistent with the

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269 Mr Jury's case was that it was Mr Maney who was solely responsible for the attack on Mr Rikihana at the latter's house. We discuss Mr Jury's account below at [315]–[358]. As we discuss in the final section below at [373]–[409], we doubt that there was any reasonable possibility that Mr Jury was not also involved in the attack, even if Mr Maney did go to Mr Rikihana's house (and we very much doubt he did so). We accept that it may well have been unlikely that Mr Maney would have been charged, even had he been alive, given the lack of forensic evidence implicating him that was found either at his house or that of Mr Rikihana.

270 Under s 27(1) of the Evidence Act, unless admitted pursuant to s 22A, which would not appear to be of relevance in this case.

271 Above at [103].

272 A court on appeal is required to apply the same threshold test in deciding if the evidence was wrongly admitted but, of course, after trial there will be a fuller context arising from the evidence, including from cross-examination of Crown witnesses and any defence evidence.

273 Above at [104].

core aspects of Mr Maney's statements (that is, what allegedly happened at his house, including the alleged threat and the additional beating in the car).[274]

[194] There are clear dangers in treating consistency with other evidence as being an overriding factor where the circumstances relating to the statement show clear indications of unreliability. This would allow a party's case to be corroborated by facially unreliable statements that just happen to coincide with other aspects of the case, thereby artificially and unfairly appearing to strengthen the case.[275] Equally, there would be dangers in deciding a statement is unreliable simply because it is inconsistent with other evidence. This would be a particular issue for the defence as defence evidence by its nature tends to be inconsistent with the Crown case.

[195] We reiterate that in any event the s 18 test relates to the circumstances as defined and that reliability must be assessed in light of those circumstances.

[196] We accept, however, that in coming to their view on reliability, the Courts below did not have the details of Mr Maney's conviction for attempting to pervert the course of justice before them. Moreover, the High Court was not made aware of what is arguably the most significant factor affecting reliability: the major inconsistency between the second police statement and the CCTV evidence.[276]

Did the admission of Mr Maney's statements occasion a miscarriage of justice?

[197] We turn now to consider whether the admission of Mr Maney's statements caused a miscarriage of justice in the sense that it was an error that created a real risk the trial outcome was affected.[277] Before we do this, we set out how the statements were dealt with at trial and, in particular, in the Crown's closing address.

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274 We comment that the circumstances outlined by the Judge and said to corroborate "many of the key matters" in Mr Maney's statement (see above at [137]) are peripheral or do not in fact provide such corroboration.

275 We note this conforms to the concerns expressed by the Law Commission: see above at [62].

276 Although it was raised in the Court of Appeal, that Court does not seem to have considered the inconsistency significant: CA recall judgment, above n 31, at [3]–[4]; and see above at [143].

277 Criminal Procedure Act, s 232(4)(a).

Mr Maney's statements at trial

[198] The Crown relied on Mr Maney's statements in closing for the proposition that Mr Jury alone murdered Mr Rikihana. Counsel labelled the defence's suggestion that Mr Maney fabricated the statements to conceal his involvement in Mr Rikihana's death as "pretty desperate stuff". He added:

> Now there are some inconsistencies in what Mr Maney had in his letter and what he told the police and those are matters for you but if this was all some part — part of some sort of setup or conspiracy you might have thought he would have got his story straight.
>
> So because there are some consistencies you don't just disregard Mr Maney's evidence you simply look at it, analyse it, decide what you accept, what's supported by other evidence just like you do with any witness. And we know for instance Rex [Mr Maney] referred to there being an issue between Gooey [Mr Jury] and Uncle Trevor [Mr Rikihana] over a car, he tells the police that and I've already talked about what Lauren [Ms Eketone] heard in the kitchen.

[199] The Crown drew upon the statements to support aspects of its theory of the case. First, and as just mentioned, that Mr Jury killed Mr Rikihana over something to do with a car:

> … in Mr Maney's second statement to the police he said it had something to do with a car and we know there had been a trip to Hamilton sometime earlier and it would appear that this is when this issue between the two of them started.

[200] Second, that Mr Jury used violence against Mr Rikihana, including at Mr Maney's house, and tied him up:

> We know that Rex refers to Uncle Trevor being tied up in the back of the car, Gooey's car and of course we know from the pathology that there is marks around Trevor Rikihana's wrist consistent with being bound. Rex Maney refers to the defendant asking for some rope and getting some rope from the house and we know that Mr Rikihana was in the back of the vehicle. On Mr Maney's evidence there is a further assault in the back of that car at his house.

[201] Defence counsel claimed Mr Maney's statements were made to "throw the scent off him". He raised the following points to undermine their reliability:

(a) Mr Maney's account in the first police statement was clearly a lie.

(b) The letter purported to be written on 30 January 2019 and was left "conveniently" lying on his kitchen table on 14 February 2019.

(c) It was "odd" and "calculating" for Mr Maney to have restarted substantially the same letter before implicating Mr Jury.

(d) Mr Maney said in the letter that Mr Jury showed up with Mr Rikihana tied up, whereas he claimed in the second police statement that Mr Jury asked him for a rope.[278]

(e) Mr Maney said in the second police statement that Mr Jury left with Mr Rikihana to Mr Te Aonui's, but Mr Maney could not explain how he knew that. Mr Maney accepted that Mr Jury did not tell him that, and defence counsel submitted that the only way he would have known was because he was the person responsible for Mr Rikihana being taken there.

[202] Counsel in closing did not raise the inconsistency between the second police statement and the CCTV evidence. He did not discuss the hearsay nature of the statements. Nor did he refer to the powder or ammunition found at Mr Maney's house.[279]

Submissions

Mr Jury

[203] Mr Jury submits that Mr Maney's hearsay statements should not have been admitted. They were central to the Crown's case, and their admission clearly caused a miscarriage of justice. He says that, while he does not contend his trial was unfair, it was perilously close to being so.

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[278] Mr Maney was clear in the letter that Mr Jury came to his house with Mr Rikihana tied up and clear in the second police statement that Mr Jury came to his house on the second visit with Mr Rikihana in the car asking for rope. It seems defence counsel misunderstood the evidence. His full submission ended with this: "on the one hand we've got him saying he's [Mr Jury's] arrived there with him [Mr Rikihana] tied up in the back, on the other hand we've got him saying he's come here *without Uncle Trev* [Mr Rikihana] wanting a piece of rope and he's going to go back and get him" (emphasis added).

[279] He did, however, cross-examine a police officer about the powder and ammunition.

The Crown

[204] The Crown submits that, even if this Court concludes that admitting Mr Maney's statements was an error, it was not one that gave rise to any risk that justice miscarried.

[205] As the Court of Appeal said in *Chand v R*, there is some merit in the observation that, far from being disadvantaged by the unavailability of the hearsay witness, a defendant may be in a stronger position than if the hearsay witness had been available.[280] The Crown says a defendant will be advantaged where they are able to traverse matters that would be raised in cross-examination "with considerably less risk".[281] This, the Crown submits, is one such case. Counsel for Mr Jury advanced the theory that Mr Maney was the real killer without Mr Maney having the opportunity to offer any response.

[206] Mr Jury relied on Mr Maney's acknowledgment of some involvement on the evening Mr Rikihana died. As well as arguing the statements made by Mr Maney were inconsistent and unreliable, the defence was able to exploit this aspect of Mr Maney's statements to support the defence theory.

[207] Similarly, the defence highlighted a text message sent by Mr Maney to Mr Jury shortly after the murder reading "the old [c…]'s dead". The defence invited the jury to consider whether Mr Maney knew this from his personal involvement in killing Mr Rikihana, without having to put that to Mr Maney. And Mr Jury himself gave evidence about what Mr Maney said, namely about Mr Rikihana owing something to Mr Maney (or vice versa).[282]

Our assessment

[208] We do not accept Mr Jury's submission that Mr Maney's statements were central to the Crown case, but they were certainly relied on in closing and not merely to counter the suggestion of Mr Maney covering up his own involvement.

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280 *Chand v R* [2021] NZCA 317 at [31].
281 At [31].
282 We discuss these two items of evidence in more detail below at [325] and [353(a)].

The statements provided a narrative of what occurred after Mr Jury had left Mr Rikihana's home after the assault and added flesh to the CCTV evidence in terms of an eyewitness account. In particular, the Crown relied on the statements as evidence of Mr Jury's motive and of Mr Jury having administered a further beating in his car at Mr Maney's house, as well as an explanation for Mr Rikihana being found with injuries consistent with being tied up.[283] It was clearly important evidence and treated as such by the Crown at trial.

[209] The prosecutor in closing did not rely on Mr Maney's references to Mr Jury's alleged threat "to get the [c…]" made during Mr Jury's alleged first visit to Mr Maney's house after he had been injured (which, as we note above at [169]–[170], could not have happened as Mr Maney described in his second statement). However, this was powerful evidence of motive and premeditation. There is a real risk that the jury relied on it, especially since the fact that this alleged visit was not consistent with the CCTV evidence had not been pointed out to the jury at trial.

[210] It is not relevant that Mr Jury referred to the letter and the second police statement at trial. He always strenuously objected to their admission. Faced with their wrongful admission, Mr Jury had to explain them. Nor is it relevant that Mr Jury gave evidence containing other statements attributed to Mr Maney — namely, the text message and Mr Maney saying Mr Rikihana owed him something (or vice versa).[284] The fact that Mr Maney sent a text message to Mr Jury that Mr Rikihana had died was already before the jury because Mr Maney acknowledged he did so in the second police statement, adduced by the Crown. And neither statement did anything to correct the course of the trial in the face of the wrongful admission of Mr Maney's statements. We rather consider Mr Jury as having been put in the position of having to counter the Crown's inadmissible evidence.

[211] We are therefore of the view that there was a real risk that the erroneous admission of the hearsay statements affected the outcome of Mr Jury's trial.[285] We

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283 See above at [199]–[200].

284 We have not heard any argument about the admissibility of those other statements attributed to Mr Maney, nor in particular whether they would have been admissible even if Mr Maney's statements were not admitted.

285 See Criminal Procedure Act, ss 232(2)(c) and (4)(a) and 240.

consider below at [373] and following whether we can be sure of guilt and therefore whether an actual miscarriage of justice occurred.

Omission of a reliability warning

[212] We turn now to consider whether the trial Judge should have warned the jury under s 122 of the Evidence Act as to the reliability of Mr Maney's statements.

Legislation

[213] Section 122(1) provides that the judge may warn the jury of the need for caution in deciding whether to accept evidence or the weight to be given to it if he or she is of the opinion it may be unreliable. Subsection (2) provides for circumstances in which the judge must consider giving such a warning, relevantly including when hearsay evidence (para (a)), or evidence by a witness who may have a motive give false evidence that is prejudicial to the defendant (para (c)), is given. Under subs (3), a party may request a warning be given, but the judge can choose not to comply with the request if he or she is of the opinion a warning might unnecessarily emphasise the evidence or there is another good reason not to do so.[286]

Courts below

High Court

[214] In his summing up, Davison J, the trial Judge, summarised the parties' submissions in an unexceptionable way. He did not, however, give the jury any warning about Mr Maney's evidence being hearsay or about Mr Maney having a motive to give false evidence. Nor is there anything on the record indicating that the Judge considered giving such a direction.[287]

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[286] We reproduce s 122 in relevant part above at [55].

[287] CA judgment, above n 30, at [92]. Mr Jury's trial counsel gave evidence before the Court of Appeal that he thought he may have raised the issue with the Judge. However, like the Court of Appeal, we have not been able to find anything on the record documenting any such submission or any decision in relation to it.

Court of Appeal

[215] Since the evidence was hearsay evidence and Mr Maney may have had a motive to give false evidence against Mr Jury, the Court of Appeal decided that the Judge was required to consider whether to give a direction under s 122(2)(a) and (c).[288] The Court concluded that, had he done so, the Judge would have considered he had to give a reliability warning, covering the caution the jury should have exercised in whether and to what extent it accepted Mr Maney's statements, the inherent difficulty in the defence not being able to cross-examine him, and the parties' positions on the reliability of the statements.[289]

[216] However, the Court decided that there was not a real risk the outcome of the trial was affected by the error. First, the evidence was well explored by counsel before the jury. Second, the Court considered the case against Mr Jury "compelling".[290]

Submissions

Mr Jury

[217] For Mr Jury, it is submitted that it was incumbent on the trial Judge to give a s 122 warning. In particular, the Judge should have reminded the jury that Mr Maney's statements were not made on oath and that cross-examination could have affected their views. Indeed, as noted above at [149], Mr Jury submits that Mr Maney's claims may well have evaporated under skilful cross-examination. The Judge should, therefore, have instructed the jury to take into account the reliability issues identified by the defence.

[218] This was especially important, Mr Jury submits, because Crown counsel had incorrectly told the jury in closing that they should analyse Mr Maney's evidence "just like you do with any witness".[291]

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288 At [91] and [93].
289 At [97].
290 At [99].
291 See above at [198].

[219] Mr Jury submits that defence counsel failed to remedy the Crown's submission, other than to characterise the implausible scenario of Mr Maney contemporaneously writing an exculpatory note as "at the very best … rather odd … but you may also think that it's somewhat calculating".[292] Submissions of counsel were, he says, no substitute for an appropriately crafted judicial warning as to the dangers of the unreliable evidence.

[220] Mr Jury submits that Mr Maney was clearly involved in the events surrounding Mr Rikihana's death, the question being to what extent. Mr Jury says that the lies of "accomplices" present a significant risk to the safety of criminal convictions.[293] The failure to give any judicial warning about the risk of Mr Maney's unreliable "accomplice" hearsay evidence was, Mr Jury submits, a serious irregularity that compromised the safety of the verdict in his case.

[221] Mr Jury submits that, irrespective of whether he succeeds on the first ground of appeal, the Judge's failure to warn the jury about Mr Maney's statements in and of itself gives rise to a miscarriage of justice. It cannot be said that the failure to warn did not risk affecting the outcome of the jury's deliberations.

The Crown

[222] The Crown emphasises that reliability warnings under s 122 are discretionary, unlike those in respect of identification evidence under s 126. A s 122 warning is likely to be justified where the risks associated with the evidence are not obvious for the jury to see or where there are contextual matters it "may not otherwise readily apprehend".[294] The jury must need the judge's assistance. That is not the case, the Crown submits, where, as here, the issues were obvious.

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292 See above at [201(c)].

293 Citing Samuel R Gross and Michael Shaffer "Exonerations in the United States, 1989–2012" (National Registry of Exonerations, June 2012) at 50–55. Mr Jury's case at trial was of course that it was Mr Maney who had killed Mr Rikihana and that he, Mr Jury, was not involved: see above at [43] and n 269. Mr Jury did not contend at trial that Mr Maney was his accomplice in the killing. The Crown case at trial was that Mr Jury alone killed Mr Rikihana: see above at [198]. We note, however, that Mr Maney had been suspected by the police of some involvement in the crime: see above at [129].

294 Citing *Jetson v R* [2023] NZSC 150, [2023] 1 NZLR 629 at [48].

[223] That s 122 appears not to have received any attention at trial may well reflect, the Crown submits, the confluence of three factors. First, Mr Maney's statements were not central to the Crown's case. Nor, the Crown submits, did it emphasise the evidence at trial. The Judge would, therefore, have unnecessarily emphasised the evidence were he to have given a warning. Second, the evidence was carefully dealt with by counsel and in a manner the jury was well-equipped to understand. Issues as to reliability were well ventilated. And third, a warning about hearsay evidence would have been a double edged sword. Mr Jury gave evidence about and relied upon things he alleged Mr Maney had said, including about the existence of a debt between Mr Rikihana and Mr Maney.

[224] In any case, the Crown submits a reliability direction would not have produced an acquittal for Mr Jury.

Our assessment

[225] Had the statements been admissible, we agree with the Court of Appeal that a reliability warning was required. We reach that conclusion for the following reasons.

[226] First, we consider this case to be one where it was not appropriate to leave counsel to address the reliability concerns with the evidence.[295] We accept Mr Jury's submission that Crown counsel misdescribed the jury's task in analysing Mr Maney's evidence. It is not the case that the evidence of such witnesses is assessed in the same way as other evidence. The jury should exercise caution in light of the known dangers of hearsay evidence. Defence counsel in this case could have made more of the hearsay nature of the statements, but the Judge should have highlighted the dangers. The imprimatur of the Judge was called for here.

[227] Second, as noted above, we reject the Crown's characterisation of Mr Maney's evidence as not being a significant part of the Crown case.[296] The Judge would not have overemphasised the evidence were he to have warned the jury about Mr Maney's evidence.

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295 See *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [50] per Elias CJ, McGrath and William Young JJ.

296 See above at [208].

[228] Third, we reject the Crown's submission that concerns around the statements were well ventilated at trial. It is true that some of the concerns were but not with the imprimatur of the Judge. Significantly, the inconsistency between the CCTV evidence and the second police statement about the two visits was not noticed until the Court of Appeal hearing, and Mr Maney's prior conviction for attempting to pervert the course of justice was not before the jury. Nor were the details of the conviction. They were only uncovered during the appeal to this Court.

[229] Fourth, we accept Mr Jury's submission that Mr Maney's claims may well have changed under cross-examination. Even if they did not, cross-examination would still have been valuable. The jury would have been able to assess Mr Maney's answers to questions about the inconsistencies.[297] The acute risks in this case amplified the need for the Judge to have given a s 122 warning.

[230] Fifth, we cannot accept that a reliability warning would have been a double-edged sword. The risk associated with Mr Jury's claims about Mr Maney's statements and actions were distinct from the risk associated with the letter and the second police statement. The risk of Mr Jury's evidence was that he fabricated or misreported what Mr Maney said and did. The risk of Mr Maney's evidence was that Mr Maney fabricated the evidence against Mr Jury contained in the letter and the second police statement. Since Mr Jury gave evidence and was cross-examined, the former risk was addressed. The latter risk was not.

[231] Finally, Mr Maney had been a suspect in the murder, and Mr Jury's case was that he was in fact the murderer. This gave Mr Maney a motive to lie, and the Judge should have covered that in any s 122 warning, as the Court of Appeal accepted.

[232] Given our conclusion above at [211], it is not necessary for us to consider whether the failure to give a reliability warning occasioned a miscarriage of justice in the sense that there was a real risk it affected the trial outcome.

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297 As we noted above at [186].

No evidence of Mr Maney's prior conviction at trial

[233] The next issue is whether Mr Maney's conviction for attempting to pervert the course of justice should have been before the jury.[298] This question also encompasses consideration of whether there was any obligation on the Crown, in offering the hearsay evidence, to place before the jury the fact of Mr Maney's prior conviction for attempting to pervert the course of justice and/or any obligation on the trial Judge to require the Crown to do so by making this a condition of admissibility. As noted above at [34], we sought further submissions on these issues after the hearing.

Courts below

High Court

[234] We noted above at [138] that Powell J considered that Mr Maney's conviction history as a whole did not undermine the reliability of the hearsay statements. At the trial, no evidence of Mr Maney's prior convictions, including his conviction for attempting to pervert the course of justice, was adduced.

Court of Appeal

[235] As to the admissibility of the hearsay statements, the Court of Appeal was inclined to place more weight on Mr Maney's conviction history with particular reference to his conviction for attempting to pervert the course of justice. Nevertheless, it was of the view the statements were sufficiently reliable.[299]

[236] Mr Jury also argued in the Court of Appeal that, if the hearsay statements were admissible, then Mr Jury's trial counsel had erred by not adducing evidence at trial of Mr Maney's conviction for attempting to pervert the course of justice.

[237] Trial counsel's explanation for this was that he had advised Mr Jury against adducing evidence of any of Mr Maney's convictions, particularly those related to violence, on the basis that it was unlikely to help the defence, and that it would

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[298] We summarised the details of Mr Maney's prior conviction and how they were only recently located above at [122]–[125].

[299] See above at [141].

potentially open the door for the Crown to seek leave to question Mr Jury in respect of some of his convictions and especially those involving violence. Mr Jury denied receiving any advice as to Mr Maney's prior convictions. The Court of Appeal considered it "likely" counsel gave the advice and took Mr Jury's instructions.[300]

[238] The Court of Appeal considered, and we accept, that trial counsel's advice as to the possibility of Mr Jury being questioned on his convictions was likely based on a misunderstanding of s 38 of the Evidence Act. That section provides for conditions that must be satisfied before the prosecution can give evidence about the defendant's veracity, including if the defence offers evidence attacking a prosecution witness's veracity. Mr Maney was not a prosecution witness for the purposes of that section.[301] Even assuming Mr Jury did accept counsel's advice, he did so against the background of a misunderstanding of the law and was thus not fully informed.

[239] The Court of Appeal was not satisfied, however, that trial counsel's error caused a miscarriage of justice.[302] The Court noted that Powell J was aware of, and not influenced by, Mr Maney's convictions when ruling his statements admissible.[303] It also considered that the conviction was unlikely to have added much to the jury's evaluation of Mr Maney's inconsistent statements, given that it occurred some 10 years before and "the jury [was] unlikely to have regarded that as a significant matter when considering the reliability of Rex Maney's various statements".[304]

Submissions

Mr Jury

[240] Mr Jury notes that in New Zealand, the prosecution must disclose to the defendant any relevant information.[305] He submits that material bearing on the reliability of a hearsay statement, including details of any relevant convictions, is "relevant". Under the current statutory scheme, there is no explicit duty on the prosecution actively to investigate matters that might affect the reliability of its

300 CA judgment, above n 30, at [103]–[105].
301 At [106]–[107].
302 At [111]–[112].
303 At [109].
304 At [110].
305 Criminal Disclosure Act, s 13.

proposed hearsay evidence. He submits that there should be such a duty, describing the prosecution's role as one to do justice to all and ensure fair trials, not to secure convictions by all means.[306]

[241] Mr Jury relies on authorities from England and Wales. As the United Kingdom Supreme Court in *R v Horncastle* said, a defendant facing hearsay evidence in that jurisdiction will, in most cases, be entitled to "ask the court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it":[307]

> That exercise will ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose what is already in its possession and capable of undermining its case; it will require active investigation of the bona fides, associates and credibility of the witness, so as to provide the defendant with, in addition to anything he already knows, everything capable of being found which can be used to test the reliability of the absentee.

[242] In *R v Riat*, the Court of Appeal held that, if the Crown seeks to adduce hearsay evidence that is important to its case, "the judge is entitled to expect that very full enquiries have been made as to the witness' credibility and all relevant material disclosed".[308] These enquiries will go beyond "simply … a check of the Police National Computer for convictions".[309]

[243] Having investigated, identified and disclosed material relevant to the reliability of a hearsay statement, Mr Jury submits that the prosecution has a further duty to ensure that any information that undermines reliability (such as a conviction for attempting to pervert the course of justice) is put before the jury.

[244] It is the judge, Mr Jury submits, who bears the ultimate responsibility to ensure a fair trial. The judge's role involves warning the jury if the judge is of the view evidence might be unreliable under s 122. There must be an ancillary duty to ensure

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306 Citing Te Tari Ture o te Karauna | Crown Law Office "Principal Guideline | Aratohu Mātāmua" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (January 2025) at [8.1], [8.4] and [8.6]; and *R v Puddick* (1865) 4 F & F 497 at 499, 176 ER 662 at 663.

307 *R v Horncastle*, above n 166, at [36].

308 *R v Riat*, above n 105, at [18].

309 At [18].

material relevant to such a warning is before the jury. How that is achieved depends on the nature of the case.

The Crown

[245] The Crown submits that there should be no enhanced duty on prosecutors to adduce evidence affecting the credibility of the makers of hearsay statements. It suffices for the prosecution to disclose known information relevant to the reliability of the hearsay evidence. In its submission, the position in England and Wales is different in that, unlike in New Zealand, there is no reliability threshold before a deceased person's hearsay statement can be adduced.[310] The statutory regime there contemplates potentially unreliable evidence being admissible. By contrast, in New Zealand, a reasonable assurance of reliability is a prerequisite for the admission of hearsay evidence. The enquiry into the circumstances in which the statement was made already requires the prosecutor to provide information bearing on reliability.

[246] In the Crown's submission, not all credibility matters will be particularly probative, significant or related to the issues at trial as to make them either necessary or helpful to adduce at trial, should hearsay statements be admitted. For example, the decision whether to adduce previous convictions of the maker of a hearsay statement will be nuanced and may require a tactical or judgement call. It is submitted that the nature and extent of any credibility challenge to prosecution hearsay evidence is properly a matter for defence counsel to determine after taking instructions and in line with the defence strategy. It would not be consistent with the adversarial system to require the Crown or the court to override this. That, the Crown says, is what happened in this case: trial counsel chose to focus on the inconsistencies in Mr Maney's statement and his motive to lie. It was not for the Crown to introduce evidence based on its own assessment that the evidence would have supported Mr Jury's case.

[247] Nor, submits the Crown, can the judge bear any duty to require the Crown to adduce particular evidence. That, it submits, would be contrary to the adversarial system of justice wherein it is for the parties to decide how to run their cases. It would risk occasioning unfair trials to defendants by stripping them of their autonomy. And

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310 See further the discussion above at [92]–[94].

the judge might well be ill-informed of the implications of such a direction at the pre-trial stage.

Our assessment

[248] It is common ground that, if the Crown wishes to adduce a hearsay statement, it must disclose to the defence any information it holds that relate to the circumstances as defined in s 16(1) of the Evidence Act. This includes, in para (d), any circumstances that relate to the veracity of the person.

[249] The conviction history of the maker of a hearsay statement is relevant to their veracity, especially any convictions that relate to dishonesty. Convictions that involve dishonesty in relation to official proceedings including court proceedings will be particularly relevant. In this case, it is clear that Mr Maney's prior conviction for attempting to pervert the course of justice was significant, no matter the length of time that had passed since that conviction. The Crown should have sought the summary of facts related to that conviction from the police and/or the sentencing notes and provided these to Mr Jury before the admissibility hearing.[311] If the summary of facts was not available, the Crown should have searched any relevant databases for any further information on the conviction.[312] That was not done in this case, despite that information being easily accessible to the Crown.[313]

[250] In terms of whether evidence of the conviction should have been adduced at trial, we accept the Crown's submission that it would usually be for the defence to decide the extent to which it wishes to introduce evidence related to veracity and any other circumstances relating to the statement. However, in at least one case, the Crown did lead evidence of its own hearsay witness's dishonesty offending.[314] We also do not rule out a judge making it a condition of admissibility that the Crown be required

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311 Maney sentencing notes, above n 197. The Crown is likely to have greater ability to source such materials than the defence.

312 Whether or not such a duty goes as far as that in *R v Horncastle*, above n 166, is a topic for a case where it arises.

313 Mr Jury requested the information before the Court of Appeal hearing. The Crown conceded at the hearing before us that it should have made searches on available databases before telling Mr Jury it could not locate the information. Mr Jury's counsel also acknowledged that he could have conducted a search but had assumed that, as it was a District Court matter, the Maney sentencing notes, above n 197, would not be available. See further above at [124]–[125].

314 See *Pepene v R* [2011] NZCA 497 at [27].

to put in evidence any matters relating to the circumstances which could affect the jury's assessment of the hearsay statement. That possibility is plainly contemplated by s 101(5) of the Criminal Procedure Act 2011.

[251] In this case, as noted above, defence counsel advised against introducing evidence of Mr Maney's conviction for attempting to pervert the course of justice, but this advice was based on an erroneous legal premise. The advice was also given without counsel having access to the details of the offending because of the failure by the Crown to investigate and disclose those details. We consider that, had these errors by both Crown and defence counsel not been made, defence counsel would have placed evidence of the conviction before the jury or asked the Crown to do so. Given our conclusion above at [189] that Mr Maney's statements were not admissible, however, we do not need to decide if this failure occasioned a miscarriage of justice in the sense that it created a real risk that the outcome of the trial was affected.

Final question: guilt

[252] We have held that Mr Maney's statements were inadmissible,[315] and that their admission created a real risk the outcome of the trial was affected.[316] The appeal can nevertheless be dismissed if this Court is sure of guilt, unless the trial was unfair.[317] This is because, despite any errors, the outcome of the trial has not been affected and there is no actual miscarriage of justice. Whether an appellate court can be sure of guilt is effectively the same question as under the proviso to s 385(1) of the Crimes Act 1961.[318]

[253] This Court has recently considered the circumstances in which it is appropriate to apply the proviso in *Tamihere v R.*[319] It was common ground in that appeal that it was not appropriate for an appellate court to apply the proviso where there had been a

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315 Above at [189].
316 Above at [211].
317 See *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [67]; and Criminal Procedure Act, ss 232(2)(c) and (4)(b) and 240. If the errors caused unfair trial, the Court must allow the appeal without considering guilt because the right to a fair trial is absolute.
318 Repealed by the Crimes Amendment Act (No 4) 2011, s 6. For shorthand purposes, therefore, it is often still referred to as the "proviso".
319 *Tamihere v R* [2026] NZSC 22.

fundamental error at trial making the trial unfair, in breach of the right to a fair trial guaranteed by s 25(a) of the Bill of Rights.[320]

[254] We do not consider that the wrongful admission of Mr Maney's statements was a fundamental error that meant his trial was unfair or even perilously close to unfair.[321] We have rejected Mr Jury's submission that Mr Maney's statements were central to the Crown case.[322] This means that their admission could not amount to a fundamental error.

[255] It was held in *Tamihere v R* that it is not generally appropriate to apply the proviso where the outcome turns on the assessment of the credibility and reliability of witnesses.[323] The Court also held that, where there has been a radical and fundamental change to the Crown case that has not been tested before a jury, applying the proviso is also inappropriate.[324]

[256] We take into account these considerations when discussing whether the Court can be sure of guilt. But first we provide a more detailed summary of the evidence.

The evidence

[257] We summarise the evidence before us in more detail under the following headings:

(a) the forensic evidence, including evidence found on Mr Rikihana's body, his property and Mr Maney's property;[325]

(b) the evidence of Mr Iorangi, who went to Mr Rikihana's property on the relevant night;[326]

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320 At [68].
321 See above at [203].
322 Above at [208].
323 *Tamihere v R*, above n 319, at [68].
324 At [14].
325 Below at [258]–[271].
326 Below at [272]–[274].

(c) Ms Eketone's evidence;[327]

(d) Mr Te Aonui's evidence;[328]

(e) the evidence of Mr Sharp, Mr Te Aonui's neighbour;[329]

(f) the CCTV evidence;[330]

(g) Jason Maney's statements;[331] and

(h) Mr Jury's account.[332]

Forensic evidence

[258] In summary, the forensic evidence showed:

(a) Mr Rikihana died due to a combination of blunt force head injuries and neck compression.

(b) A bloodstained hammer and red bloodstained towel were found on the lawn at the back of Mr Rikihana's property. Mr Rikihana's DNA was detected in samples taken from the stains on the hammer's handle and the towel.[333] At least one other person's DNA was detected in these samples but at a level unsuitable for profiling.

(c) There was a trail of Mr Rikihana's blood connecting areas stained with his blood at his property — one at the front and one at the rear. This was consistent with an object soaked in his blood (possibly Mr Rikihana himself) being dragged from the rear to the front of the property.

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327 Below at [275]–[287].
328 Below at [288]–[290].
329 Below at [291]–[292].
330 Below at [293]–[311].
331 Below at [312]–[314].
332 Below at [315]–[358].
333 The Crown argued that the towel was used to garrotte Mr Rikihana and the hammer used to beat him.

(d) Mr Jury's bloody fingerprint was found on a light switch in Mr Rikihana's bedroom.[334]

(e) A sample from a bloodstain on Mr Rikihana's t-shirt contained Mr Jury's DNA. DNA from at least one other person was detected in the sample but at a level unsuitable for profiling.[335]

(f) Samples taken from probable bloodstains in Mr Maney's washroom were unable to be fully analysed.

[259] We now discuss the forensic evidence in more detail, organised according to where it was located.

Mr Rikihana's body

[260] The forensic pathologist who examined Mr Rikihana's body testified that there were a range of blunt force injuries: bruises, abrasions and lacerations to the head, neck, torso, upper limbs and lower limbs. There were significant head injuries, neck injuries and fractures of the nose and ribs.[336] One of the head injuries was consistent with being hit by a hammer.[337] Another was consistent only with being hit by the handle of a hammer. Damage to the brain was consistent with "substantial force" being applied to the head.

[261] There were abrasions to Mr Rikihana's neck similar to those caused by carpet burn. Deeper injuries to the muscle tissue of his neck could have been caused by the application of substantial force to the neck or by vigorous movement of the head about the neck. Injuries to the carotid artery could have been caused by strangulation. Collectively, the injuries to Mr Rikihana's neck were consistent with kicking, stomping and also garrotting (pulling fabric, carpet or cloth around the neck

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334 The fingerprint was found to belong to Mr Jury and the DNA profile in the blood was consistent with his DNA profile.

335 The forensic scientist said that he compared the samples against Mr Rikihana's and Mr Jury's DNA profiles. If any DNA was found that did not match either of them, he would assign it to an invented name (e.g. "female A"). He did not say whether he had invented any names in the course of his analysis.

336 Some rib fractures were consistent with CPR. Others towards the back of the ribs were not.

337 Golf clubs, cricket bats and baseball bats could cause similar injuries.

very tight and applying increasing pressure around the neck). The red towel found at Mr Rikihana's property could have caused the neck injuries.

[262] There were bruises and abrasions on the wrists consistent with a piece of rope being used to bind the wrists together. There was bruising around the knuckles, of a kind common in those who have thrown punches. Mr Rikihana's right thumb sustained a cut from a sharp object. Abrasions to his body and limbs were consistent with having been dragged over a surface or with having blunt force applied, such as stomping from shod feet.

[263] The cause of death was the combined effects of blunt force head and neck injuries. There was contest at the trial as to whether Mr Rikihana's blunt force injuries could have been inflicted by someone with bare feet or without sustaining injuries to their hands. The forensic pathologist could not discount that possibility.

[264] Mr Rikihana's shirt was separately analysed by forensic scientists. The DNA analyst testified that a sample taken from a bloodstain on the lower front left of Mr Rikihana's t-shirt contained DNA matching Mr Jury's and DNA from at least one other at a level unsuitable for comparison purposes. The upper right side of his shirt was covered in small holes, the result of recent tearing.[338]

[265] Mr Rikihana was not wearing shoes when he arrived at the hospital.

Mr Rikihana's property

[266] Examining police officers located a bloodstained red towel and bloodstained, 20 ounce, blue-handled hammer together outside near Mr Rikihana's bedroom. The red towel was stained with blood, mostly on one half, but on both sides. The stains were mostly the result of the accumulation and saturation of blood into the absorbent fabric. Some stains were from blood that had soaked right through the towel. The hammer's handle and head were stained too. DNA samples taken from the bloodstains on these items were consistent with having originated from

[338] "Recent" meant the tearing occurred after the t-shirt was last washed.

Mr Rikihana. Present also was the DNA of at least one other person, although that DNA was present at a level unsuitable for comparison purposes.[339]

[267] There were extensive areas of bloodstaining found around the property. Samples of the blood corresponded to Mr Rikihana. The forensic scientist who examined the scene said that a blood-soaked object — possibly Mr Rikihana himself — was on the ground for some time in the backyard in front of a swing seat. Someone — not Mr Rikihana — with blood on their right shoe walked in the same area towards the right side of the house. The object wet with Mr Rikihana's blood was on the ground at several points,[340] and the bloody object was dragged to the paved front yard. Parts of the blood trail beginning at the rear of the property and going around the right side of the house were "striated" and "approximately linear". The bloody object had then been carried to an area of visible bloodstaining in the front yard.[341]

[268] Blood was found on a light switch cover in Mr Rikihana's bedroom. The forensic scene examiner gave evidence that the bloodstain was not an old one. The Crown's DNA analyst gave evidence that samples taken from the stain matched Mr Jury's blood. A fingerprint officer said that imprinted in the blood were three fingerprints. There was a non-bloody fingerprint, consistent instead with being pressed by a finger with paint on it.[342] The officer matched one bloody print — which may also have left a partial print on the switch itself — with Mr Jury's left forefinger. The two other bloody prints contained insufficient detail for comparison purposes. The non-bloody print was sufficiently detailed but did not match any of Mr Jury's fingers. The officer said he compared that print to a computer-generated list of possible candidates from a police database, none of which matched.

[269] The police did not locate any drugs or drug paraphernalia in Mr Rikihana's bedroom. Nor did they locate any methamphetamine or related paraphernalia

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339 Samples taken from the non-stained parts of the towel contained DNA originating from at least three people, possibly including Mr Rikihana, consistent with it having been used for domestic purposes.

340 The scene examiner described some "large areas" of bloodstaining at the property.

341 We infer (in line with the Crown case) that the blood-soaked object referred to by the forensic scientist was Mr Rikihana.

342 There is no evidence as to the source of any paint.

anywhere in the house. Notably, they did not locate Mr Rikihana's gang patch at his house.

Mr Maney's property

[270] Samples were collected from probable bloodstaining in Mr Maney's washhouse. The samples either could not be confirmed to contain human DNA or contained human DNA at a level unsuitable for comparison purposes.

[271] Mr Maney was present while police searched his home and collected evidence. One such officer who searched Mr Maney's house described him as "decrepit", adding, "He moved very slow, spoke slowly". That police officer was Mr Maney's cousin. Another police officer described Mr Maney as "frail".

Mr Iorangi's evidence

[272] Mr Iorangi's evidence at trial was that he lived in Tokoroa and came to Rotorua on 29 January 2019 to see his girlfriend. He said he had earlier fixed Ms Eketone's lawnmower and, seeing he was in Rotorua, he decided that it was a good time to drop it off.[343] He thought he went round in his truck to her house at "around half two, three o'clock" in the morning of 30 January 2019. He stopped about halfway up the driveway. He saw a car parked outside the front property, viewing the car from its rear. He saw some legs hanging outside the opened, right-hand side, rear door, wearing boots and jeans. He said he saw only one other person. It was a shirtless man with a tattooed back standing beside the right-hand rear door. Mr Iorangi did not see the man's face. Nor did he recognise him. He immediately reversed out of the driveway, dropped the lawn mower off at his brother-in-law's, asked him to message Ms Eketone and left to go back to Tokoroa.

[273] Mr Iorangi accepted in cross-examination that it was foggy and that he could not see the left-hand side of the car. He said he saw the vehicle "just vaguely you know with a bit of fog and that". In answer to the question, "There was another person

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[343] Mr Iorangi said he popped out from time to time over the night, including to get his girlfriend chocolate and matches. During cross-examination and during questioning about why Mr Iorangi would have dropped off the lawnmower so early in the morning, Ms Eketone said she thought Mr Iorangi may have done so because he started work at about 4.30 or 5 am.

on the left-hand side of the vehicle, wasn't there?", he replied that the only one he saw was "a couple of legs out the back of the car." He accepted the feet were moving. He said he "vaguely" saw the person at the right-hand rear door and could not make out what sort of hair they had, nor the words tattooed on their back. He left because he thought there "might have been something going on there".

[274] The CCTV evidence confirmed that Mr Iorangi's grey truck entered Pukepoto Road from the south at 12.59 am on 30 January 2019. It then exited at 1.03 am, turning back onto Te Ngae Road in the direction from which it came.

Ms Eketone's evidence

[275] As noted above, Ms Eketone was Mr Rikihana's niece. He lived with her and her seven-year-old son. She gave evidence at trial, and her two police interviews, conducted on 30 January and 5 February 2019, were played to the jury. Transcripts of those interviews were admitted by consent.

[276] Ms Eketone said she first met Mr Jury at the beginning of 2018 in Rotorua. He and Mr Rikihana travelled to Hamilton. She did not accompany them. She thought an argument about money between Mr Jury and Mr Rikihana began during that trip. Her evidence was that the last time she saw Mr Jury before the night Mr Rikihana died was between two weeks to a month before, when Mr Jury visited Rotorua. Mr Jury had made himself at home at their house even though Mr Rikihana was not there. He slept on the bed in what Ms Eketone called the "pool room".[344]

[277] Ms Eketone claimed that on the night of the murder she was woken by Mr Jury arriving at the property. It was "one or something in the morning". Mr Jury parked his car at the front of the property and called out for Mr Rikihana. He was alone apart from his bulldog, Madam Rogue. Ms Eketone greeted Mr Jury, patted Madam Rogue and escorted Mr Jury around the side of the property to Mr Rikihana's sleepout at the

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[344] Ms Eketone said in cross-examination that she and Mr Rikihana had left, and Mr Jury slept in the pool room alone with his bulldog, Madam Rogue. She was also asked in cross-examination about an alleged visit by Mr Jury a week before Mr Rikihana died where Mr Jury helped Mr Rikihana fix a fence. She denied that Mr Jury had helped with the fence, but she seems to have been talking about the visit she was describing when Mr Jury had slept in the pool room.

back. Mr Jury knocked on the door. The two men seemed happy to see each other.[345] Ms Eketone returned to bed with her son in their bedroom at the front of the house.

[278] This account was challenged in cross-examination. Counsel suggested that Mr Jury found Ms Eketone and Mr Rikihana consuming methamphetamine in Mr Rikihana's sleepout. Ms Eketone denied the suggestion and said she had never smoked methamphetamine.

[279] Ms Eketone said she heard Mr Rikihana and Mr Jury go into the kitchen to prepare food. "Next minute", she heard an argument, apparently about a debt, develop between them. Defence counsel established she had known Mr Maney since she was 11 years old and would have known Mr Maney's voice, then put it to her that the argument developed only when Mr Maney arrived at the house. She rejected that suggestion, saying she did not hear Mr Maney's voice, nor see him arrive. She also said that she had never known Mr Maney beat up Mr Rikihana when they were both in Rotorua.

[280] Ms Eketone said she heard whacking or scuffling whereupon the two men, Mr Jury and Mr Rikihana, went out of the house to an area in front of Mr Rikihana's sleepout.[346] The men then moved to the front of the property where Mr Jury's car was parked.[347] She said she heard Mr Rikihana getting hit and heard him "moaning and groaning" but did not see it. In her first statement she said:

> I heard him like f'n b and swearing and clonk and, and uncle was going ohhh, ohhh and he couldn't breathe cos he's an asthmatic and there was nothing we could do to help him.

[281] She and her son went to hide at the rear of the property. Her own bulldog followed them thinking that they were playing. She was holding onto him and trying to quieten him. Ms Eketone and her son went back into the house to try to get a view of the two men, but when Mr Jury apparently began looking for them ("we're the only witnesses"), they retreated again to the rear of the property. She described him as

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345 Ms Eketone did not claim to *see* Mr Rikihana when leaving Mr Jury at his door. Indeed, she said the last time she saw him was during dinner that evening: see below n 357.

346 Ms Eketone gave conflicting accounts as to when sounds of a physical fight happened in relation to the men leaving the house.

347 Ms Eketone did not specify what the movement of the men sounded like.

"quite a strong fulla", capable of catching both her and her son.[348] While hiding near Mr Rikihana's room, she heard someone enter Mr Rikihana's room and saw the light turn on. She then heard them leave. She heard two car doors shut, and the car sped off. She looked for Mr Rikihana but did not find him.

[282] Ms Eketone said in her second interview (but not the first) that she had seen Mr Iorangi's truck come up the driveway "[a]nd he sorta stayed there for a good five, 10 minutes".[349] She did not know it was Mr Iorangi at the time, but she later gathered it was after her cousin texted her to say that that her lawnmower was at his house.[350]

[283] After the car had left, Ms Eketone cleaned up the dishes the men had left behind and packed some items for the following morning for her and her son.[351] She said the dishes were half done and that Mr Rikihana must have started cleaning them before he was attacked. She looked inside Mr Rikihana's room for his patch on the couch — where he normally kept it — but did not see it.[352] She was cross-examined on the possibility that she also cleaned up Mr Rikihana's room. She said she did not. Nor did she see a small bag belonging to Mr Jury on Mr Rikihana's bed. She explained that, after being spooked by a bloody fingerprint on the light switch, she left the room. She and her son then returned to bed.[353]

[284] Ms Eketone said she heard but did not see a car returning about 30 minutes to an hour after Mr Jury had left.[354] She fled the property with her son towards their neighbour's house, Damian Maney (another of Mr Maney's sons). She did not have time to grab the items she had packed or her phone. She said she "knew that something was wrong with [Mr Rikihana] cos … he was out to kill us because … he wouldn't come up that fast". When the light on Damian's house turned on, they fled again

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348 Ms Eketone also said she thought Mr Jury was scary and, in particular, scary to look at.

349 Ms Eketone also said it might not have been that long.

350 We presume that Ms Eketone's cousin is Mr Iorangi's brother-in-law: see above at [272].

351 Ms Eketone had jury duty, and her son had school.

352 Ms Eketone surmised that Mr Jury must have taken it when he went into Mr Rikihana's room.

353 Ms Eketone also said she found a juice bottle filled with water and ice near where the car was. It had blood on it, and she threw it in a bin at the rear of the property. There was some forensic evidence as to the bottle. The blood on it was transferred from another object, and the blood had run down the side of the bottle. Samples were taken from the blood and the opening of the bottle. There is no evidence about the results of testing those samples.

354 It seems she assumed it was Mr Jury's, although she only saw the reflection of the headlights on the fence.

towards Lake Rotokawa to the north. She said that she did not want to stop at Damian's house because of his affiliation with the Mongrel Mob. In cross-examination she rejected the proposition that she did not go to Damian's house because it was Mr Maney who had beaten Mr Rikihana.

[285] Eventually, Ms Eketone went to the property of an uncle with no gang affiliations who lived near Lake Rotokawa, arriving at his place at what she thought was 5 am.[355] She said another uncle came and took her and her son to the airport. Scared that she was "next on the list", she wanted to be in a public place. She and her son caught the bus into town and then another to Western Heights where they went to a friend's place.

[286] In cross-examination, Ms Eketone was told that the period between Mr Jury leaving and returning was an hour and a half,[356] and she was asked why she did not call the police. Her explanation was that her phone was flat. She put it on to charge when Mr Jury left (with Mr Rikihana) but forgot to use it after cleaning up. She did not accept that she omitted to call the police to protect Mr Maney. She was also cross-examined about her close relationship with Mr Maney (evidenced also by the fact that he had moved in with her after Mr Rikihana's death). When it was suggested that she was covering for Mr Maney, she replied that there was nothing to cover up because he had died.

[287] In re-examination Ms Eketone was asked how often she saw Mr Maney and Mr Rikihana together and replied, "All the time". She agreed that, from what she observed of the two of them, they were good friends.

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355 Ms Eketone's uncle gave evidence too, saying that he was asleep on the couch that night. He awoke and tripped on Ms Eketone who, he said, appeared frightened. Ms Eketone and her son left — Ms Eketone's uncle did not know where to.

356 See below at [303] and [305].

Mr Te Aonui's evidence

[288] Mr Te Aonui said that his son and Mr Rikihana had accompanied him to a medical appointment in Hamilton on 29 January 2019.[357] Later, he had some kai and went to bed early.

[289] He woke up to use the toilet and sat up a while in the kitchen. At some stage — he could not recall when — he heard a noise outside and went out to investigate.[358] The light was already on. After a few seconds he saw "a shape of someone just lying on the driveway". He went to have a look, and when he got up close and turned the body over, he saw that it was Mr Rikihana. He was unresponsive, made no noise and did not move. Mr Te Aonui went and got his car. He left with Mr Rikihana for the hospital.

[290] In cross-examination, he accepted that CCTV footage from the hospital showed them arriving at 3.15 am. He said the drive would have taken about 15 or 20 minutes, so he would have left his home at about 3 am. He also accepted that it took him a couple minutes — five at most — from finding Mr Rikihana to loading him into his car.

Mr Sharp's evidence

[291] Mr Sharp lived across the road from Mr Te Aonui. Because it was hot in January, Mr Sharp slept with his windows open. He said he awoke early on 30 January 2019 to someone — he said a man — saying "let me in, let me in" about a dozen times and knocking on a door across the road.[359] He accepted in cross-examination that he did not hear a car before he heard the male voice.

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357 Ms Eketone said that after Mr Rikihana and Mr Te Aonui returned from this trip, she had dinner with her son and Mr Rikihana before Mr Rikihana went to bed. She said that was the last time she *saw* Mr Rikihana.

358 The Court of Appeal said he was "woken at about 2.45 am by Mr Jury arriving at his property": CA judgment, above n 30, at [10] and [99(e)]. We record that is not necessarily accurate. Mr Te Aonui heard the noise when he was already awake. While it caused him to investigate and find Mr Rikihana, he did not specify a time, what the noise was, nor who or what may have been responsible for making the noise.

359 Mr Sharp said the man was knocking during his evidence in chief, but in cross-examination he said that he could not hear knocking.

[292] The man sounded unpanicked, was not shouting and spoke with a "normal" voice. Mr Sharp could not hear another voice. He looked at his clock, which he said in evidence ran 15 minutes fast. It read 3.10 am, meaning Mr Sharp's observations occurred, on his evidence, at 2.55 am.

The CCTV evidence

[293] Mr Jury was driving a green Ford station wagon on the night of 29–30 January 2019.[360]

[294] At trial, the Crown called Constable Collier to give evidence relating to the car's movements on the relevant night captured by CCTV from various sites. His role "involved receiving and collecting all the CCTV footage in relation to the incident, all vehicles of interest".[361] There is nothing in Constable Collier's evidence about who was present in the vehicle when it was captured throughout the evening.[362]

[295] There were three locations of interest — the houses of Mr Maney, Mr Rikihana and Mr Te Aonui — and a number of cameras dotted between them.

[296] Mr Maney's house on Te Ngae Road was the northernmost location of interest. It was north of the airport and on the west side of Te Ngae Road, closest to Lake Rotorua. Therefore, turning left out of Mr Maney's property, one would travel north on Te Ngae Road towards Tikitere and Lake Rotoiti — and right, south, towards Mr Rikihana's, Mr Te Aonui's and then Rotorua city.

[297] Mr Maney's house was north of the automatic number plate recognition camera (ANPR camera), itself at the north end of the airport runway. This camera, unlike the CCTV cameras, did not capture video footage; it captured still images of vehicles. More narrowly still, it captured images only of southbound vehicles — that is, those entering Rotorua, not leaving it.

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360 Mr Jury disclaimed ownership of the car but admitted to driving it between 29 and 30 January.
361 Constable Collier did not say when the evidence was collected.
362 The evidence of other witnesses sheds light on that matter as we set out below.

[298] Mr Rikihana's house on Pukepoto Road, itself off Te Ngae Road, was about halfway between Mr Maney's (the northernmost location of interest) and Mr Te Aonui's (the southernmost).[363] A camera on the Super Storage facility (Super Storage camera) covered the turn between Pukepoto Road and Te Ngae Road.

[299] Mr Te Aonui's house was on Reeve Road, south of the District Council's traffic camera (DC camera) on Te Ngae Road near Sunrise Avenue. Mr Te Aonui's house was around the corner from a Caltex service station which itself had a CCTV system. Further south of Mr Te Aonui's were more suburbs and an industrial area — and east of those areas, on the southern shore of Lake Rotorua, the city.

[300] Various other cameras between the three properties were referred to in evidence adduced at trial. Moreover, three cameras south of Mr Te Aonui's house operated by the Rotorua District Council captured Mr Jury's departure from Rotorua.

[301] When Mr Jury visited Rotorua on the night of 29–30 January 2019, he made a series of southbound and northbound trips. Mr Jury's case was that he arrived in Rotorua from the north in the evening before midnight, having had left Hamilton earlier that day. This was not disputed by the Crown.

[302] As far as Constable Collier's evidence went, Mr Jury's car was captured for the first time on the night of 29 January 2019 at 10.58 pm[364] by the ANPR camera which, we reiterate, is south of Mr Maney's house and only captures southbound vehicles. The Super Storage camera captured the car turning left onto Pukepoto Road leading to Mr Rikihana's house at 11.01 pm and leaving at 11.09 pm. Mr Jury could therefore have spent eight minutes there. The DC camera captured the car at 11.10 pm travelling south towards Mr Te Aonui's house. Mr Jury spent 40 minutes at, near or south of Mr Te Aonui's house until, at 11.50 pm, the car was seen entering the nearby Caltex service station.

[303] The car continued north and stopped for a short time at the nearby FreshChoice and continued north, before taking the turn towards Mr Rikihana's house.

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363 Mr Rikihana's home was formally on Te Ngae Road, down the paper road locally known as Pukepoto Road: see above n 52.

364 We have removed the seconds from all expressions of time in this judgment for ease of reading.

The Super Storage camera caught the car going towards Mr Rikihana's at 12.01 am and away at 1.32 am on 30 January 2019 — meaning Mr Jury could have spent about 91 minutes there — whereupon the car turned north onto Te Ngae Road towards Mr Maney's home. An airport camera captured the car travelling north at 1.33 am. The car spent 51 minutes at, near or north of Mr Maney's house before the ANPR camera captured it travelling south away from Mr Maney's house at 2.24 am.

[304] The car continued past Mr Rikihana's house and was caught on camera outside some shops[365] travelling towards Mr Te Aonui's house at 2.26 am. Mr Jury spent 27 minutes at, near or south of Mr Te Aonui's house before the same camera captured the car travelling north at 2.53 am.

[305] The Super Storage camera caught the car turning right onto Pukepoto Road towards Mr Rikihana's house for a third time at 2.54 am. Five minutes later, at 2.59 am, it captured the car driving away from Mr Rikihana's house and turning right onto Te Ngae Road towards Mr Maney's house. The car was not seen again until 3.26 am when the ANPR camera captured it travelling south, leaving the vicinity of Mr Maney's house. Mr Jury therefore spent about 27 minutes at, near or north of Mr Maney's house.

[306] Mr Jury continued past the turn onto Pukepoto Road before being captured at 3.29 am outside the shops referred to above at [304] and then the DC camera. The three cameras referred to above at [300] south of Mr Te Aonui's house captured the car continuing south at 3.32, 3.33 and 3.36 am, leaving Rotorua altogether. Mr Jury and the car were seen at a Z service station in Taupō on CCTV cameras at 4.24 am.

[307] This means that there are three possible periods when Mr Jury could have visited Mr Maney's house. The first was before his first southbound trip starting at 10.58 pm (first Maney window).[366] The second was for up to 51 minutes between

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365 The Eastside Electrical shop and Jeram Superette.

366 See above at [302]. Indeed, Mr Jury's evidence at trial was that such a visit did take place: see below at [318].

1.33 am and 2.24 am (second Maney window).[367] The third was for up to 27 minutes between 2.59 am and 3.26 am (third Maney window).[368]

[308] There are three recorded trips where Mr Jury could have visited Mr Rikihana's house: for up to eight minutes between 11.01 and 11.09 pm (first Rikihana window);[369] up to 91 minutes between 12.01 and 1.32 am (second Rikihana window);[370] and up to five minutes between 2.54 and 2.59 am (third Rikihana window).[371]

[309] The CCTV evidence is consistent with Mr Jury having three opportunities to visit Mr Te Aonui's house: for up to 40 minutes between 11.10 and 11.50 pm (first Te Aonui window);[372] for up to 27 minutes between 2.26 and 2.53 am (second Te Aonui window);[373] and, theoretically at least, for up to three minutes between 3.29 and 3.32 am (third Te Aonui window).[374] Mr Te Aonui arrived with Mr Rikihana at the hospital at 3.15 am.

[310] We provide the above information in tabular form for ease of reference:[375]

	Start	**End**	**Period (minutes)**
First Maney window	–	22.58	–
First Rikihana window	23.01	23.09	8
First Te Aonui window	23.10	23.50	40
Second Rikihana window	0.01	1.32	91
Second Maney window	1.33	2.24	51
Second Te Aonui window	2.26	2.53	27
Third Rikihana window	2.54	2.59	5

367 See above at [303].
368 See above at [305].
369 See above at [302].
370 See above at [303].
371 See above at [305].
372 See above at [302].
373 See above at [304].
374 See above at [306].
375 See further Appendix A below.

Third Maney window	2.59	3.26	27
Third Te Aonui window	3.29	3.32	3

[311] A more detailed timeline is provided in Appendix A to this judgment, as well as, in Appendices B and C, a map and a diagram showing the locations of the relevant properties.

Jason Maney's statement

[312] Jason Maney, Mr Maney's nephew and whāngai son, was first interviewed in June 2020 by a private investigator, Mr Tinsley, retained by Mr Jury. Jason said Mr Maney made a confession, boasting about how he had killed Mr Rikihana. He (Mr Maney) was coherent and knew what he was saying. Jason said that Mr Maney was physically strong at the time of Mr Rikihana's death; the effects of his cancer "didn't kick in … until a little bit later".

[313] Jason was not called as a witness at trial because, among other things, he told defence counsel and the private investigator when he later met with them at the courthouse that he did not know if what Mr Maney had said was the truth. Jason said that, if called as a witness, he would say he had been asked to lie. He said that Mr Jury "may not have done this, but he's done a lot of other bad s[…]".[376]

[314] The Court of Appeal found that it was not an error for Mr Jury's trial counsel not to call Jason because counsel relied on Mr Jury's instructions to that effect.[377] As noted above at [33], this Court refused leave for Mr Jury to appeal that finding. However, we have set out the above summary of Jason's statements because they are relied on in the submissions before us.

Mr Jury's account

[315] Mr Jury gave evidence. We divide his account into various phases, being:

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376 For more detail see CA judgment, above n 30, at [69]–[79].
377 At [82]–[85].

(a) Mr Jury's earlier visits to Mr Rikihana's house — that is, those Mr Jury made before 29 January 2019;[378]

(b) his arrival in Rotorua on the night of the murder;[379]

(c) the alleged fight between Mr Maney and Mr Rikihana;[380]

(d) the end of the fight;[381]

(e) the time at Mr Maney's house;[382]

(f) Mr Jury's departure from Mr Maney's and then Rotorua;[383] and

(g) his time in Napier and at Hawke's Bay Hospital.[384]

Earlier visits to Mr Rikihana's house

[316] Mr Jury accepted in cross-examination that he visited Rotorua and travelled to Hamilton with Mr Rikihana sometime before his death, as Ms Eketone recounted.[385] But he denied any argument about a car or money arose between them.

[317] Mr Jury said he had visited Mr Rikihana for a couple of hours one week before his death. Ms Eketone and two others were also at the property. Mr Jury said Mr Rikihana was moving the corrugated iron fence next to the pool room farther from the house to widen the driveway. Mr Jury cut himself on the fence. In cross-examination, he said he was not sure whether the visit he made to Mr Rikihana's house where he stayed the night, as recounted by Ms Eketone, was same one that occurred a week before his death.[386]

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378 Below at [316]–[317].
379 Below at [318]–[324].
380 Below at [325]–[333].
381 Below at [334]–[340].
382 Below at [341]–[346].
383 Below at [347]–[351].
384 Below at [352]–[358].
385 See above at [276].
386 See above at [276].

Arrival in Rotorua on the night of the murder

[318] Mr Jury said that on 29 January 2019 he drove a green Ford station wagon from Hamilton to Rotorua, arriving late at night. He said he had his bulldog, Madam Rogue, with him. He first visited Mr Maney for about half an hour. He left in the car, travelling south to Mr Rikihana's address, to collect him and to bring him to Mr Maney's house at Mr Maney's request.

[319] Asked in cross-examination why Mr Maney needed him to pick Mr Rikihana up when he lives just up the road, Mr Jury replied that "he didn't have a licence and I'm sure he was being pulled up many a times [sic] for disqualified driving",[387] and also that it was part of the normal route when visiting a town to visit all his "brothers".

[320] Once he reached Mr Rikihana's house, he pulled up alongside the window to the pool room — where Mr Rikihana had been sleeping the first time he visited. He looked inside the pool room, but no one was there. He cursorily looked for Mr Rikihana and called out before getting back in his car, reversing down the driveway and leaving.

[321] Mr Jury said he then drove south to Mr Te Aonui's address. Mr Te Aonui's lights were off, but some associates were standing on the footpath nearby. He spoke with them, and "a few joints later" left to go to the Caltex service station around the corner.

[322] He agreed in cross-examination that he had stopped at the service station and made a purchase. He agreed he was wearing his patch and a t-shirt. Asked if he was wearing shoes he said, "No I wasn't wearing shoes man". Asked again he said, "I doubt very much if I had shoes on because it was summer". He said that he hardly ever wore shoes in summer. He only wore shoes if it were "icy or if it [were] cold on the ground". Asked if was wearing shoes at a petrol station in Tauranga a few days earlier, he said he was wearing sandals which he did once in a while. He said that he hardly ever wore boots.

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[387] We note that in the letter, Mr Maney recounted having "got done for driving": see above at [132].

[323] Now armed with some information about Mr Rikihana,[388] Mr Jury returned to Mr Rikihana's house. He said he was wearing shorts, his t-shirt and his patch. He had bare feet. He parked his car at the front of the property and walked around to the back of the house, where he was greeted by Mr Rikihana and Ms Eketone in Mr Rikihana's sleepout. The three of them had some methamphetamine and cannabis there before the two men left Ms Eketone "at the back" to go to the kitchen for a meal. The men, he said, cleaned up after themselves.

[324] Mr Maney, seemingly not too happy,[389] then arrived, entering through the back door to the kitchen. Mr Jury denied knowledge of how Mr Maney travelled from his own house to Mr Rikihana's.

The alleged fight between Mr Maney and Mr Rikihana

[325] Mr Jury said that Mr Maney and Mr Rikihana began arguing: "One was demanding, one was saying 'I already paid you.' One was demanding. One was denying everything". Asked about the volume of their voices, Mr Jury said:

> Well it got that bad that [Mr Rikihana] got up and started, his voice was so loud it kinda freaked me out because I'd never heard him yell so much or loud. … I couldn't understand what he was talking about 'cos it must have been incidents that way before my time, or whatever happened I wasn't privy to what was going on or anything about transactions. But I knew it had to do something with business.

[326] Mr Jury said he took no part in the conversation because he "knew nothing about what they were going on about". When it got too loud, he finally intervened, telling them to sort it out outside, further from Ms Eketone and her son. Mr Maney "was pissed but he turned around, went out the back". Mr Jury was still sitting at the table. Then, Mr Rikihana "went around by the kitchen area, doing the haka around there, came back and went around and followed [Mr Maney] out". Mr Jury followed. At trial he said, "I stepped through the door, turned around, my back was to [Mr Maney and Mr Rikihana], and I … closed the door. When I turned around, I just saw a big white flash in [f…]ing inside my head, and then I dropped".

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388 Mr Jury did not say what that information was. There seems to have been some concern at trial about the information being hearsay. In any event, Mr Jury's counsel in opening said he learned about where Mr Rikihana slept from his visit to Mr Te Aonui's house.

389 Mr Jury elaborated that he thought Mr Maney "wasn't too happy about being kept waiting".

[327] Mr Jury did not know at the time what had caused him to drop but "just knew it was something solid as". He had no idea how long he was down and for a while could not hear anything going on around him, but the next thing he remembered was hearing moaning and yelling behind him. The first thing he saw was grass. After some time, he picked himself up and saw Mr Maney and Mr Rikihana "just shuffling or scuffling", but he could not actually see as he was more concerned about his eye and the state of his head. He said he thought he "got in between them and tried to break them up and got banged in the head again". After giving that evidence, this exchange then took place:

> Q. Was either one of them getting the upper hand that you could see?
>
> A. I just peop – I just saw my two Rogue brothers fighting each other. That was enough for me to get up and try and stop them. As who was getting the better, I had no interest of who the hell was getting the better of each other.
>
> Q. Were you able to stop them?
>
> A. Not for long.
>
> Q. And what then – so what happened when you say "not for long" what happened after, when you say not for long then what did they start doing?
>
> A. Well, they kept on going at each other. It must have been something deep for them to be getting all this crap going on. I don't know what it was but, [f…]. I don't know.
>
> Q. Was this the sort of behaviour that you would've expected to see between –
>
> A. Not at all, not for those two old dogs to be doing that. It's the first time I ever shit like that happen.

[328] Mr Jury was asked why he did not get involved apart from "telling them, trying to split it up, stop them fighting". He said:

> … well those two are older than me, not only that it was a local take or local issue and really those – we don't interfere in local issues we let the locals sort [out] local issues and not get involved in it, and not only that, I don't think they would [f…]in – I thought they would just snap out of it and stop all the crap that was going on.

[329] In cross-examination, Mr Jury surmised that it was Mr Rikihana who had hit him the first time, causing him to "drop". He was cross-examined on this statement

in an affidavit he had sworn in support of his bail application and claimed not to remember making the statement:[390]

> 18. I accept that on 30th January 2019 the same day as the death of Trevor RIKIHANA, I presented at the Hawkes Bay Public Hospital. I had been assaulted and suffered facial and head injuries. *These injuries were not caused by Trevor RIKIHANA*. I left the Hawkes Bay Hospital because I was tired of waiting to see a Doctor. *I repeat that these injuries were not caused by Trevor RIKIHANA*.

[330] Asked what he had done to cause Mr Rikihana to hit him in the head with a hammer, this exchange took place:

> A. I had – my myself have done nothing personally to him. I'm just picking that he thought that I was part of a set up or some [f…]in thing and that because I was the last one out he would have took a swing at me.
>
> Q. But you see if he and Uncle – sorry if he and Rex Maney were already getting into it in the house and you told them to take it outside why would he hit you and not Rex?
>
> A. Because he might of thought I was – I don't know, as I said I'm speculating there. I can't read what dead man's thoughts man but as I say he must have thought I was part of a [f…]in – part of what Rex – what he had come there for.
>
> Q. Well maybe it was because you were having a go at him about a debt that you say he owed you?
>
> A. Nobody owed me money, I owed nobody any money, no one owed me any cars and I certainly didn't owe anyone else cars.

[331] As to the fight he witnessed between Mr Rikihana and Mr Maney, Mr Jury said "there was scuffling and arguing going on". Asked what he meant by scuffling, he said, "Throwing punches, throwing each other off, slightly grabbing each other". He did not intervene at the time because he "was more concerned with [his] head than anything else". He did not see a hammer because it was "pretty dark that night … It's hard to see anything". He said that from what he glimpsed of them they were both still standing up in a scuffle. Asked if Mr Rikihana ended up on the ground, he said he did not know and did not want to guess. He said that he never saw the other two men use a red towel or ropes during the altercation. Mr Jury denied that he was the person who had in fact caused Mr Rikihana's injuries.

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[390] Emphasis added. The material contents of the affidavit were admitted by consent.

[332] Mr Jury was reminded that he had said in examination-in-chief that he got between Mr Maney and Mr Rikihana when they were scuffling. He agreed and then this exchange took place:

Q. So, they must've both been standing up?

A. Must have been.

Q. So how did Uncle Trevor end up on the ground?

A. Well he might've fallen.

Q. Might have?

A. Well that's the only thing I can think how he could get on the ground.

Q. But you're there aren't you?

A. Mmm?

Q. You were there when this is happening?

A. Āe.

Q. You are watching it?

A. As I said I was more focused on what was going on in my head than anything else.

Q. But you said that you tried to, "I think I got between them."

A. Āe.

Q. So, you must have been paying attention to what was going on between them?

A. My eyes wasn't on them 24/7 you know.

Q. Rex Maney never hit you, did he?

A. Well the second blow I don't know which one of them did.

Q. See this was a fight between you and Uncle Trevor no one else, wasn't it?

A. That is not correct.

[333] The prosecutor also questioned Mr Jury about his height relative to the other two men. In answer to the question how tall he was, he said "six something" but could not be more precise as he "never measured [himself]". He said it was obvious he was

taller than Mr Rikihana,[391] but he did not know about Mr Maney. When asked how heavy he was he said he was "nothing" in January 2019 compared to being "a bit too heavy" at trial. He agreed he was bigger than Mr Rikihana, saying, "I think we're all bigger than Uncle Trevor". When asked if he was bigger than Mr Maney, Mr Jury said that "he was sick" and that "he had an accident, but he was a very fit man".[392] Mr Jury had earlier said that Mr Maney was "well enough to keep maintaining his house and that and surrounding areas".

End of the fight

[334] Mr Jury was asked how the fight ended. He said:

> I just pushed them out the way and, "Dog we got to take this bro out of here." So, I went and helped and tried to carry him [Mr Rikihana] over to the – where the car was back around.

[335] Mr Jury said that he carried Mr Rikihana to the car because "he was limping he was having a – finding it hard to walk or stand up and breathe". He said that he had "started with under his arms trying thing" and added, "my other brother [Mr Maney] wasn't being very helpful at all, so I had to do this on my own". Later he said that he carried him "back head back under his knees, that way". He said that Mr Rikihana was not dragged while he was with him.

[336] When he got to the car, he lifted Mr Rikihana up into the rear seat of the car and Mr Maney helped him from the other side of the car. At this point, Mr Maney was "fuming" but was physically "alright". Mr Jury put Mr Rikihana in the car through the rear driver's side door. At Mr Jury's request, Mr Maney came over to help from the rear passenger side. Mr Jury observed Mr Rikihana's face or nose bleeding. He did not see any blood on Mr Maney "from where [he] was".

[337] Mr Jury removed his own patch and t-shirt since he had been sweating, but before he could replace his t-shirt, a "white truck" — Mr Iorangi's grey

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391 As we noted above at [38], the evidence was that Mr Rikihana was 168 cm tall, making him shorter than six feet.

392 Mr Maney was in a car accident in 2014 or 2015: see above at [128].

truck — arrived at the address. Mr Jury said he replaced his t-shirt with a new one and accepted it was him that Mr Iorangi described in his evidence.[393]

[338] Mr Rikihana asked him to retrieve his patch from his room and Mr Jury did so. Asked if from his experience as a member of the Mongrel Mob whether "your colours" are important, Mr Jury replied, "Only thing that's important. Very important". Going to get the patch formed the basis of Mr Jury's explanation at trial for how his blood ended up on the light switch cover in Mr Rikihana's room; he thought he had probably been bleeding from the earlier assault, but he did not know at the time, and therefore deposited blood on the light switch cover while retrieving Mr Rikihana's patch.[394] He was cross-examined on the following inconsistent explanation in the bail affidavit, whereupon he accepted either explanation was possible:

> In respect of the bloody fingerprint allegedly found on a light switch at the victim's home, if it is mine, I say this. The week before 30th January 2019 I was at Trevor RIKIHANA's house helping him pull down his old rusty corrugated fence. I cut myself and if the blood and the fingerprint are mine, I have an explanation for them being on the light switch. I often went to Mr RIKIHANA's house. He was a member of our Rogue whanau and I regarded him as my brother.

[339] In cross-examination, Mr Jury rebuffed the suggestion his shirt was covered in blood — the suggestion being that he had replaced it for that reason. He also said that Mr Rikihana was conscious when he laid him in the car. When asked whether Mr Rikihana had to lie down in the car because he could not sit up, Mr Jury answered that he did not ask him. There was then the following exchange:

> A. … I just had to adjust his legs. It was the only thing that I had to do.
>
> Q. So, he couldn't do any of this on his own, could he?
>
> A. As I said I had to assist him in there. I lifted him and carried him in there.
>
> Q. This is because he'd been badly beaten at this place?
>
> A. Because he couldn't make it himself.
>
> Q. Because he'd been badly beaten.
>
> A. Because he couldn't make it himself.

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393 See above at [272]–[273].
394 See above at [268].

Q. And he couldn't –

A. So, I helped him.

Q. – make it himself because he'd been badly beaten.

A. I wouldn't know about that.

[340] Mr Jury was also questioned about the blood and footprints around the house and blood on the concrete near where his car was parked. He disclaimed any knowledge of to how blood could have stained the concrete. He suggested, however, that the blood could have dripped from Mr Rikihana while Mr Jury was carrying him. He denied dropping Mr Rikihana a couple of times, saying, "He wasn't that heavy". He also denied picking Mr Rikihana up and dragging him along the ground. The prosecutor asked whether scratches to Mr Rikihana's back and the linear marks on the ground were caused by Mr Jury dragging Mr Rikihana,[395] but Mr Jury maintained that he did not drag Mr Rikihana.

Mr Maney's house

[341] After retrieving Mr Rikihana's patch, Mr Jury then got in the driver's seat of his car and Mr Maney got in the front passenger seat. Mr Jury did not say where in the car Madam Rogue was.[396] Mr Jury then drove off intending to take Mr Rikihana south to Mr Te Aonui's house. In cross-examination he said that this was so Mr Rikihana could be taken to hospital. He agreed that he was worried about Mr Rikihana at this point.

[342] At Mr Maney's suggestion, Mr Jury instead drove north to Mr Maney's address. Asked in cross-examination what the purpose was in taking Mr Rikihana to Mr Maney's house, he said, "I was merely the driver. I was merely the messenger". He said he was doing as he was asked.

[343] On arrival at Mr Maney's house, Mr Jury parked the car around the back of the house, got out and washed himself using the taps in the washhouse. Mr Jury returned to see Mr Rikihana and Mr Maney "still carrying on where they'd left off at the other

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395 See above at [262] and [267].

396 We note Mr Jury said he had put her in the front passenger seat when later leaving Mr Maney's: see below at [345].

house", with Mr Maney still in the front seat and Mr Rikihana still in the back. Mr Jury said during evidence-in-chief, "Madam Rogue was out the back underneath the tyre or the back broken tyre, that's what got me". Asked what was happening between Mr Maney and Mr Rikihana, he said:

> Oh, they were just accusing each other of ripping each other and the bro was trying to hit at the bro at the back and the other one was denying shit. So, I just grabbed – went to the back door, helped [Mr Rikihana] out of the back seat, got him up to a sitting position and grabbed him, lifted him up and put him onto the, um, back steps …

[344] In cross-examination, Mr Jury described Mr Rikihana as "cohesive",[397] adding, "[H]e was talking. Ah, he was arguing and not talking". He would not know whether Mr Rikihana had a big cut on the back of his head or a broken nose.

[345] After dropping Mr Rikihana on the back steps, Mr Jury ordered Mr Maney out of the car, and Mr Maney obliged. Mr Jury took Mr Rikihana's patch from the car, gave it to him and grabbed Madam Rogue from underneath the tyre. Madam Rogue could only be grabbed "after a bit". "She was freaking out", Mr Jury said, because of the "bad rarurarau". Mr Jury carried Madame Rogue into the car and placed her on the front passenger seat — where Mr Maney had been sitting. He then "[c]losed all the doors and … burst out of there". In cross-examination, he said he left Mr Maney's house because he had had enough. It was a "local matter that should have been [f…]in sorted out with local people, not with visitors". The two men "just carried on" in Mr Jury's absence.

[346] The prosecutor also implied Mr Jury had abandoned a "mate" (meaning Mr Rikihana) needing his help. Mr Jury took issue with the word "mate", describing Mr Rikihana as his "brother" — his "Rogue brother" — as was Mr Maney. In terms of Mr Jury's explanation about keeping out of local matters, the prosecutor pointed out that Mr Jury had got involved at the outset in this local matter. Mr Jury replied:

> The brother went and asked me, if I could ask [Mr Rikihana] to come over his place for a kōrero and my intention I said yeah because that's all that was said. He didn't tell me about anyone owing, people owing him or nothing. That wasn't what was asked of me and of course I wouldn't oblige.

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397 We take Mr Jury to have meant "coherent".

Departure from Mr Maney's house and then from Rotorua

[347] Mr Jury said he turned left out of Mr Maney's property and went nowhere in particular but "towards Ngongotahā", seeking somewhere to get his head together. After commencing this northward route, he realised he was missing his "travel pack" — a bag of drugs, we understand — and drove back to Mr Rikihana's house to look for it. He briefly looked for it, could not find it and left Mr Rikihana's property, without seeing Ms Eketone. The prosecutor suggested to him in cross-examination that he in fact went back to look for Ms Eketone, to which Mr Jury replied he had no reason to do so and that his "stash bag was more important than Ms Eketone".

[348] Mr Jury said after he left Mr Rikihana's having failed to find his travel pack, he went "nowhere in particular, just somewhere quiet" and smoked some cannabis he found in his car. After getting his head together, he travelled south and left Rotorua.

[349] In cross-examination, Mr Jury denied dropping Mr Rikihana on Mr Te Aonui's driveway. In response to the suggestion it could not have been Mr Maney because Mr Maney did not drive, Mr Jury said Mr Maney was "very capable" of driving, adding, "Whether he did or not at that point in time I cannot say".

[350] Mr Jury stopped at the Z service station in Taupō — he said to purchase ice for his throbbing head. CCTV footage depicting Mr Jury's visit to the Z service station in Taupō was played at trial. He arrived at the forecourt at 4.24 am and entered the store at 4.26 am. There, he purchased $20 of petrol and a bag of ice. Mr Jury was asked in cross-examination about what the prosecutor described as a "little brown spot just above, around [his] knuckle". Mr Jury said the spot appeared to be just the knuckle and that it was not a bruise.

[351] During the cross-examination of Constable Collier — the Crown's CCTV witness — the officer testified that Mr Jury's feet appeared bare in the footage. He also said he did not notice any bruising, blood or cuts on Mr Jury's hands.

Napier and Hawke's Bay Hospital

[352] Mr Jury said he then drove to his daughter's house in Napier. When asked in cross-examination why he decided to leave Rotorua to travel to Hawke's Bay early in the morning, he repeated that he had had enough.[398]

[353] On his way to his daughter's house, he called her to arrange for her to take him to the hospital for his injuries. He got to his daughter's house, parked the station wagon on the road in front of the house, met his daughter and then she drove him to the hospital. Mr Jury said that, at the hospital:

(a) he received a text from Mr Maney reading "the old [c…]'s dead" but did not read the message until a week later;

(b) he was in and out of consciousness;

(c) he received a scan but no sutures;

(d) staff asked him to wait;

(e) he did not — or at least at trial had no memory of — being seen by a dental doctor; and

(f) after becoming impatient, he left.

[354] CCTV footage of Mr Jury at Hawke's Bay Hospital with his daughter on 30 January 2019 was admitted by consent. He presented to the emergency department at 7.30 am. He accepted in cross-examination that the footage showed him with white bandaging on his cheek and around his right hand, but he disclaimed memory of having any stitches on his face and of injury or treatment to his hand.[399]

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398 The prosecutor further suggested that Mr Jury sought treatment in Napier as opposed to Rotorua because Mr Jury knew Mr Rikihana would be at Rotorua Hospital. Mr Jury said he knew nothing of "that" — presumably referring to Mr Rikihana being at Rotorua Hospital.

399 The prosecutor suggested that the bandage on his right hand covered a cut finger which could have been the one that deposited blood on Mr Rikihana's light switch cover as described above at [268]. Mr Jury replied, "If I remember correctly that ESIR [sic] fulla reckons it was from the left hand".

[355] Mr Jury also made the following admissions under s 9 of the Evidence Act as to his visit to the hospital:[400]

> 75. The CCTV shows that at 7:30am on 30 January 2019, the defendant presented at the Hawkes Bay Hospital emergency department in Hastings, with his daughter.
>
> 76. The defendant was seen by a triage nurse. He told her:
>
> 76.1. that he had been hit on the head with a hammer.
>
> 76.2. that it had happened at 02:00am in Rotorua.
>
> 76.3. that he had driven back from Rotorua.
>
> 77. When she asked the defendant if Police were involved, the defendant replied, "*not yet*".
>
> 78. Later that day the defendant was seen by a dental registrar at Hawkes Bay in the emergency department.
>
> 79. At that time, the defendant had:
>
> 79.1. a swollen left eye,
>
> 79.2. a cut on his left cheek that that been sutured (stitched) and dressed.
>
> 79.3. a subconjunctival haemorrhage (bleeding in the white part) of his left eye.
>
> 80. A CT scan was completed and showed the defendant had:
>
> 80.1 a fracture to the left lateral part of his eye socket.
>
> 80.3 a fracture to his left cheek bone.
>
> 80.3 a fracture to the interior and lateral wall of the left sinus, which is an air filled space behind the cheek bone a[nd] left maxillary.
>
> 80.4 a fracture of the crinoid processes of the left jaw.
>
> 81. There was no reason for the defendant to be treated immediately or for surgery and it was determined he could be seen at a later date for follow up.
>
> 82. He was then discharged and left the emergency department with his daughter.

[400] Emphasis in original.

[356] Mr Jury said in evidence it was after about three or four hours that they left the hospital. The footage showed Mr Jury leave the Emergency Department at 1 pm. He accepted in cross-examination that he changed into yet another shirt before going to hospital but said that shirt had no blood on it.[401]

[357] Mr Jury and his daughter, who also gave evidence, said on returning to her house, they noticed that the station wagon Mr Jury had been driving was missing. The daughter said Mr Jury swore. Mr Jury said he made enquiries of acquaintances in the area about what had happened to the car to no avail.

[358] In another admission, Mr Jury accepted that the green Ford station wagon was found completely burnt out in Hastings in the early morning of 31 January 2019.

Can we be sure of Mr Jury's guilt?

[359] In the light of that evidence, we now turn to the question of whether we can be sure of Mr Jury's guilt.

Court of Appeal decision

[360] The Court of Appeal did not analyse whether it could be sure of guilt, but it made the following comments in the context of discussing whether the trial Judge's failure to give a s 122 warning caused a miscarriage of justice in the sense that it created a real risk the outcome of the trial was affected:[402]

> … our reasons for reaching this conclusion primarily relate to the compelling case against Mr Jury. We have previously traversed that evidence and for present purposes we will confine ourselves to the following summary which demonstrates the strength of the Crown case against Mr Jury:
>
> (a) Ms Eketone gave compelling evidence that only Mr Jury went to her house between 12.01 and 1.33 am on 29/30 January 2019 and Mr Jury was the only person involved in the altercation with Mr Rikihana.
>
> (b) Mr Jury's evidence, that Rex Maney went to Ms Eketone's place on the night in question and was responsible for the

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401 It is not entirely clear which shirt Mr Jury referred to — the one he changed out of or the one he changed into. He referred to a jersey which had blood on it, but it is not clear when he was wearing the jersey.

402 CA judgment, above n 30, at [99].

assault on Mr Rikihana, was not supported by any other evidence. There is no merit in the defence theory that Ms Eketone was lying to protect Rex Maney. As she said under cross-examination, Rex Maney was dead by the time of the trial. He no longer required protection.

(c) Ms Eketone's evidence is also supported by CCTV footage showing the movements of Mr Jury's vehicle as it was driven between the key sites of interest on the night Mr Rikihana was murdered. There is no CCTV footage showing Rex Maney going to Ms Eketone's property that night.

(d) Mr Iorangi's evidence also supports Ms Eketone's evidence, and the Crown's case. He saw a shirtless man standing next to a vehicle that was parked in Ms Eketone's driveway during the early hours of 30 January 2019. Mr Jury accepted he was not wearing a shirt when he placed Mr Rikihana's body in the back of his car. Mr Iorangi also saw the legs of a person protruding from the back of the vehicle. That was consistent with Mr Rikihana's legs hanging out from the back seat of Mr Jury's vehicle. Mr Iorangi only saw one man near the car that evening.

(e) Mr Te Aonui's evidence also supports the Crown's case. He said he was woken at about 2.45 am by Mr Jury arriving at his property and that Mr Jury dumped Mr Rikihana's body on Mr Te Aonui's driveway.[403]

(f) The forensic evidence which points to Mr Rikihana having been severely assaulted at the back of Ms Eketone's property, and then dragged in the direction of the driveway also supports her evidence, as does the discovery of Mr Jury's blood and fingerprints on a light switch inside her house.

(g) The presence of Mr Jury's blood on the front of the shirt worn by Mr Rikihana also points towards Mr Jury's guilt.

(h) It is also notable that Mr Jury's car was found completely burnt out near Napier on 31 January 2019. It is reasonable to infer that this was a deliberate act by Mr Jury to destroy forensic evidence against him.

(i) We also consider it significant that no forensic evidence linked Rex Maney to the death of Mr Rikihana.

Submissions

[361] As noted above at [35], the parties provided written submissions on the issue of whether this Court could be sure of guilt after the hearing. They were told to assume Mr Maney's statements were inadmissible and that their admission caused a

403 As noted above n 358, this is not an accurate summary of Mr Te Aonui's evidence.

miscarriage of justice in the sense that it created a real risk that the outcome of the trial was affected.

Mr Jury

[362] Mr Jury submits his case is one that depends on the assessment of his and Ms Eketone's credibility. Relying on *R v Matenga*, he says this makes his case inapt for this Court itself to determine guilt.[404] In any event, he submits that the evidence is not so clear cut, and Mr Jury not so convincingly guilty, that this Court can be sure of his guilt.

[363] Mr Jury submits Ms Eketone's evidence has numerous red flags, including that she was close to Mr Maney and he moved in with her after Mr Rikihana's death. This suggests that she was motivated to lie to cover up Mr Maney's involvement. As to Mr Iorangi's evidence, Mr Iorangi admitted he could not see well in the foggy conditions and stopped for only a short period of time. Mr Jury submits evidence about Mr Maney's physical condition cannot support the Crown's case. Mr Maney had every reason to portray himself as frail and decrepit when police searched his home. Mr Jury gave evidence at trial that Mr Maney was well enough to maintain his property around the time of Mr Rikihana's death.

[364] Mr Jury suggests the CCTV evidence was incomplete. There is no evidence before the Court about the movements of any other vehicles. Mr Jury, however, points to a previously unseen job sheet (not adduced at trial) that records a vehicle entering Pukepoto Road at 11.33 pm. It is submitted that it is not for Mr Jury to account for how Mr Maney got to Mr Rikihana's home but that is not inconceivable that he drove or was driven to Mr Damian Maney's house and then later walked next door to Mr Rikihana's house.

[365] The absence of forensic evidence at Mr Maney's house is, Mr Jury submits, unsurprising. The search warrant was executed on 14 February 2019, two weeks after Mr Rikihana's death. It is submitted that Mr Maney had plenty of time to destroy forensic evidence.

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404 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [29].

[366] Mr Jury invites the Court to consider Jason Maney's pre-trial statement about Mr Maney's confession. He submits it would be remiss if this Court were not to consider Jason's statement because, should Mr Jury be retried, Mr Jury's new trial counsel may choose to call him. Mr Jury says that Jason never resiled from his account. Rather, Jason threatened to give false evidence.[405]

The Crown

[367] Mr Jury's case is, the Crown submits, different to *R v Matenga*.[406] *R v Matenga* involved a pure contest between the credibility of the complainant and the defendant, whereas the wealth of other evidence in Mr Jury's case makes his markedly different.

[368] It is submitted by the Crown that, even without Mr Maney's letter and the second police statement, its case was strong, and this Court can be sure of Mr Jury's guilt. In the Crown's submission, Mr Jury's account is implausible, internally inconsistent and not supported by the other evidence.

[369] With regard to the suggestion that Mr Maney was the murderer, the Crown points out that he was a disqualified driver, lacked access to a car and there was thus no obvious means for Mr Maney to get to Mr Rikihana's house. Nor is it realistic for Mr Maney to have walked there, the evidence suggesting it was around a 38-minute walk. As to Mr Jury's reference to the car that entered Pukepoto Road at 11.33 pm,[407] the Crown says that the police believe it to have belonged to a woman who visited Damian Maney at what she believed was between 10 pm and 2 am.

[370] The Crown submits that Mr Jury's evidence is also inconsistent with the forensic evidence. The forensic evidence strongly supports the fatal beating having occurred at Mr Rikihana's house. An absence of comparable forensic evidence at Mr Maney's property eliminates the possibility of the fatal beating occurring there, contrary to Mr Jury's contention that he had left both men at Mr Maney's house still arguing. The drops of blood found in the washhouse are consistent with Mr Jury's

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405 See above at [313]–[314].
406 *R v Matenga*, above n 404.
407 See above at [364].

account of having washed himself in there. In the Crown's submission, Ms Eketone was a credible witness, and her evidence accords with the forensic and other evidence.

[371] The Crown says that Mr Maney — "decrepit", "slow" and "frail" — could not have inflicted so sustained a beating on Mr Rikihana. He also lacked any means of transporting Mr Rikihana from his house to Mr Te Aonui's, some six km. By contrast, the Crown points out that the CCTV evidence shows Mr Jury driving north away from Mr Te Aonui's shortly after (or around) the time Mr Rikihana's body was found there. His car was found burnt out the next day, destroying evidence of Mr Rikihana's presence in his car and any items he was wearing the night before.

[372] Finally, the Crown submits that this Court cannot consider Jason Maney's statement because it does not form part of the evidence admitted at trial or on appeal.[408] In any case, the statement does not meet the threshold in s 18 of the Evidence Act. He did not give the statement on oath, and he later resiled from it, threatening to give evidence adverse to the defence.

Our assessment

[373] Before analysing whether we can be sure of guilt without considering Mr Maney's inadmissible statements, it is worth setting out the main differences between the two cases at trial:

(a) The Crown said Mr Jury, alone apart from his bulldog, went to Mr Rikihana's and administered the beating that occurred there, including blows with the hammer and the strangulation with the red towel. By contrast, Mr Jury said that Mr Maney came to Mr Rikihana's, and it was he, Mr Maney alone, who administered the beating there.

(b) The Crown said that, after the beating, Mr Jury took Mr Rikihana to Mr Maney's house and then drove to Mr Te Aonui's in order to dump

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[408] As noted above at [33] and [314], this Court refused leave to appeal with regard to whether Jason should have been called as a witness. Evidence of Jason's statement was not adduced at trial and the Court of Appeal did not admit it on appeal: see CA judgment, above n 30, at [69]–[85].

him on the driveway. By contrast, Mr Jury said that that he left Mr Rikihana at Mr Maney's and has no knowledge of how Mr Rikihana ended up on Mr Te Aonui's driveway.

[374] We accept the Crown's submission that the Crown case against Mr Jury was strong, even without Mr Maney's statements.[409] It was supported by the forensic and pathological evidence as well as the CCTV evidence mapping the movements of the car Mr Jury was driving. It was also supported by other evidence, including that of Ms Eketone, Mr Iorangi and Mr Te Aonui. We accept the Crown's submission that the forensic and CCTV evidence means that this case is not one that relies solely on the assessment of the credibility and reliability of competing accounts by witnesses.[410]

[375] We also accept the Crown's submission that Mr Jury's account is implausible, internally inconsistent and not supported by the other evidence.[411] The most important point is that the forensic evidence is clear that the fatal beating occurred at Mr Rikihana's house and not at Mr Maney's house.[412] This in itself throws significant doubt on Mr Jury's account. The whole of Mr Jury's account of what occurred at Mr Rikihana's house and Mr Maney's house has an air of unreality, fabricated to fit in with what Mr Jury knew of the evidence against him.

[376] We now analyse the evidence and the respective cases under the following headings before setting out our conclusion:[413]

(a) Did Mr Maney go to Mr Rikihana's house and assault him?[414]

(b) Is Mr Jury's account of the fight credible?[415]

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409 Above at [368].
410 Above at [367].
411 Above at [368].
412 See above at [258]–[271].
413 Below at [407]–[409].
414 Below at [377]–[384].
415 Below at [385]–[389].

(c) Is Ms Eketone's evidence credible?[416]

(d) Is Mr Jury's account of the aftermath of the fight credible?[417]

(e) What happened at Mr Maney's house?[418]

(f) How did Mr Rikihana end up on Mr Te Aonui's driveway?[419]

(g) Did Mr Jury visit Mr Maney again before leaving Rotorua?[420]

(h) What is the significance of the burnt-out car?[421]

Did Mr Maney go to Mr Rikihana's house and assault him?

[377] We accept the Crown's submission that there was no evidence that Mr Maney had access to a vehicle and that it was unlikely that he had walked to Mr Rikihana's house. We also accept the Crown's submission that Mr Maney was not in the car that arrived at 11.33 pm.[422] Assuming Mr Maney "wasn't too happy about being kept waiting" as Mr Jury claimed,[423] Mr Maney would have been unlikely to remain for so long at Damian Maney's house before going to Mr Rikihana's, if indeed he had been in that car.

[378] In any event, if Mr Maney had ready access to a vehicle (and indeed a cell phone), it is not at all clear why he would have needed Mr Jury to fetch Mr Rikihana for him. Mr Jury's explanation for this (that Mr Maney was a disqualified driver, and it was Mr Jury's custom to visit all his brothers)[424] is unconvincing. That is so because later Mr Jury said that Mr Maney was capable of driving (when discussing how

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416 Below at [390]–[392]. It is not generally appropriate to apply the proviso where the credibility and reliability of witnesses are at issue (see above at [255]). In this case, however, we have been able to do so. Ms Eketone's evidence was supported by the circumstances and by other evidence (and, in particular, the independent forensic evidence). Mr Jury's account, by contrast, was in many particulars clearly false.

417 Below at [393]–[397].

418 Below at [398]–[400].

419 Below at [401]–[403].

420 Below at [404]–[405].

421 Below at [406].

422 Above at [369].

423 Above n 389.

424 Above at [319].

Mr Rikihana ended up on Mr Te Aonui's driveway).[425] It is even more unconvincing in light of Mr Jury's insistence that it was a simple request to get Mr Rikihana and that he was not told about any debt as, if he had been, he would not have involved himself given it was a local matter.[426] We comment that, on his own evidence, Mr Jury had become involved in the matter from the outset,[427] and did intervene at various points during the fight between the two other men.[428]

[379] It is significant that there was no forensic evidence linking Mr Maney to Mr Rikihana's house or to the assault on him. By contrast, a sample taken from a bloodstain on the lower front left of Mr Rikihana's t-shirt contained DNA matching Mr Jury's, and Mr Jury's bloody fingerprint was found on a light switch in Mr Rikihana's bedroom.[429] Mr Jury gave conflicting accounts as to how the latter might have been left behind.[430]

[380] Nor, it appears from Mr Jury's account, did Mr Maney sustain any injuries from what must have been a very violent fight.[431] Mr Jury, by contrast, was injured in the fight.[432] As discussed below, we do not accept Mr Jury's account of how he sustained those injuries.[433]

[381] Further, Mr Maney died of lung cancer about five months after the murder.[434] In these circumstances, there seems little reason to doubt the description of Mr Maney as decrepit, slow and frail by the officers who searched Mr Maney's house.[435] Mr Jury's evidence that Mr Maney was still well enough to maintain his home[436] does not mean he would have been well enough to have inflicted such a sustained beating on Mr Rikihana, at least without assistance from Mr Jury. Mr Jury's description of

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425 Above at [349]. We note the (inadmissible) letter mentioned Mr Maney needing to appear in court for driving without a licence or while disqualified: see above at [131]–[132].
426 Above at [318] and [345]–[346].
427 Above at [346].
428 Above at [327]–[328], [332] and [334].
429 Above at [264] and [268].
430 Above at [338].
431 Above at [336].
432 Above at [326]–[327], [329]–[330] and [355].
433 Below at [385]–[389].
434 Above at [127]. It was an agreed fact that Mr Maney died in July 2019.
435 Above at [271]. As we noted, one officer was Mr Maney's cousin and may well have had knowledge as to Mr Maney's condition from family sources.
436 Above at [333]. It is not clear if Mr Maney's girlfriend lived with him. If she did, then Mr Maney may not have looked after the property alone.

Mr Maney as being "very fit"[437] is clearly (at best) a self-serving exaggeration given Mr Maney was terminally ill.[438]

[382] Even if Mr Maney had gone to Mr Rikihana's house (which, for the reasons set out above, we do not think he did), he would not have been well enough to have beaten Mr Rikihana on his own. Any beating would have to have been conducted by Mr Maney and Mr Jury as a joint enterprise, and Mr Jury would still have been guilty of the murder.[439] But again, we do not consider that to have happened.

[383] We comment here that we cannot rule out the possibility that Mr Jury was tasked by Mr Maney, on his first visit to Mr Maney's house in the first Maney window (before 10.58 pm), to enforce a debt.[440] If anything, however, that would strengthen the case against Mr Jury. It would suggest that Mr Maney was not able to do this himself because he was too ill. Mr Jury would then have been carrying out instructions when he administered the fatal beating at Mr Rikihana's which, as we discuss,[441] the totality of the evidence shows he did alone. The fact that Mr Maney sent a text to Mr Jury ("the old [c…]'s dead")[442] may lend some support to the suggestion that he had engaged Mr Jury to collect a debt, although we recognise that the term "[c…]" does not necessarily signal animosity. The fact there was possibly a third visit to Mr Maney's house after Mr Rikihana was dumped at Mr Te Aonui's may lend some credence to this theory also.[443]

[384] However, we consider it much more likely that Mr Jury was pursuing a debt owed to himself.[444] There was no evidence of any long-standing animosity between Mr Maney and Mr Rikihana.[445] By contrast, there is Ms Eketone's evidence of a

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437 Above at [333].

438 Mr Jury also noted that Jason Maney gave similar evidence about Mr Maney's state of health. Jason's statement did not form part of the evidence at trial or before the Court of Appeal. As already noted, this Court refused leave to appeal against the Court of Appeal decision relating to Jason. In these circumstances, we accept the Crown's submission that it would not be proper for us to have any regard to his statement for any purpose at all.

439 The possibility that Mr Maney had gone to Mr Rikihana's house was before the jury at trial. This means that we are not considering a fundamentally different case from that considered by the jury: see above at [255].

440 Above at [302], [307] and [318].

441 Below at [385]–[392].

442 Above at [353(a)].

443 Below at [404]–[405].

444 Above at [279].

445 Ms Eketone deposed that the two men were "good friends": above at [287].

relatively recent dispute between Mr Jury and Mr Rikihana.[446] The clear inference from all the circumstances is that Mr Jury attributed to Mr Maney his own motive to beat Mr Rikihana.

Is Mr Jury's account of the fight credible?

[385] In terms of the Mr Jury's account of the altercation itself, he, attempting to act as peacemaker, had the bad luck to be knocked unconscious immediately upon going outside, thereby missing all of the fatal beating, including the likely strangulation with the red towel.[447]

[386] Mr Jury gave conflicting accounts about who had injured him, finally surmising in evidence that it was Mr Rikihana who had inflicted at least the first hammer blow.[448] Mr Jury's explanation as to why Mr Rikihana would have hit him with the hammer when he had not been involved in the dispute is unconvincing.[449] On Mr Jury's account, Mr Rikihana risked being attacked by his alleged real opponent, Mr Maney, while distracted by his attack on Mr Jury. Instead, all the circumstances suggest that Mr Jury sustained his injuries in the course of a fight with Mr Rikihana.

[387] The forensic evidence found at Mr Rikihana's property[450] and on his body[451] strongly suggests he was badly hurt there and is not consistent with the "scuffle" Mr Jury described between Mr Rikihana and Mr Maney.[452] The forensic evidence also does not accord with Mr Jury's assertion that the only injuries to Mr Rikihana that he noticed were to his face or nose, although he did concede Mr Rikihana was having trouble walking and breathing.[453] The reality was that there were copious quantities of Mr Rikihana's blood found at the property, and the red towel located at the property was saturated with Mr Rikihana's blood.

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446 Above at [276].
447 Above at [326]–[332].
448 Above at [329]–[330].
449 Above at [330].
450 Above at [266]–[267].
451 Above at [260]–[264].
452 Above at [327]–[331].
453 Above at [335]–[336] and [339].

[388] Mr Jury initially accepted in cross-examination that Mr Rikihana was "badly hurt". That was a convenient explanation for Mr Rikihana needing to lie down in the back seat of the car. But he later repeatedly denied knowledge of Mr Rikihana being badly beaten when asked why he had to help Mr Rikihana into the car.[454] He was clearly seeking to distance himself from the fight and from Mr Rikihana's death. In failing to concede ground, he wove inconsistencies into his evidence.

[389] Finally on this point, even if Mr Jury's evidence that he was not wearing shoes is accepted,[455] the evidence from the forensic pathologist was that Mr Rikihana's blunt force injuries could have been inflicted by someone with bare feet and also without sustaining injuries to their hands.[456] In any event, there was evidence of possible bruising on Mr Jury's hand from the Taupō service station CCTV and there were bandages on his hand at Hawke's Bay Hospital.[457]

Is Ms Eketone's evidence credible?

[390] We accept the Crown's submission that Ms Eketone was a credible witness.[458] She gave a chilling account of the beating and her fear that she and her son were in danger because they were witnesses to the attack.[459] Her account is consistent with the forensic and other evidence. Ms Eketone was very familiar with Mr Maney's voice and said his was not one of the voices in the kitchen arguing.[460] We do not accept Mr Jury's submission that she was lying to cover up Mr Maney's involvement.[461] It is not clear why she would throw blame on Mr Jury, who she described as "scary" and "strong".[462] It seems improbable that Ms Eketone would have allowed Mr Maney to live with her soon after Mr Rikihana's death[463] had she known he was responsible for

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454 Above at [339].
455 Above at [322]–[323]. There was also evidence from Constable Collier, above at [351], that Mr Jury appeared to have bare feet in Taupō after Mr Rikihana's murder. We accept that Mr Jury denied wearing shoes while at Mr Rikihana's house, but comment that the evidence about him not wearing shoes at other times is not necessarily probative of whether or not he was wearing shoes at the time of the beating.
456 Above at [263].
457 Above at [350]–[351] and [354].
458 Above at [370].
459 Above at [280]–[281] and [284]–[285].
460 Above at [279].
461 Above at [363].
462 Above at [281] and n 348.
463 Above at [286].

the death. We comment too that, as she had known Mr Maney for so long,[464] she may well have been less likely to have felt the need to hide had it been Mr Maney fighting with Mr Rikihana. In any event, Ms Eketone was clear that Mr Maney and Mr Rikihana were often together and, from what she observed, were good friends.[465]

[391] Mr Jury's account was that he arrived at the house to find Ms Eketone and Mr Rikihana in the sleepout smoking methamphetamine. The three of them then smoked methamphetamine and cannabis together there. The two men then left for the kitchen, leaving Ms Eketone in Mr Rikihana's sleepout.[466] Ms Eketone, however, said she has never smoked methamphetamine.[467] She said that she was woken up by Mr Jury and took him to the sleepout before returning to bed.[468] As she and her son had to be up early the next morning,[469] we accept her account of being in bed asleep at around midnight when Mr Jury arrived. We note that police did not find any drugs or drug paraphernalia in their search of Mr Rikihana's property.[470] There also seems to be no reason why the men would, as Mr Jury claimed, have left Ms Eketone in Mr Rikihana's bedroom when they went to the kitchen or why she would have stayed there[471] rather than immediately returning to be with her son.

[392] Ms Eketone's evidence is consistent with that of Mr Iorangi who saw only Mr Jury by the car and legs sticking out of the back seat. He did not see a second figure on the left side of the car, although he could not see the left side of the car itself.[472] We accept that, if his evidence is considered in isolation, the possibility that he was mistaken about this cannot be discounted, given the darkness, fog and obstruction. But considered in the context of all of the evidence discussed above,

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464 See above at [279].
465 Above at [287].
466 Above at [323].
467 Above at [278].
468 Above at [277].
469 Above at [283] and n 351.
470 Above at [269].
471 Above at [323].
472 Above at [272]–[273] and [337].

Mr Iorangi was not mistaken. Mr Maney was not seen because he was not there to be seen.[473]

Is Mr Jury's account of the aftermath of the fight credible?

[393] The blood deposits[474] and the abrasions to Mr Rikihana's body and limbs[475] strongly suggest a bested — indeed, mortally wounded — Mr Rikihana was dragged along the ground. We do not accept Mr Jury's submission on appeal that his description of carrying Mr Rikihana by holding him "under his [Mr Rikihana's] arms"[476] was consistent with dragging. His suggestion at trial that the blood could have dripped from Mr Rikihana[477] is also implausible given the sheer quantity of blood deposited at the property, and is inconsistent with Mr Jury's evidence as to his t-shirt not being bloody and the fact that he did not notice any significant injuries to Mr Rikihana.[478] In any event, Mr Jury insisted he did not drag Mr Rikihana in his evidence at trial and later described carrying him by holding him under the head and under the knees. He said that he had not dropped Mr Rikihana at any point (again, this is inconsistent with the forensic evidence).[479]

[394] Mr Jury said that once he had regained consciousness after the hammer blow, he was then hit again while trying to intervene.[480] At the end of the fight, he decided it was necessary to take Mr Rikihana away from his house.[481] He does not appear to have consulted Mr Rikihana about this, a startling omission if indeed Mr Rikihana was conscious and talking as he alleges.[482]

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473 In deciding the letter and second police statement were inadmissible, we said above at [178] and [188(d)] that there was a risk Mr Maney lied to divert suspicion from himself (knowing he was a suspect) or alternatively that he lied to cover up his actual involvement. It is clear from the whole of the evidence that Mr Maney was very unlikely to have gone to Mr Rikihana's house that night, but it may be that his involvement when Mr Rikihana was brought to his house was more extensive than he recounted (possibly assisting in tying Mr Rikihana up or performing actions amounting to being an accessory after the fact in terms of s 71(1) of the Crimes Act 1961). See also above at [383] as to the other possibility that Mr Maney engaged Mr Jury as "enforcer".

474 Above at [267].

475 Above at [262].

476 Above at [335].

477 Above at [340].

478 Above at [335]–[336] and [339].

479 Above at [340].

480 Above at [327].

481 Above at [334].

482 Above at [338]–[339].

[395] Mr Jury then said that he carried Mr Rikihana to the car but, while acknowledging Mr Rikihana was having trouble breathing and walking, failed to notice the full extent of Mr Rikihana's injuries.[483] Nor did he notice any physical signs of Mr Maney having been in a fight.[484] Mr Jury's shirt was not covered in blood,[485] even though, on his account, he had carried Mr Rikihana whose blood was found to have coated the ground and saturated the towel at the property.[486]

[396] Mr Jury was then easily persuaded not to take Mr Rikihana to Mr Te Aonui's house so that he could be taken to the hospital, even though Mr Jury must have thought Mr Rikihana was injured enough to require hospital care.[487] At Mr Maney's request, Mr Jury instead drove them to Mr Maney's place, again apparently without consulting Mr Rikihana and despite supposedly taking a neutral position in the alleged dispute between the two men.[488] Then, after alleged further fighting in the car, Mr Jury left Mr Rikihana at the house of the still obviously angry Mr Maney.[489] He did this despite being worried about Mr Rikihana, his "Rogue brother", who even on Mr Jury's account had been having trouble walking and breathing before the latest alleged fight in the car.[490]

[397] Finally, with regard to the aftermath of the fight, Mr Jury's explanation of having gone back into the house to get Mr Rikihana's patch at the latter's request has the air of a manufactured excuse.[491] The much more likely explanation is the one contended for by the Crown at trial: that he was searching for Ms Eketone as she was a witness to the attack.[492] We accept that Mr Jury likely picked up Mr Rikihana's patch while he was in the sleepout (as Ms Eketone surmised),[493] but we doubt that this was at the request of Mr Rikihana, who was very likely either unconscious or barely

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483 Above at [335]–[336] and [339].
484 Above at [336].
485 Above at [339]. We again acknowledge Mr Jury said a jersey of his had blood on it: see above n 401.
486 Above at [266]–[267].
487 Above at [341]–[342].
488 Above at [328] and [346].
489 Above at [343]–[345].
490 Above at [335] and [346].
491 Above at [338].
492 That was certainly Ms Eketone's impression both at that time and when Mr Jury returned to the property later: above at [281] and [284]. As accepted by the Crown at trial, Mr Jury may also have been searching for items in Mr Rikihana's room.
493 Above at [269], [283] and [338].

conscious when he was put into the car.[494] This was why Mr Jury was content to leave Mr Rikihana in the car while he returned to the house to search for Ms Eketone.[495] If Mr Rikihana had been conscious and asking for his patch, leaving him alone in the car would have been rash. In any event, it is not clear why Mr Jury would have acceded to Mr Rikihana's request after he had been so angry with Mr Rikihana that he had inflicted such a severe and sustained beating on him.[496]

What happened at Mr Maney's house?

[398] Given the extent of Mr Rikihana's injuries as described by the forensic pathologist and the forensic evidence found at Mr Rikihana's property,[497] there must be significant doubt as to whether, by the time they arrived at Mr Maney's house, Mr Rikihana was capable of being "cohesive", "arguing" and fighting in the car with Mr Maney, as Mr Jury claimed.[498] The fact that Mr Rikihana[499] had been on the ground at the back of his property for some time and then had to be dragged to the front of the property and lifted into the car suggests that Mr Rikihana was unconscious or barely conscious before being driven to Mr Maney's house.[500] Even on Mr Jury's account, Mr Rikihana was having trouble breathing and walking[501] when he was carried to the car where Mr Jury had to adjust his legs.[502] Mr Rikihana also had to be lifted out of the car at Mr Maney's house.[503] Mr Jury's account of the two men fighting in his car at Mr Maney's house (with Mr Maney leaning over the front seat and

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494 Below at [398]. We accept that Ms Eketone's account above at [280] may provide some support for Mr Rikihana still being conscious when the two men were in front of the house, although on her account he was clearly having trouble breathing and was moaning. He was also still being beaten at that stage on her account.

495 However, we do accept that Mr Rikihana was possibly also tied up at this point. We note the evidence referred to above at [262] about the marks on his wrists.

496 We also note that Mr Jury implied it was Mr Maney who disposed of Mr Rikihana's patch. In all likelihood, however, it perished in the same arson that caused Mr Jury's t-shirts to evade forensic analysis: see above at [371].

497 Above at [260]–[267].

498 Above at [343]–[344].

499 The blood-soaked object referred to by the forensic scientist was Mr Rikihana: see above n 341.

500 We have not overlooked Mr Iorangi's evidence above at [273] that Mr Rikihana's legs were moving, which may suggest he was at least semi-conscious. Mr Iorangi may, however, have been mistaken about this. We note the less-than-ideal viewing conditions, including the fog: see above at [273]. We also note that Mr Jury said that he had had to adjust Mr Rikihana's legs in the car, which may have been why they appeared to be moving, although Mr Jury did not directly accept the prosecutor's suggestion that this was because Mr Rikihana could not do this himself, and he also said that Mr Rikihana was conscious: see above at [339].

501 Above at [335]. This is consistent with Ms Eketone's evidence above at [280].

502 Above at [335]–[336] and [339].

503 Above at [343] and [345].

Mr Rikihana lying in the back seat)[504] has, in any event, a farcical and invented quality to it.

[399] On Mr Jury's account, the fatal beating had to have been administered by Mr Maney after Mr Jury had left. We do not accept that happened, particularly as there was, as the Court of Appeal noted, no forensic evidence linking Mr Rikihana's death to Mr Maney's property.[505] Mr Jury submits that Mr Maney could have destroyed the forensic evidence before his property was searched.[506] We accept it is possible that Mr Maney had cleaned up,[507] but as we note above, the evidence is clear that the fatal beating occurred at Mr Rikihana's house.[508]

[400] We are satisfied, therefore, that the absence of forensic evidence at Mr Maney's house is because there was no forensic evidence to find, other than the blood in the washhouse. This blood is likely explained by Mr Jury's admission that he washed himself in there.[509]

How did Mr Rikihana end up on Mr Te Aonui's driveway?

[401] As there is no evidence of Mr Maney having had access to a vehicle, he would not have been able to transport Mr Rikihana to Mr Te Aonui's house.[510] By contrast, the CCTV evidence shows that Mr Jury was in the vicinity of Mr Te Aonui's between 2.26 and 2.53 am,[511] at around the time that Mr Rikihana's body was found on Mr Te Aonui's driveway.[512] The inference is overwhelming that, despite his denials, it was Mr Jury who deposited Mr Rikihana on Mr Te Aonui's driveway.

[402] Mr Jury said that, after he got fed up and left both Mr Maney and Mr Rikihana at Mr Maney's house, he turned left out of Mr Maney's to go north (the opposite

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504 Above at [343].
505 Above at [270] and [360].
506 Above at [365].
507 Although it may be doubted that Mr Maney would have managed to clean up to the extent that no trace of blood was found (apart from in the washhouse) had the fatal beating occurred at Mr Maney's house as Mr Jury claimed.
508 Above at [375].
509 Above at [343]. But that blood may be altogether unrelated to Mr Rikihana's death since it could not be compared to any DNA profile.
510 Above at [377].
511 Above at [304] and [309]–[310].
512 See above at [290] and [292].

direction to Mr Te Aonui's) in order to get his head together.[513] There is no CCTV evidence from cameras north of Mr Maney's house, and this means no CCTV evidence of whether or not he made this trip (which would have been during the second Maney window from 1.33 am to 2.24 am).[514] If he did, it would in our view have been with Mr Rikihana in the car. It is in itself highly unlikely Mr Jury would, on this scenario, have been getting his thoughts together in order to decide what to do with him. However, we consider it clear from all the evidence that this trip was invented as a convenient way of trying to distance himself both from the murder (by purporting to have left Mr Rikihana with Mr Maney during the second Maney window) and from the dumping of Mr Rikihana's body in Mr Te Aonui's driveway.

[403] Mr Jury's evidence was that, while getting his head together, he realised his travel pack was missing and went to Mr Rikihana's to look for it.[515] However, the CCTV evidence shows that he did not immediately go to Mr Rikihana's once he started driving back south.[516] Instead, he passed the turnoff to Mr Rikihana's and continued towards Mr Te Aonui's at 2.26 am and away again at 2.53 am.[517] Mr Jury made no mention at all of this trip towards Mr Te Aonui's house before going to Mr Rikihana's. This can only have been to conceal the fact that Mr Jury had been near Mr Te Aonui's house when Mr Rikihana was dumped in the driveway and, indeed, to conceal the fact that it was Mr Jury who had dumped him there. Mr Jury's failure to give any evidence at all about the period spent near Mr Te Aonui's house is a major omission which throws further doubt on his entire account.

Did Mr Jury visit Mr Maney again before leaving Rotorua?

[404] The Crown submits that Mr Jury did not account for a trip towards Mr Maney's in the third Maney window (between 2.59 am and 3.26 am).[518] At trial, the Crown submitted that Mr Jury visited Mr Maney's for a third time during this window. In fact, Mr Jury did account for that time period in his evidence, saying he had been

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513 Above at [345] and [347]. Mr Jury said in cross-examination that he went towards Ngongotahā, which is on the opposite side of Lake Rotorua to Mr Maney's house.

514 Above at [303], [307] and [310].

515 Above at [347]. The ANPR camera captured Mr Jury travelling southbound at 2.24 am, 51 minutes after he had arrived at, around or near Mr Maney's property: above at [303], [307] and [310].

516 The third Rikihana window was between 2.54 and 2.59 am: above at [305], [308] and [310].

517 Above at [304] and [309]–[310].

518 Above at [305], [307] and [310].

"nowhere in particular" (thus presumably not Mr Maney's house), to get his head together for a second time.[519]

[405] We accept the Crown's position at trial that the CCTV evidence is consistent with a third visit to Mr Maney during the third Maney window before Mr Jury left Rotorua. We think it possible he did so and infer that this visit, if it occurred, may well have been to report on what had transpired since his second visit and perhaps to ask Mr Maney's advice on what to do next. Be that as it may, Mr Jury's account of driving to "get his head together" on two occasions,[520] if indeed he did,[521] would in any event be consistent with his needing to decide how to deal with the consequences of his serious assault on Mr Rikihana and therefore consistent with guilt.

What is the significance of the burnt-out car?

[406] Mr Jury accepted that he had been the bare-chested man Mr Iorangi had seen by the car at Mr Rikihana's house. He said that he took off his patch and shirt because he had been sweating.[522] He did not accept that he had changed because his shirt was covered in blood.[523] We agree with the Court of Appeal that it is reasonable to infer that it was Mr Jury who set or caused another to set fire to his car near Napier to destroy any forensic evidence against him. That evidence included the blood on the two shirts he had been wearing: the one he had taken off before being seen by Mr Iorangi, and the one he had then changed into. This is an important point and clearly consistent with guilt.

Conclusion

[407] We are satisfied that Mr Jury's account is false.

[408] As to the primary points of contention above at [373], we are sure that Mr Jury alone fatally beat Mr Rikihana at Mr Rikihana's house, dragged him to the car and

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519 Above at [348].

520 During the second and third Maney windows: see above at [303], [305], [307], [310] and [347]–[348].

521 We do not accept that Mr Jury did in fact "get his head together" on two occasions. See our comments at [402], many of which are also applicable to the second alleged occasion.

522 Above at [337].

523 Above at [339].

drove him to Mr Maney's house. We are also sure that Mr Jury later left Mr Maney's house with Mr Rikihana in his car and dumped him on Mr Te Aonui's driveway.

[409] Based on the remaining evidence, and disregarding Mr Maney's statements, we are sure that the Crown proved Mr Jury's guilt beyond reasonable doubt.

Summary of our conclusions on the appeal

[410] In summary, the conclusions reached on the issues in the appeal referred to above at [36(b)–(e)] and [120] are that:

(a) Mr Maney's hearsay statements should not have been admitted;[524]

(b) their admission caused a miscarriage of justice (in the sense that it created a real risk that the outcome of the trial was affected);[525]

(c) had the statements been admissible, an appropriate warning should have been given by the trial Judge;[526]

(d) the details of Mr Maney's conviction for attempting to pervert the course of justice would have been before the jury had defence counsel not been mistaken as to the adverse consequences for Mr Jury if this evidence were adduced and had the Crown not failed to disclose the details of the offending to defence counsel.[527]

[411] Despite these errors, in answer to the issue referred to at [36(f)], and having determined the trial was not unfair, we are sure of guilt on the basis of all the admissible evidence (that is, excluding Mr Maney's statements).[528] There has therefore been no actual miscarriage of justice.

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524 Above at [156]–[189].
525 Above at [208]–[211].
526 Above at [225]–[232].
527 Above at [248]–[251].
528 Above at [373]–[409].

Result

[412] In accordance with the views of the majority, the appeal is dismissed but for reasons that differ from those in the Court of Appeal.

ELLEN FRANCE AND MILLER JJ
(Given by Ellen France J)

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A "circumstantial assurance" of reliability

[413] A hearsay statement is admissible under s 18(1) of the Evidence Act 2006 where "the circumstances relating to the statement provide reasonable assurance that the statement is reliable",[529] and the maker of the statement is unavailable.[530] In this case, there is no issue about the unavailability limb. Under s 16(2)(a), a person is unavailable as a witness where they are dead, as is the case with Mr Rex Maney, the proposed hearsay witness.

[414] Hearsay evidence meeting the threshold under s 18(1) may still be inadmissible if it is not relevant in terms of s 7 of the Evidence Act, or if the probative value of the evidence is outweighed by the risk that its admission will have an unfairly prejudicial effect on the proceeding, under s 8. Section 8(2) provides that, in determining where the balance lies, the judge "must take into account the right of the defendant to offer an effective defence". In the present context that will mean the court must consider the impact of the inability to cross-examine the maker of the hearsay statement.

[415] The issue on this part of the appeal is whether the Court of Appeal was right to conclude that the circumstances relating to the hearsay statements of Mr Maney

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529 Section 18(1)(a).
530 Section 18(1)(b)(i).

provided reasonable assurance of their reliability. In particular, there is a question about the extent to which it was correct to rely on other Crown evidence led at trial to support the finding that the circumstances provided reasonable assurance of reliability.

[416] The "circumstances" referred to are defined in s 16(1) of the Act as follows:

> **circumstances**, in relation to a statement by a person who is not a witness, include—
>
> (a) the nature of the statement; and
>
> (b) the contents of the statement; and
>
> (c) the circumstances that relate to the making of the statement; and
>
> (d) any circumstances that relate to the veracity of the person; and
>
> (e) any circumstances that relate to the accuracy of the observations of the person

The statutory scheme

[417] The following observations about the approach to the assessment of reliability under s 18(1) can be drawn from the statutory scheme.

[418] First, the court is not making a final determination about reliability. Rather, it is deciding whether the circumstances show that the evidence is sufficiently reliable to place before the jury. The test is accordingly a threshold one in which the role of the judge is that of a gatekeeper.[531] The requirement under s 122 of the Evidence Act to consider making a direction as to reliability in certain cases underlines that point, as it anticipates evidence may be admitted which the decision-maker may ultimately conclude is not reliable. In a criminal trial, whether the evidence is accepted and what weight it is given will be for the jury, and the court in exercising its role under s 18(1) must take care not to usurp the jury's function.

[419] That said, although ultimately it will be for the jury to decide whether to accept the evidence and its weight, as the Court of Appeal of England and Wales said in *Regina v Riat (Jaspal)*, hearsay evidence must not "simply be 'nodded through'".[532]

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531 *Adams v R* [2012] NZCA 386 at [26].

532 *Regina v Riat (Jaspal)* [2012] EWCA Crim 1509, [2013] 1 WLR 2592 at [25].

The Court in *Riat* went on to say that there is no "precondition that the hearsay be shown independently to be accurate" but, rather, a "careful assessment" of various factors is required.[533] The court is expected to address the relevant circumstances carefully with an eye to the dangers of hearsay evidence to which the hearsay provisions in the Evidence Act are directed.[534]

[420] Second, the test is one that will apply to both defence and Crown evidence and to evidence in civil proceedings, so it needs to accommodate the different interests that will be in play. A strictly-applied standard may well be disadvantageous for the defence who may, for example, find it more difficult to get witnesses to court.

[421] In the context of a criminal trial, this Court in *R v Gwaze* and in *L (SC 80/2023) v R* make it plain that the standard for the admission of defence hearsay evidence is not different from that applicable to the Crown.[535] However, as the majority in *L (SC 80/2023) v R* observed, albeit in the context of consideration of the unavailability limb of s 18(1), that practicalities may mean the way in which the standard is applied differs as between the Crown and defence.[536] The analysis to be undertaken under s 8 will in any event address any concerns about the impact of admission of the evidence on the defence because of the fair trial emphasis in s 8(2).

[422] Third, as is clear on the face of the section, the "circumstances" in s 16(1) are defined widely and the list is not exhaustive. Any circumstance meeting this definition may be taken into account under s 18(1)(a) provided it relates to the statement.

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533 At [25]. The factors identified include the importance of the evidence to the case, the risks of unreliability, and whether the reliability of the absent witness can safely be tested and assessed. These factors reflect the different statutory scheme in the United Kingdom, but largely capture a mix of what will be considered in New Zealand under ss 7, 8 and 18 of the Evidence Act 2006. See Glazebrook and Kós JJ's reasons above at [106] and [92]–[94] in relation to *Riat*.

534 See *L (SC 80/2023) v R* [2024] NZSC 153, [2024] 1 NZLR 640 at [30], [70], [81] and [90] per Ellen France, Williams and Miller JJ, discussing the dangers of hearsay evidence.

535 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 dealt with the admissibility of defence evidence and there is no suggestion in the judgment that the test is a different one than that applicable to Crown evidence. See also *L (SC 80/2023) v R*, above n 534, at [72] per Ellen France, Williams and Miller JJ.

536 *L (SC 80/2023) v R*, above n 534, at [71], n 69 per Ellen France, Williams and Miller JJ, noting the appellant's submissions in that case suggested a "lighter touch" was applied to the calling of defence evidence. The appellant in that case referred to an observation in *R v Foreman (No 17)* HC Napier CRI-2006-041-1363, 21 May 2008, where the trial Judge expressed "natural" hesitation at making the relevant ruling "because one prefers to facilitate the calling of defence evidence": at [11]. This Court did not see the observation as suggesting a different standard applied. But it is demonstrative of the way in which the test may be applied in practice.

Circumstances relating to the *making* of the statement are only one of the listed kinds of circumstance. Further, a contrast can be drawn between the range of circumstances set out in s 16(1) and those applicable to other provisions in the Act where an assessment of reliability is required. In particular, s 34(2)(a) of the Act (dealing with admission in civil proceedings) requires a reasonable assurance of reliability, but that provision refers only to the circumstances relating to the making of the statement.[537]

[423] Fourth, the focus must be on the circumstances as defined. What comprises a "reasonable" assurance is coloured by those circumstances. Because the question is whether the fact-finder should consider the evidence of a witness who is unavailable to give it in person, the court will focus on the reasons for excluding hearsay evidence; it cannot be tested for personal knowledge of the event, accuracy of perception, accuracy of recollection, accuracy of communication and sincerity. Whether these call for exclusion at the threshold stage will be a question of fact and judgement.

[424] The task for the court under s 18(1) is not to undertake a complete review of the overall evidence. Te Aka Matua o te Ture | the Law Commission made it clear that there is not a requirement for corroboration.[538] That is because such a requirement may exclude what might be sufficiently reliable evidence. As the Court of Appeal said in *Mills v R*:[539]

> … the overall statutory focus is on reliability rather than the accuracy and … the s 18 inquiry must address this in light of circumstances (as defined) relating to the statement rather than in terms of the congruence between what [the maker of the hearsay statement] said and the overall facts of the case.

[425] As the Court of Appeal acknowledged in *Mills*, "some context may be relevant" and the exercise cannot be undertaken "in a complete vacuum".[540] In that case, the Court was considering the admissibility of a hearsay statement made by the victim who died after she, and her house, had been set alight. The victim,

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537 See also s 28, dealing with the admission of statements of a defendant offered by the prosecution. If an issue of reliability is raised, the statement must be excluded unless the court is "satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability": s 28(2).

538 Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [34]–[35].

539 *Mills v R* [2010] NZCA 286 at [21].

540 At [21].

Ms Delzoppo, was found by a neighbour lying on the ground near her house while it was still burning. In response to questions from the neighbour about what had happened, Ms Delzoppo said that the appellant had put petrol on her and in the house and then set her and the house alight. She also told the neighbour that the appellant had run away.

[426] The neighbour suggested to Ms Delzoppo that they walk down the driveway to the ambulance. Ms Delzoppo was initially unwilling to do so because she had no clothes on the lower part of her body, her clothing having been burnt off. Her recognition of her situation was relevant because it undermined the appellant's argument that she was not competent at the time she made her statement. Eventually, with the neighbour's assistance and with some difficulty, Ms Delzoppo made her way to the ambulance but subsequently had a seizure and died in hospital some weeks later without having spoken again. Forensic evidence made it clear that petrol had been poured on Ms Delzoppo, and that evidence also suggested that this had happened to her on her bed.

[427] In a statement to the police the appellant, amongst other matters, suggested that Ms Delzoppo had set herself on fire. This was the context in which the reliability questions were addressed.

[428] One of the arguments for the appellant in challenging the admissibility of Ms Delzoppo's hearsay statement was that there were issues of competence as to her ability to give an accurate account, engaging para (e) of the definition of circumstances in s 16(1), that is, accuracy. Ms Delzoppo was an alcoholic and had been drinking on the day in question. The appellant said she had what counsel described as a "history of mental illness", and it was also suggested that she may have been affected by her injuries to the extent that she was unable to give an accurate account.[541]

[429] The Court of Appeal noted that given the inclusion in the definition of "circumstances" of both the nature and contents of the statement, some context may be relevant. Further, the Court suggested that, as the discussion of the questions of

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[541] At [14].

Ms Delzoppo's competence showed, it was not possible to approach the reliability assessment without some broader assessment.[542]

[430] A further illustration of the relevance of context is found in the High Court case of *Waretini v Matete*, which dealt with a paternity claim.[543] The High Court considered the admissibility of a hearsay statement supporting the claim of paternity was finely balanced, noting that:[544]

> An obvious answer is perhaps to say that the context provides reliability; a mother is telling her daughter that she has an older brother. It is difficult to see this as an environment for mischief.

[431] By contrast, in the present case there was a motive for Mr Maney, as a potential suspect, to lie; plainly there was an "environment for mischief". Cross-examination directed to his sincerity might be valuable. That must be relevant context for the s 18(1)(a) inquiry. Factors such as the importance or otherwise of the proposed hearsay evidence may also provide relevant context. It also needs to be kept in mind that admission of a statement may have both disadvantages and advantages for a defendant. The position will not always be a binary one.

[432] Finally, depending on the particular facts, it will not be possible to assess at least some of the circumstances in s 16(1) without a broader inquiry. The authors of *Cross on Evidence* make the point that, while reliability does not "depend on congruence between what the statement maker asserted and the overall facts of the case", those overall facts "may still be relevant circumstances to assessing the veracity of the person and the accuracy of her observations".[545]

[433] The authors of *Mahoney on Evidence* note that the definition of circumstances in s 16(1) may "arguably" require some consideration of other evidence, pointing to the reference to "contents" in para (b) (particularly when that is contrasted to para (a), the nature of the statement), and to both "veracity" and "accuracy" in paras (d)

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542 At [21].
543 *Waretini v Matete* HC Wellington CIV-2010-485-1588, 17 March 2011.
544 At [37].
545 Andru Isac (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA18.2] citing *Mills v R*, above n 539, at [16] and [21].

and (e).[546] Considerations of "contents" and "veracity" will often make no sense if not compared to other evidence. This Court in *Gwaze* found that the sorts of factors that made the hearsay statement irrelevant on a s 7 analysis were also applicable to the assessment of reliability under s 18(1), suggesting a broader inquiry.[547]

[434] To illustrate the point about the need for some external reference, the facts of *Mills*, discussed above, are helpful. This is because, in order to assess the extent of sobriety, or the impact of mental health, for example, it must be contemplated by the statutory scheme that the court will consider available evidence about the witness's sobriety or mental health at the relevant time.[548]

[435] As to the approach to the listed circumstances, the Law Commission suggested the factors were cumulative and may overlap.[549] Certainly, all of the circumstances need to be considered, as shown by the decision of this Court in *Gwaze*. The Court in *Gwaze* found the Judge erred in determining that reliability under s 18(1)(a) was established where there was sufficient confirmation the hearsay witness's words were "accurately captured and communicated" and then accurately recorded.[550] In other words, the Court needed to go beyond consideration of the accuracy of the recording or capture of the hearsay statement. The present case provides an illustration of this point. The recorded conversation of 18 February 2019 satisfies the formalities but is nonetheless problematic because its content is inconsistent with the first statement Mr Maney made to the police.[551]

[436] It follows from these observations that what is required is an evaluation of the relevant circumstances relating to the statement. The court is not confined to the circumstances relating to its making. This enables a fairly broad range of matters to be considered although, where the Crown seeks to rely on a hearsay statement, the

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546 Scott Optican and Elisabeth McDonald (eds) *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [EV16.03.03].

547 *Gwaze*, above n 535, at [45].

548 In *Booth v R* [2013] NZCA 371 at [32], the Court of Appeal in assessing "veracity" said the Judge was entitled "to offset against the possibility [the maker of the hearsay statement] was fantasising because of her schizophrenia, [the clinicians'] clinical capacity to tell whether she was. That was the 'circumstance' in which [the witness's] statement was 'made'; and it was a 'circumstance' that went also to the 'accuracy' of the clinicians' 'observations' of [the maker]."

549 Te Aka Matua o te Ture | Law Commission *Evidence* (NZLC R55, 1999) vol 2 at [C75].

550 At [45].

551 See above at [133]–[134] per Glazebrook and Kós JJ.

exercise provided for should not be seen as entailing a complete review of the statement as against the Crown case. Against this background, it is not possible to be prescriptive as to what comprises "reasonable assurance" as that will depend on the facts. But, while the test is a threshold one, it imposes a responsibility on the Court to assure itself, having carefully assessed to ensure the circumstances provide sufficient assurance reflecting the reasons for excluding hearsay evidence, to the extent applicable in the particular circumstances, and the potential impact of its admission on fair trial rights.

Summary of principles in relation to hearsay

[437] In agreement with Glazebrook and Kós JJ,[552] the relevant principles can be summarised as follows.

[438] The statement in s 18(1)(a) of the Evidence Act, that hearsay evidence is admissible where "the circumstances relating to the statement provide reasonable assurance that the statement is reliable", means just what it says.

[439] Recognising the gatekeeping responsibility of the court under s 18(1)(a), the judge will need to give the circumstances relating to the statement a hard look against the background of the dangers of hearsay.

[440] The threshold test to be applied under s 18(1)(a) is a different exercise, and involves a different test, to that set out in s 7. But obviously the evidence has to be relevant and so the s 7 test, as well as that under s 8, must also be met.

[441] The exercise involved is a threshold one and does not involve a general review of the overall evidence or of the Crown case.

[442] Circumstances are widely and inclusively defined. The context in which the circumstances of reliability are being assessed may be relevant to the assessment of some of these circumstances. Further, some circumstances may call for a broader inquiry into other evidence.

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552 Above at [115].

[443] As this Court said in *Gwaze*, all of the circumstances need to be considered, although that will not necessarily require a slavish examination under each of the separate headings in s 16(1)(a)–(e) in every case.

[444] The exercise is an evaluative one dependent on the facts. This means it is difficult to be any more prescriptive about the test.

[445] We add that the dangers of hearsay will also be relevant to the application of the s 8 test as the inability to cross-examine may impact on fair trial rights. The right in s 25(f) of the New Zealand Bill of Rights Act 1990 to examine the witnesses for the prosecution is also significant in this respect.

Application of the principles to this case

[446] In issue here is the admissibility of two statements. To put those statements in context we note that, prior to his death on 10 July 2019, Mr Maney spoke to police on two occasions after the murder of Mr Rikihana. On the first occasion, on 8 February 2019, just over a week after the murder, he said he knew nothing about the death of Mr Rikihana.

[447] The first of the hearsay statements is a letter written by Mr Maney that appeared to have been written on the day of Mr Rikihana's death, 30 January 2019. The letter suggested it was re-started part way through after Mr Jury's first visit to Mr Maney that night. It was addressed to Mr Maney's son, "Styles" Maney. Styles Maney was in prison at the time. In the letter, Mr Maney said Mr Jury came to Mr Maney's home with Mr Rikihana tied down in the back of his car. The letter recorded a fight between Mr Rikihana and Mr Jury and that Mr Jury was giving Mr Rikihana "heaps of kickings". It also stated that Mr Jury left the property with Mr Rikihana tied down in the back of the car.

[448] This letter was found by police when they executed a search warrant at Mr Maney's address. The police also located 7.5 g of crystalline powder and some ammunition during this search. No charges were laid in relation to these items. The explanation for that was put down to a question of resources.

[449] Police spoke again with Mr Maney on 18 February 2019. As the Court of Appeal described:[553]

> On this occasion, he signed a statement in which he said Mr Jury had come to his home twice on the night of 29 January 2019/in the early hours of 30 January 2019 and that on the second occasion Mr Jury had Mr Rikihana in the back of his car. According to Rex Maney, Mr Jury asked for some rope, which Rex Maney gave to him. Mr Jury then returned to his car and Rex Maney told police he could hear yelling and the sound of someone being kicked.

[450] Addressing first the nature of the statements, both purport to record matters within Mr Maney's personal knowledge. It is not disputed that the handwriting of the letter is Mr Maney's. Unlike the police statement of 18 February 2019, which Mr Maney signed and initialled, the letter is not a formal document. However, the police record of the conversation includes what purports to be confirmation of the fact the letter was in Mr Maney's handwriting, was to his son and was dated by him.

[451] In terms of their contents, both statements are completely at odds with Mr Maney's first statement to the police in which he maintained he had no knowledge of the events surrounding Mr Rikihana's death. Given these inconsistencies, in agreement with Powell J, it is difficult to place weight on the fact the record of the conversation with the police meets the formalities.

[452] Nor do the circumstances that relate to the making of the statement provide a great deal of assurance about reliability. We emphasise first, as Powell J noted, that Mr Maney was aware his statements could be used in court proceedings and acknowledged it was an offence to provide false or misleading evidence. However, he had no compunction in advancing two "fundamentally inconsistent stories".[554] There are also inconsistencies, albeit lesser in degree, between the letter and the police record of the conversation.

[453] Both the letter and the record of conversation were made reasonably close in time to the relevant events. That said, while the letter was advanced as voluntary and unprompted, it was fortuitous that it was unposted for nearly two weeks and left on a

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553 *Jury v R* [2024] NZCA 320 (Cooke, Collins and Osborne JJ) at [18].
554 *Jury v R* [2020] NZHC 736 at [14(b)] (Powell J).

table to be seen during the (probably inevitable) police search of Mr Maney's house. The Court of Appeal rejected the suggestion that there were explicit inducements, but it must be said that the situation was not an auspicious one for Mr Maney. Police had their suspicions about his involvement in Mr Rikihana's death.

[454] As to questions of veracity and accuracy, it is possible to draw support on these aspects from the other Crown evidence. As the Court of Appeal noted, much of what was said in Mr Maney's letter and second police statement was consistent with the key statements of other witnesses, so it does come within the definition of circumstances relating to the statement. Particular reference can be made to the evidence of Ms Eketone, the evidence of the pathologist and the forensic evidence, all of which indicates Mr Jury's involvement in the offending in a manner consistent with much, although not all, of the detail given by Mr Maney. On the other hand, as the appellant says, there are some differences. The evidence of CCTV coverage from Constable Collier is inconsistent with Mr Maney's second statement. More specifically, the car driven by Mr Jury could only have visited Mr Maney's once after the altercation at Mr Rikihana's house, rather than the two visits Mr Maney describes.[555]

[455] We interpolate here that we would not go beyond this key evidence in assessing reliability. As we have said, it is not a review of the Crown case but a more focused inquiry. Further, in this context, recognising the gatekeeping responsibility of the judge, it can be expected the judge would give evidence as to circumstances a hard look.

[456] However, when the hearsay evidence is viewed in light of all of the circumstances, we consider it was wrong to conclude that it provided the necessary reasonable assurance of reliability. Ms Eketone's evidence provides the strongest support because she describes a fight between Mr Jury and Mr Rikihana. Some of the other evidence does not eliminate Mr Maney. Added to that, the CCTV footage casts doubt on one aspect of Mr Maney's account—namely, his description of Mr Jury's two visits.[556] We reach that view because the two hearsay statements reflect a

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555 In this respect, see the discussion at [168]–[172] of Glazebrook and Kós JJ's reasons.

556 See above n 238 per Glazebrook and Kós JJ.

complete turnaround in approach by the maker who was under suspicion at the time. Plainly cross-examination might have assisted the jury to decide which statement, if any, was true. Further, Mr Maney had perverted the course of justice in not dissimilar circumstances.[557] As the appellant submits, the proposition that Mr Maney would send a record of the events as described in the letter to his son in prison where the letter could well be read by prison authorities, is implausible. Leaving the letter there to be found by police is a further reason for caution, albeit these things also served to provide ammunition for the defence at trial. The obvious conclusion is that these were the self-serving statements of someone with a motive to lie.

Impact of admission of the Maney evidence

[457] We agree with Glazebrook and Kós JJ that there has been a miscarriage of justice although we consider that the admission of the hearsay evidence would not have occasioned a miscarriage of justice had a reliability warning been given. That is primarily because Mr Maney's unreliability was obvious. As we reach the same outcome as Glazebrook and Kós JJ, we say no more about this aspect.

Application of the proviso

[458] We agree with Glazebrook and Kós JJ that the proviso was available and with the conclusion it was applicable here.

WINKELMANN CJ

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Introduction

[459] The majority find that Mr Maney's hearsay statements should not have been admitted at trial. I agree. The majority go on to conclude that despite the real risk that the outcome of the trial was affected, there has been no actual miscarriage of justice because they are sure of the appellant's guilt. They support that conclusion by reference to the remaining admissible evidence.

[460] I write in dissent because I would have quashed the appellant's conviction and ordered a retrial. This is on the basis that the error in admitting the hearsay statements, the error in judicial direction in connection with those statements and the error by trial counsel in failing to disclose and introduce the details of Mr Maney's conviction for perjury mean the appellant has not had a fair trial.

[461] There is another respect in which I differ from the majority. I disagree with aspects of their reasoning related to the interpretation and application of the test for admissibility of hearsay evidence under ss 16–18 of the Evidence Act 2006. In broad overview:

(a) Unlike the majority, I consider that some elucidation of the admissibility standard in s 18(1)(a) — which is contained in the phrase "reasonable assurance that the statement is reliable" — is necessary in light of the existing state of the Court of Appeal authorities. That elucidation is achieved by situating the phrase within the statutory scheme.

(b) I disagree with the majority's formulation of the approach required under ss 16(1) and 18(1)(a) for determining the admissibility of

hearsay evidence.[558] My disagreement focuses upon the majority's interpretation of the phrase "the circumstances relating to the statement", which provides the framework for the reliability assessment. I do not consider that the majority's formulation accords with the meaning of that phrase as ascertained from its text and purpose, and by reference to its legislative history. Their formulation carries with it an increased risk of miscarriage of justice which is known to be associated with the admission of hearsay evidence, and, in my view, provides inadequate assistance to trial judges as to the nature of the s 18(1)(a) task.

(c) I disagree also with the majority's application of ss 16–18. While noting that the application differs between the two sets of reasons, I consider that each errs in assessing the reliability of Mr Maney's hearsay statements with reference to Crown evidence which is not directly related to the circumstances of those statements, and in adopting that approach in a search for support for — or contradiction of — the contents of the statements. As is apparent from the legislative history and the text of the relevant provisions of the Evidence Act, a search for corroboration was rejected as an element of the test to be applied.[559]

[462] My reasons are structured as follows:

(a) the interpretation of ss 16–18 of the Evidence Act;

(b) the application of those provisions to this appeal; and

(c) the appropriate remedy for the appellant, addressing whether the threshold of unfair trial is reached.

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[558] See above at [115] per Glazebrook and Kós JJ and [437]–[445] per Ellen France and Miller JJ.
[559] See below at [484]–[502].

Interpretation of ss 16–18 of the Evidence Act

[463] Under s 17 of the Evidence Act, a hearsay statement in a criminal proceeding is not admissible except as provided for in pt 2, subpt 1 of the Act, which relates to hearsay evidence, or by the provisions of any other Act.[560] There are several reasons for this presumptive inadmissibility:

(a) Because hearsay evidence cannot be tested by opposing counsel through cross-examination, the jury is deprived of the usual means of assessing its reliability by reference to limitations in the statement maker's personal knowledge, perception, memory, sincerity, credibility, truthfulness, observational skills and narrational accuracy.[561]

(b) The fact that the maker of the statement will not give evidence under oath — and therefore lacks the potential sanction of prosecution for perjury if they lie to the court — exacerbates the risk that concocted or wholly fabricated evidence will be introduced into a proceeding through the admission of hearsay statements.

(c) Where hearsay evidence is relied upon by the prosecution, s 25(f) of the New Zealand Bill of Rights Act 1990 (Bill of Rights) is engaged. That provision affirms as a minimum standard of criminal procedure the defendant's right to examine the witnesses for the prosecution.

[464] Hearsay evidence therefore carries the inherent dangers that it may contain misperception, flawed recollection, misinterpretation or lies, and that its admission may amount to a limitation of affirmed constitutional rights which is not justified by law, as required under s 5 of the Bill of Rights.

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560 Evidence Act 2006, s 17(a). The other exception to the presumption of inadmissibility is where the Act provides that pt 2, subpt 1 does not apply, and the hearsay statement is relevant and not otherwise inadmissible under the Act: s 17(b).

561 See Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) [NZLC Options Paper] at [7] citing Law Reform Commission of Canada *Hearsay: a study paper* (Ottawa, 1974) at 5.

[465] That said, when assessed with reference to the circumstances relating to it, some hearsay evidence may be sufficiently reliable that it would not be in the interests of justice for it to be excluded. Prior to the enactment of the reforms contained in the Evidence Act, attempts by courts to differentiate reliable hearsay from unreliable hearsay led to the development of complex, and at times unsatisfactory, interpretations of existing statutory provisions and common law rules governing admissibility. This legal framework was highly technical, and involved applying categories of narrow exception rather than evaluating the necessity for or reliability of the hearsay evidence in question.[562] In particular, it was premised on the idea that certain defined categories of hearsay statement such as dying declarations, business records, or utterances forming part of the event (the latter referred to as res gestae) were intrinsically trustworthy. While considerations of reliability were typically reflected in the creation of the category, the associated principles were unclear and were not always explicitly focused on circumstantial reliability.

[466] The drafting of the Evidence Act was informed by difficulty and dissatisfaction with a body of law which provided for admissibility decisions to be made by reference to a series of situation-specific exemptions. Te Aka Matua o te Ture | Law Commission observed in 1991 that "[a] plethora of exemptions has grown up around the [hearsay] rule, causing complication and confusion in its application and an artificial and technical approach to its interpretation".[563] The Law Commission's view was that the hearsay rule should operate to exclude evidence only where there were sound policy reasons for so doing.[564] It sought an approach that would rationalise the existing rule "without the need to define a large number of exceptions (which would lead to a continuation of the present complication and technicality)", and provide a clear and workable rule to govern the admission of hearsay in criminal cases.[565] Those intentions underpin s 6(a), which states that one of the purposes of the Evidence Act is to help secure the just determination of proceedings by providing for facts to be established by the application of logical rules.

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562 In setting out the rationale for the reforms, the Law Commission drew upon John Henry Wigmore and James H Chadbourn *Evidence in Trials at Common Law* (4th ed, Little, Brown and Co, Boston, 1974) vol 5 §§ 1420–1422: see NZLC Options Paper, above n 561, at [8]–[9].

563 Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) [NZLC Discussion Paper] at vii.

564 At vii.

565 At vii.

The principled nature of the framework created by the Evidence Act is also apparent in s 12, which requires that decisions be made with regard to the Act's principles and purpose, even in respect of evidential admissibility matters that are beyond the scope of the Act.

[467] The hearsay rules contained in the Evidence Act provide limited exceptions to the presumption of inadmissibility. The present appeal engages the exception contained in paras (a) and (b)(i) of s 18(1), which provides that hearsay evidence is admissible where the maker of the statement is unavailable as a witness and the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable.[566] Although the Act's underlying admissibility criteria are not referred to in ss 16–18, I agree with the majority that the path to admissibility for hearsay evidence is clearly subject to the ss 7–8 gateway — a point to which I return.[567]

[468] Section 16(1) is the interpretation provision for the hearsay subpart of the Evidence Act and a focus of this appeal. It defines circumstances as follows:

> **circumstances**, in relation to a statement by a person who is not a witness, include—
>
> (a) the nature of the statement; and
>
> (b) the contents of the statement; and
>
> (c) the circumstances that relate to the making of the statement; and
>
> (d) any circumstances that relate to the veracity of the person; and
>
> (e) any circumstances that relate to the accuracy of the observation of the person

[469] Ellen France and Miller JJ observe that this definition is not exhaustive.[568] In interpreting the scope of s 16(1), the majority find that "[c]ircumstances are widely

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566 Provided there is a reasonable assurance of reliability in terms of s 18(1)(a), hearsay may also be admissible if the judge considers calling the witness would result in undue expense or delay: s 18(b)(ii).

567 See below at [475] and [479]–[481]. See also above at [98], [109], [112] and [115] per Glazebrook and Kós JJ and [414] and [440] per Ellen France and Miller JJ; and Law Commission | Te Aka Matua o te Ture *Evidence: Reform of the Law* (NZLC R55, 1999) vol 1 [NZLC Report] at [52] citing *R v Smith* [1992] 2 SCR 915 at 937 per Lamer CJ.

568 Above at [422].

and inclusively defined", that "[t]he context in which the circumstances of reliability are being assessed may be relevant to the assessment of some of these circumstances", and that "some circumstances may call for a broader inquiry into other evidence".[569] As I come to, the application of the s 16(1) definition of "circumstances" in each set of reasons suggests that the majority consider a search for corroboration between the statement and the other evidence to be called at trial forms a legitimate part of the inquiry that must be undertaken to satisfy the requirements for admissibility under s 18(1)(a).

[470] The text of ss 16(1) and 18(1)(a) makes it clear that the issue for the court in determining admissibility is whether there is reasonable assurance as to the reliability of the hearsay statement. The text also makes it clear that reliability is to be tested through reference to circumstances related to the statement and its maker. The inquiry is limited by these parameters. To adopt a broad approach to s 16(1) — pushing beyond those parameters, as the majority does — is, in my view, to misread the text of the legislative provisions, to ignore the legislative history, and to overstate the significance of the 2010 Court of Appeal decision in *Mills v R*.[570] It is an approach which opens the door to some of the risks that ss 16–18 were intended to avoid.

Text of the legislative provisions

The s 18(1)(a) threshold

[471] First, looking to the text of the hearsay subpart of the Act, the phrase "reasonable assurance that the statement is reliable" in s 18(1)(a) is the general standard that must be met in a criminal proceeding to establish an exception to the s 17 presumption of inadmissibility.[571]

[472] Mr Stevenson KC draws on Canadian, Australian and United Kingdom case law as well as dictionary definitions in his submission for the appellant that the word "assurance" denotes a very high level of confidence in the hearsay statement's

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569 Above at [422] and [442] per Ellen France and Miller JJ; and see at [115] per Glazebrook and Kós JJ.

570 *Mills v R* [2010] NZCA 286.

571 Section 18 provides for "General admissibility of hearsay". In any given case, one or more of the other exceptions in s 17(a)–(b) may apply.

reliability.[572] He submits that it requires more than a possibility, a likelihood or a probability. Rather, it must be something closer to a certainty and is "an *exacting standard*".

[473] Ms Johnston and Ms Hamill for the Crown submit that the threshold proposed by the appellant would usurp the constitutional role of the jury and is not supported by overseas jurisprudence or the plain terms of the Evidence Act. Drawing upon Court of Appeal authority, the Crown submits that there is a settled approach to interpreting the s 18(1)(a) threshold, such that threshold reliability "simply means the evidence is reliable enough for the fact finder to consider and draw conclusions as to its weight".[573] Significant issues as to the credibility of the hearsay evidence, the Crown submits, will not prevent it from meeting the required reliability threshold where counsel can make submissions at trial, call evidence pointing out the credibility issues, or meet those credibility issues with other evidence. Moreover, the Crown argues, the judge can have regard to other evidence if that evidence corroborates the statement.

[474] Glazebrook and Kós JJ find that while overseas jurisprudence is not directly relevant as the main issue in the interpretation of the New Zealand statutory provisions, the common touchstone of reliability means it can nevertheless still be relevant.[574] Beyond those comments, the majority do not expand upon the phrase "reasonable assurance that the statement is reliable". They say instead that s 18(1)(a) "means just what it says".[575]

[475] I agree with the majority that neither formulation proposed by counsel is correct. Mr Stevenson's formulation, which draws upon jurisprudence from other jurisdictions, does not grapple with the statutory scheme of the Act as it relates to hearsay evidence in New Zealand criminal trials. On the other hand, on the Crown's analysis, very serious concerns as to reliability of the hearsay evidence would be able

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572 See *R v Khelawon* 2006 SCC 57, [2006] 2 SCR 787 at [39]; *R v Bradshaw* 2017 SCC 35, [2017] 1 SCR 865 at [31] per McLachlin CJ, Abella, Karakatsanis, Wagner and Brown JJ; and *Regina v Riat (Jaspal)* [2012] EWCA Crim 1509, [2013] 1 WLR 2592.

573 Citing *Rongo v R* [2023] NZCA 626 at [40] in turn citing *Anderson v R* [2020] NZCA 106, [2020] 3 NZLR 429 at [78], *Adams v R* [2012] NZCA 386 at [25]–[28] and *TK v R* [2012] NZCA 185 at [23].

574 Above at [90]–[95].

575 Above at [115] per Glazebrook and Kós JJ and [438] per Ellen France and Miller JJ.

to be put to one side at the threshold stage if the judge considers that counsel can make reliability issues clear through the trial process, or on the basis that there is other evidence that corroborates the narrative contained in the hearsay evidence. On this approach, the phrase "reasonable assurance that the statement is reliable" comes to resemble something closer to the requirement for mere relevance as provided under s 7 of the Act. Indeed, it could arguably be a lesser standard than that under s 7.

[476] The Crown is right, however, that the Court of Appeal has on a number of occasions articulated the threshold as simply being that the evidence is reliable enough for the fact-finder to consider and draw conclusions as to its weight.[576] That proposition was quoted with approval by the Court of Appeal in the present case.[577] When the various decisions relied upon for that proposition are considered, it seems unlikely that the court was intending to displace the statutory threshold, or indeed applying a lesser threshold on the facts of each case. The 2012 decision in *TK v R*, for instance, applied an approach that was closely guided by the statutory scheme and calibrated to observe the statutory threshold.[578]

[477] From the decisions of the High Court and Court of Appeal in this case, however, it is apparent that this articulation has come to be understood as permitting facially unreliable evidence to be admitted where the judge's assessment is that any unreliability identified by the judge can be exposed for the jury's consideration through submissions or other evidence at trial.[579]

[478] This formulation of the s 18(1)(a) threshold, and this approach to the reliability assessment, are wrong. It is for the judge to undertake the ss 16(1) and 18(1)(a) inquiry to satisfy themselves as to whether *they* are reasonably assured of the statement's reliability when determining whether the statement is admissible. As already explained, this threshold protects fair trial rights and proceeds on the basis that it is unfair to the other party if hearsay statements are placed before the jury where

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576 See above n 573.

577 *Jury v R* [2024] NZCA 320 (Cooke, Collins and Osborne JJ) [CA judgment] at [55]–[56] citing Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV18.02].

578 *TK v R*, above n 573, at [21]–[27].

579 See *R v Jury* [2020] NZHC 736 (Powell J) and CA judgment, above n 577.

there are significant indicators to be found in the circumstances relating to the statement that the statement is unreliable.[580]

[479] To the extent that further elucidation is needed, the statutory scheme itself provides it. The focused inquiry required under s 18(1)(a) is designed to support assessment of the statement's reliability with reference to the statement's own specific features and characteristics to ensure that its admission is neither unfair nor likely to lead to miscarriage of justice. Where the ss 16(1) and 18(1)(a) exercise raises significant concerns as to the reliability of the statement, the judge will not be reasonably assured as to its reliability. To admit apparently unreliable evidence on the basis that it can be tested before the jury is to equate the ss 16–18 test with the s 7 gateway in a way that undermines the former's protective purpose.

[480] The Crown submits that the ability of opposing counsel to challenge the reliability and accuracy of the evidence through submissions and other evidence is a matter to be taken into account at the s 18(1)(a) stage. These are issues that do arise for the judge when addressing admissibility — but not under s 18(1)(a). As already noted, hearsay evidence remains subject to ss 7–8 of the Act. Section 8(1)(a) provides for a general exclusion of evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding. Section 8(2) provides that in a criminal proceeding, in making this determination, the judge must also take into account the right of a defendant to offer an effective defence.

[481] Consideration of the effects of the Evidence Act's other provisions on the meaning of the s 18(1)(a) threshold must also account for the role of s 122. As I discuss below, the Law Commission conceived of the requirement for the judge to consider whether to issue a reliability warning to the fact-finder as being an integral element of the statutory scheme.[581] I agree with Glazebrook and Kós JJ that the possibility of a s 122 warning cannot affect the analyses under ss 8 and 18, and that s 122 neither lowers the threshold for admissibility nor tips the scales in favour of admission.[582] As they rightly note, s 18 operates to admit hearsay statements only if

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580 See above at [463]–[464].
581 See below at [496] and [501].
582 Above at [113] citing *R v Kereopa* HC Tauranga CRI 2007-087-411, 11 February 2008 at [30].

those statements meet the threshold of reasonable assurance of reliability, and evidence may be both admissible and ultimately unreliable when considered in light of all the evidence at trial.[583]

[482] As this framework suggests, the judge need not be *sure* of the statement's reliability, and it would be a mistake for the judge to search for satisfaction that approached the level of certainty. The statutory scheme proceeds on the basis that the s 18(1)(a) assessment is undertaken prior to trial, at a time when the extent of the evidence that will ultimately be available to the fact-finder is still unknown. The fact-finder will have access to all of the evidence and will have the assistance of judicial direction in making its assessment as to the weight to be attached to the hearsay statement. As a matter of the correct observance of constitutional roles, an assessment of how the statement stands against the other evidence at trial is not for the judge. To overstate the level of assurance required to satisfy the s 18(1)(a) threshold would prevent admission of evidence that may provide assistance to the fact-finder.

[483] The Crown submits that it is appropriate for the judge, when undertaking the threshold reliability assessment, to have regard to the extent that other trial evidence supports or contradicts the contents of the statement. As outlined above and as I discuss in the next section, the s 18(1)(a) inquiry provided for in the Evidence Act does not require or permit such a search for corroboration.

The definition of "circumstances": s 16(1)(a)–(e)

[484] The focused nature of the s 18(1)(a) inquiry is apparent from the definition of "circumstances" contained in s 16(1). The circumstances listed there all refer to the statement itself — that is, the form it takes, what it contains, and how it was made — and to the competence and reliability of the statement's maker. There is no suggestion that a general review of other evidence is contemplated as forming part of this inquiry. While the term "includes" is used to introduce the list of types of circumstances in the s 16(1) definition, the identified types provide assistance as to circumstances that fit the statutory description of "circumstances relating to the

583 Above at [113].

statement". Each type of circumstance in the list bears directly on the statement or its maker. Consideration of the defined circumstances, then, provides support for the conclusion that the s 16(1) inquiry is intended to be limited to circumstances directly relating to the statement. As I come to below, this approach finds support in the publications prepared by the Law Commission.[584]

[485] Section 16(1)(a) refers to "the nature of the statement", in the sense of its inherent character. Hearsay statements can include notes, signed and unsigned statements, digital documents, electronic communications, oral exchanges, sound and video recordings, and gestures and other forms of non-verbal conduct.[585] Whether the statement is offered in its original form or whether it has subsequently been recorded, written up as a signed statement, translated or revised may be material to assessing its nature.[586] While different considerations may apply to different types of statements, the s 16(1)(a) inquiry calls for a reliability assessment which is based in the first instance upon characteristics referrable to the statement's own distinct type.

[486] By contrast, the focus of s 16(1)(b) is on "the contents of the statement". Among other matters, assessment under s 16(1)(b) might consider the subject matter covered in the statement; the level of detail contained in the statement; how definitive or equivocal the statement purports to be; whether it contains opinion evidence or speculation; whether it contains internal inconsistencies or contradictions; and whether it contains first hand or multiple hearsay. There may well be considerable overlap between paras (a) and (b), and it is of note that in the early drafts of the proposed Evidence Code, the Law Commission combined these two aspects of the s 16(1) inquiry in a single paragraph.[587]

[487] The majority construe the reference to "the contents of the statement" in s 16(1)(b) as inviting a comparison with the contents of other evidence to provide reassurance that the hearsay statement is substantively consistent with that

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584 See below at [495], [497], [502] and [517].

585 See for example *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734; *Mills v R*, above n 570; *Adams v R*, above n 573; and *TK v R*, above n 573.

586 See for example *Adams v R*, above n 573, at [35]–[36].

587 See NZLC Discussion Paper, above n 563, at 33; and Te Aka Matua o te Ture | Law Commission *Evidence: Code and Commentary* (NZLC R55, 1999) vol 2 [NZLC Draft Code and Commentary] at 44 and [C76].

other evidence. Ellen France and Miller JJ state that considerations of "contents" will often make no sense if not compared to other evidence.[588] Glazebrook and Kós JJ state that consistency of other evidence would be most useful as an indicator of reliability where that consistency relates to the "core aspects" of both the statement and the other evidence, and they go on to apply this principle when assessing the contents of Mr Maney's hearsay evidence.[589] But s 16(1)(b) does not expressly require or even implicitly invite comparison of the contents of the hearsay statement with the contents of any other evidence, or assessment of the extent to which the hearsay statement is corroborated by such evidence. The hearsay statement's own contents constitute the relevant circumstance. Had s 16(1)(b) been intended to invite a general inquiry with reference to any evidence that bears upon the credibility of the statement's contents, then it would be logical for that to have been stated in the provision.

[488] Section 16(1)(c), which refers to "the circumstances that relate to the making of the statement", captures matters such as the physical environment in which the statement was made, and when and how it was made. That means it is likely to capture circumstances which, under the pre-Act common law, would have been referred to as the res gestae — when a statement is made as part of, or close in time to, the events to which it relates. At common law, the fact that a statement was proximate in time to the events and made as a spontaneous response to them was seen as an indicator of its reliability, since such a statement was unlikely to be concocted in the heat of the moment.[590] Statements engaging the res gestae principle therefore constituted a category-based exception to the hearsay rule. Other relevant circumstances under s 16(1)(c) might be evidence that the statement was made in accordance with, or against, a maker's own interest, or that it was made in response to an incentive — all factors bearing upon reliability. Again, there is the possibility for overlap between the strands of the inquiry since a declaration against interest or a self-serving statement may engage s 16(1)(b) as well.[591]

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588 Above at [433].

589 Above at [104] and [168]–[171].

590 See NZLC Options Paper, above n 561, at [25].

591 See Scott Optican and Elisabeth McDonald (eds) *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [EV16.03.01(2)] citing *Commissioner of Police v Hayward* [2013] NZHC 1358 at [32] and *Kavanaugh v R* [2023] NZCA 316 at [42].

[489] Paragraphs (d) and (e) of s 16(1) permit inquiry into any circumstances relating to the veracity of the statement maker and to the accuracy of the observation of that person. It should be noted that the para (e) inquiry relates to circumstances which may have impacted upon the observational acuity of the person, hence the language referring to "circumstances that relate to the accuracy of the observation of the person". It does not invite comparison of the hearsay statement with other forms of evidence at trial in order to verify the accuracy of the statement's contents. It should also be noted that because paras (d) and (e) both begin with the determiner "any", they provide that there may in fact be no circumstances relevant to the maker of the statement which require consideration in assessing the statement's threshold reliability.[592]

[490] Overall, then, the s 16(1) criteria show an intention to circumscribe the evidence to which the judge should refer in undertaking the reliability assessment. All of the listed criteria can properly be categorised as relating directly to the circumstances of the statement. There is a logic to this. As noted above, admission of a hearsay statement deprives the opposing party of the right to cross-examine the maker of the statement in relation to matters bearing upon the statement's reliability.[593] If the hearsay evidence is to be called for the Crown, it engages the s 25(f) right of those charged with an offence to examine the witnesses for the prosecution.[594] Counsel for the opposing party can still make submissions as to how the hearsay evidence fits with and ought to be weighed against the other evidence by the fact-finder.

Section 22

[491] Further support for the circumscribed nature of the assessment that the judge is required to make under s 16(1) is found elsewhere in pt 2, subpt 1 of the Act. Section 22(2) requires that a party in a criminal proceeding who wishes to offer a

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592 Compare *R v Gwaze*, above n 585, at [45] where Elias CJ, giving the reasons of the Court, stated: "the definition of 'circumstances' for the purpose of hearsay evidence makes it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making".

593 See above at [463]–[464].

594 See above at [463(c)].

hearsay statement in evidence must serve a written notice on every other party advising of that intention and providing other stipulated information. As provided by s 22(1)(b)–(c), this must be done unless every other party or the judge waives the requirement. Where the s 22 admissibility pathway is relied upon — as it was in this case — the written notice must stipulate the reasons for the witness's unavailability and the circumstances relating to the statement that provide reasonable assurance that the statement is reliable.[595] The notice must be served before the hearing to provide other parties with a fair opportunity to respond.[596] The s 22 procedure does not indicate any legislative intention that a party proposing to offer a hearsay statement may invoke a widespread review of the evidence to be produced at trial. Nor does it suggest a legislative intention that the judge should undertake any such review in determining whether the statement is admissible.

Sections 28(2) and 34(2)

[492] Ellen France and Miller JJ rely on ss 28(2) and 34(2) of the Evidence Act as supporting their view that circumstances in s 16(1) is "defined widely".[597] I do not see that these provisions provide such support. Section 28(2) deals with statements of a defendant offered by the prosecution in a criminal proceeding. If the reliability of the statement is put at issue, the statement must be excluded unless the judge is satisfied on the balance of probabilities that the circumstances in which it was made were not likely to have adversely affected its reliability. Section 34(2) deals with the admissibility of an admission offered in civil proceedings and provides that the general hearsay provisions in the Act do not apply to this category of evidence. The pathway to admission of such statements is the consent of the other party, or the judge being satisfied that "the circumstances relating to the making of the admission provide reasonable assurance that the admission is reliable".[598] The criterion of circumstances relating to the making of the statement in each of these sections corresponds to s 16(1)(c) and is undoubtedly therefore a very circumscribed inquiry, given that it omits the other indicia of reliability set out in s 16(1). But that of course does not

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595 Section 22(2)(f) and (d). Section 22(5) does provide that the judge may dispense with the requirements of s 22(2)–(4) if certain factors apply in a particular case.

596 Section 22(4). Again, s 22(5) may provide an exception to this requirement in particular cases.

597 See above at [422] and n 537.

598 Section 34(2)(a)–(b).

mean that the s 18(1)(a) inquiry — approached via the s 16(1) definition — is wide. It merely means that it is not *as* circumscribed as the tests in ss 28(2) and 34(2).

Legislative history

Law Commission Options Paper (1989)

[493] The Act began its gestation with the 1989 options paper *Hearsay Evidence.*[599] In that paper, the Law Commission considered how the complexity and inconsistencies associated with the hearsay rule — then to be found in a mixture of statutory provisions and case law — might be addressed in a new legislative regime. Distilling the principles to be drawn from this body of law, the Law Commission noted that the common law and statutory exceptions which existed at that time mostly came down to cases where there was good reason for not requiring the maker of the statement to testify in person, and where there were "circumstantial guarantees as to the reliability of the evidence".[600]

[494] In setting out policy issues raised by the prospect of reform, the Law Commission identified concerns that the law of hearsay evidence was "out of tune" with the needs of cases being dealt with in the courts, and that the courts had not succeeded in working out or articulating rules supplying deductive answers to practical problems in respect of the hearsay rule.[601]

Law Commission Discussion Paper (1991)

[495] As a consequence of the 1989 options paper, the Minister of Justice asked the Law Commission to make recommendations for reforms that would make the law of evidence "as clear, simple and accessible as is practicable".[602] In its subsequent 1991 discussion paper *Evidence Law: Hearsay*, the Law Commission proposed replacing all existing category-based hearsay exceptions with a single broad exception which

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599 NZLC Options Paper, above n 561.

600 At [9]–[10] citing Wigmore and Chadbourn, above n 562, at ch 45.

601 At vi citing *R v Baker* [1989] 1 NZLR 738 (CA) at 741 per Cooke P.

602 See Elisabeth McDonald "Going 'Straight to Basics': The Role of Lord Cooke in Reforming the Rule Against Hearsay — From *Baker* to the Evidence Act 2006" (2008) 39 VUWLR 143 at 143; and Te Aka Matua o te Ture | Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, 1996) at ix.

would be subject to the underlying principle of "reasonable assurance of reliability", and which would be supported by procedural safeguards providing for mandatory notice requirements in criminal proceedings.[603] Describing the effect of the proposed reform, the Law Commission explained it as "dispensing with the categories of hearsay evidence which are supposedly based on reliability and placing the focus directly on the reliability of the particular hearsay evidence", and "avoiding the technical and detailed requirements which inevitably come with a categories approach".[604] The objective of the reforms was to enable the judge to assess the statement in the light of all of its circumstances, and to determine whether it was sufficiently reliable to be admitted notwithstanding its hearsay nature.[605]

[496] The need to give effect to the constitutional protections enacted in the Bill of Rights was acknowledged in the Law Commission's proposed approach. Noting the potential for tension between the restrictions of the hearsay rule and the right of an accused to present evidence, the Law Commission offered the view that the balance would be "best dealt with by a rule which emphasises reliability as the basis for admission".[606] The Law Commission also discussed the desirability of judicial warnings about hearsay evidence.[607]

[497] The Law Commission delineated the proposed scope of the reliability inquiry in the following terms:[608]

> In some cases where the hearsay is contentious a detailed assessment of the circumstances relating to the particular statement will be required — such as its nature and contents, the circumstances in which it was made (including evidence from other witnesses that they heard the statement), and the credibility of the declarant (including any motive to manufacture evidence). Matters which will not, however, be relevant in relation to the admissibility of the statement are the credibility of the witness who relates the hearsay and the consistency of the statement with other evidence not directly related to the statement. Those matters should be canvassed before, and assessed by, the fact-finder.

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603 NZLC Discussion Paper, above n 563, at [31], [38]–[42], [47]–[55] and [C13]–[C20].
604 At [C13].
605 At [31].
606 At [33].
607 At [57]: see also NZLC Report, above n 567, at [70].
608 NZLC Discussion Paper, above n 563, at [34].

[498] The Law Commission went on to explain that the distinction between circumstances relating to the statement and all other evidence in the case was important for both logical and practical reasons:[609]

> Logically, the general strength of the case does not affect the reliability of individual items of evidence. Indeed, if the distinction is not made, hearsay which the circumstances relating to the statement indicate to be reliable, may tend to be held inadmissible because other evidence is contradictory or neutral. From a practical point of view, drawing the distinction also enables the court to consider a reasonably limited set of circumstances when determining whether the statement should be admitted (although it will still be necessary on occasions for the judge to hold a voir dire). Moreover, limiting the relevant circumstances to those relating to the statement means that admissibility can be determined at the time the statement is offered in evidence.

[499] To aid interpretation of the proposed admissibility exception which would rely on reliability, the discussion paper set out a definition of "circumstances relating to the statement" in its draft Evidence Code.[610] This included:[611]

> (a) the nature and contents of the statement; and
>
> (b) the circumstances in which the statement was made; and
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> (c) any circumstances that relate to the credibility of the maker of the statement.

Accompanying commentary noted that the last of these factors may legitimately be used to raise issues concerning any motive on the part of the maker to manufacture evidence.[612]

[500] The Law Commission's discussion of the proposed mandatory notice requirement in criminal proceedings — which, as mentioned above, is enacted in s 22 — is also noteworthy.[613] The Law Commission considered that the practical problems of a notification procedure should not be overestimated since it "would not add much" to require the prosecution to include in its disclosure any information required to satisfy a notice requirement in relation to significant hearsay evidence, and it would not be difficult for an accused to comply with the "relatively simple" notice

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609 At [35].
610 At [C10] and [C13].
611 At 33.
612 At [C10].
613 See above at [491].

requirement proposed in the draft provisions.[614] Again, none of this is suggestive of a wide-ranging or expansively open-ended reliability inquiry.

Law Commission Report (1999)

[501] Having received strong support for its 1991 hearsay evidence proposals from the profession and interested community groups, the Law Commission published a final report on the evidence review and an accompanying draft Evidence Code and commentary in 1999.[615] Consistent with the overall aims of reforming the law so as to increase the admissibility of evidence that was relevant and reliable, *Evidence: Reform of the Law* recommended rules that would "provide a principled and much simplified approach to hearsay evidence".[616] The Law Commission affirmed the appropriateness of a reliability inquiry into the circumstances relating to the statement for determining admissibility — provided in the draft Code as s 16(1) — and noted that codification of a reliability test was very well supported in the submissions received.[617] The Law Commission also affirmed its intentions to codify the notice requirement for hearsay in criminal proceedings, and to codify a requirement for the judge to consider whether to provide a jury warning whenever hearsay evidence was admitted.[618]

[502] The draft Code that was provided as part of the report included all five of the factors found in the s 16(1) definition of "circumstances" as enacted.[619] In its accompanying commentary, the Law Commission noted that the factors listed in the s 16(1) definition were cumulative but may, on occasion, overlap.[620] Very clear exclusions were highlighted in terms which echoed the 1991 discussion paper. The Law Commission stated that the s 16(1) factors:[621]

> … do not include either the truthfulness of the witness who relates the hearsay or the consistency of the statement with other evidence not directly related to the statement … It is important to distinguish between circumstances relating

614 NZLC Discussion Paper, above n 563, at [51].
615 NZLC Report, above n 567; and NZLC Draft Code and Commentary, above n 587.
616 NZLC Report, above n 567, at [48].
617 At [52]–[54].
618 At [65]–[68] and [70]; and see NZLC Draft Code and Commentary, above n 587, at 54–55 and 242–244.
619 NZLC Draft Code and Commentary, above n 587, at 44 and 46.
620 At [C75].
621 At [C75].

> to the statement and other evidence in the case: hearsay that the circumstances relating to the statement indicate to be reliable should not be held inadmissible because it contradicts other evidence.

Mills v R

[503] The majority treat the 2010 Court of Appeal decision in *Mills v R* as supporting their conclusion that the s 16(1) inquiry is wide and may include trial evidence not directly related to the circumstances of the hearsay statement. Glazebrook and Kós JJ's reasons acknowledge that the Law Commission considered that consistency or inconsistency between a hearsay statement and other evidence in the case was not relevant for the purposes of assessing threshold reliability.[622] Their reasons also acknowledge that "[e]ven though circumstances are defined inclusively [in the Evidence Act] there is nothing in that definition that suggests general consistency or inconsistency with other evidence is an overriding consideration."[623] Nevertheless, the reasons go on to state:

> [104] That said, statements can be considered in context. As the Court of Appeal said in *Mills v R*, consideration of the circumstances does not preclude consideration of the facts of the case for contextual purposes, since "it is not possible to approach the reliability assessment in a complete vacuum".[624] In that regard, it may in some cases be helpful, in assessing threshold reliability, to have regard, to general consistency with other evidence, while taking into account that the other evidence has not been tested and may be incomplete and also taking care not to usurp the role of the jury. Consistency with other evidence would be most useful as an indicator of reliability where that consistency relates to the core aspects of both the statement and the other evidence.

[504] Ellen France and Miller JJ's reasons adopt a similar treatment of *Mills*. They too begin by noting that the task for the court is not to undertake a complete review of the overall evidence, and that the Law Commission made it clear there was not a requirement for corroboration — citing *Mills* in support of that first proposition.[625] Again, however, *Mills* is said to provide for an approach which allows that "some context may be relevant" on the basis that the evaluation of hearsay evidence "cannot be undertaken 'in a complete vacuum'", and it is not possible to

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622 Above at [102].
623 Above at [103].
624 *Mills v R*, above n 570, at [21].
625 Above at [424] citing *Mills v R*, above n 570, at [21].

approach the reliability assessment without some broader assessment.[626] Their reasons go on to conclude that because the court is not confined to the circumstances of the statement's making:[627]

> … [t]his enables a fairly broad range of matters to be considered although, where the Crown seeks to rely on a hearsay statement, the exercise provided for should not be seen as entailing a complete review of the statement as against the Crown case. Against this background, it is not possible to be prescriptive as to what comprises "reasonable assurance" as that will depend on the facts.

[505] The principal point to be made in relation to this approach is that the decision of the Court of Appeal in *Mills* — which was issued at a time when the courts were first grappling with how to interpret and apply the new statutory scheme — cannot justify setting to one side the statutory test. The text and scheme of the statute, especially when read against the legislative history, are as clear as they can be that only evidence of circumstances directly related to the statement is to be used for the reliability assessment.[628]

[506] The second point to be made is that the Court in *Mills* did in fact articulate the narrow nature of the statutory "circumstances" inquiry, and, for the most part, applied it. To the extent that there is any support for the majority's approach in statements made by the Court of Appeal in *Mills*, it comes from the reference within that decision to the former res gestae exception, which the Act was intended both to replace and displace. The term "context" as used by the Court in *Mills* harks back to the res gestae exception, which provided that where the statement was contextually proximate to the event or transaction in terms of place and time, there would be adequate reassurance as to its reliability.[629] Sections 16 and 18 do not use the term "context", instead repeatedly using close variants of the phrase "circumstances relating to the statement".

[507] Hearsay statements which would formerly have come under the res gestae exception are now assessed by reference to the statutory framework to assess their

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626 Above at [425] and [429] citing *Mills v R*, above n 570, at [21].
627 Above at [436].
628 See above at [484]–[502].
629 *Mills v R*, above n 570, at [2], [11]–[12] and [21].

reliability. The s 16(1)(c) aspect of the circumstances inquiry most closely aligns with the res gestae analysis, but it does not stand on its own. To the extent that they are relevant, the other criteria must also be considered. As I come to, the importance of this multidimensional assessment is apparent on the facts of this case. Mr Maney wrote a letter in a manner which suggested that at least part of it had been penned during the course of the offending or very shortly following it. But those circumstances of temporal proximity can only be ascertained from the content of the hearsay statements themselves, and when other circumstances listed in s 16(1) are considered, it appears possible that these "circumstances that relate to the making of the statement" were fabricated.

[508] *Mills* was an appeal against convictions for arson and murder. The Crown case was that the appellant had poured petrol on his wife while she was in bed, and had also poured petrol around their house and ignited it.[630] The appellant's wife, Ms Delzoppo, had escaped the fire and, while still conscious, made a statement to a neighbour, Ms Lambert, describing what her husband had done and asserting that he had then run away.[631] The defence case was that her statement was unreliable; the defence alleged that she was an alcoholic and had set herself on fire whilst drunk.[632]

[509] The Court in *Mills* began by referring to the ss 16(1) and 18(1)(a) framework under the Evidence Act. Rejecting an argument that the statement of Ms Delzoppo would have been analysed as a dying declaration under the pre-Act law, the Court said instead that it would have been analysed as res gestae.[633] The Court stated that "[t]he res gestae criteria adopted by the courts for determining admissibility of statements such as Ms Delzoppo's were closely associated with reliability", and hence also with the enquiry mandated by the Evidence Act.[634] At [11] of its decision, the Court then applied the res gestae criteria to Ms Delzoppo's evidence:

> (a) In a real sense, the events to which Ms Delzoppo was referring were still on-going. The house was still on fire. There were things to do, in particular getting Ms Delzoppo to the ambulance. That petrol had been poured on her and set alight was relevant to her condition and

630 At [4].
631 At [1].
632 At [6] and [13]–[14].
633 At [10].
634 At [11].

> thus perhaps her eventual treatment. And once Ms Delzoppo had said that the appellant had set her alight, his whereabouts were material to the continuing safety of the two women. The fact that he had run away was thus of contextual significance and presumably was of some reassurance to Ms Lambert. Ms Lambert was doing her best to assist Ms Delzoppo who, in this context, had every reason to be co-operative and candid.
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> (b) If it was not the appellant who poured petrol on Ms Delzoppo and set her alight, she must have done so herself. She could hardly have been mistaken. And the horrific nature of what happened and what must have been its overwhelming effect on Ms Delzoppo's thinking tell strongly against any concoction theory.

[510] Noting that while very similar considerations resulted in the same sort of evidence being admitted under the res gestae exception, the Court continued:[635]

> This Court generally prefers to address the interpretation and application of the Evidence Act without reference to the previous case law, and s 17 provides that hearsay statements are admissible only in accordance with the provisions of the Act. Accordingly, the res gestae cases cannot be directly relied on to admit the disputed hearsay evidence. However, in this instance we see the logic as to why Ms Delzoppo's statement would have been admissible at common law as equally relevant under the s 18 inquiry. In light of the considerations referred to in [11] we are of the provisional view that the circumstances associated with the making of the statement provide a reasonable assurance of its reliability.

[511] The Court went on to reject an argument that the statement should have been excluded as unreliable because the evidence suggested that Ms Delzoppo had been drinking.[636] The Court accepted the parts of her statements in which she said that petrol had been poured on her and in her house, and that her husband had run away.[637] These propositions were said to be "undoubtedly true" because they could be externally referenced to undeniable facts.[638]

[512] Finally, noting the implausibility of the defence theory, the Court said:

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635 At [12].
636 At [15]–[16].
637 At [16].
638 At [16].

> [21] When assessing reliability (including veracity), it is tempting to take into account all the considerations which are relevant to whether Ms Delzoppo's statement was accurate. These would include the implausibility of the alternative self-immolation theory and also the strength of the other circumstantial evidence implicating the appellant. But we accept that the overall statutory focus is on reliability rather than accuracy and that the s 18 inquiry must address this in light of circumstances (as defined) relating to the statement rather than in terms of the congruence between what Ms Delzoppo said and the overall facts of the case. But given items (a) and (b) of the definition of "circumstances" (the nature and contents of the statement) some context may be relevant. Indeed, as our discussion of the competence considerations [summarised above at [511]] shows … it is not possible to approach the reliability assessment in a complete vacuum. Clearly any tendency on Ms Delzoppo's part to lie can only be material if, in light of the other relevant circumstances (particularly those referred to in s 16), it detracts from the reliability of the statement in issue. And, if material, any such tendency is only one of a number of considerations which must [be] addressed.

[513] The Court went on to observe that "[t]he broader the 'circumstances' inquiry here, the stronger the case for the Crown as to reliability becomes."[639] On that basis, it was content to adopt a relatively narrow approach.[640] That enabled the Court to resist the temptation to take into account all the considerations that were relevant to whether the victim's statement was accurate — such as the strength of the circumstantial evidence against the defendant.

[514] The Court's treatment of "circumstances" in *Mills*, then, reflects a mixture of the common law res gestae approach and the test required under the Evidence Act. This was potentially problematic since, as the Law Commission had explained, the new Act was intended to dispense with the common law's category-based exceptions and to focus instead upon the reliability of the hearsay statement.[641]

[515] Even so, the Court's analysis in *Mills* in large part conforms with the requirements of the s 16(1) definition. Under the Act, the matters referred to by the Court in *Mills* at [11] come within s 16(1)(c) as being circumstances that relate to the making of the statement. These were circumstances in which, the Court concluded, Ms Delzoppo would not have lied. She had run out of a burning house and was badly burnt. She made the statement to her neighbour, who was attempting to render

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639 At [22].
640 At [22].
641 See above at [495].

assistance to her. While para [11] also involved some analysis of the contents of the statement, this was simply as a means of linking those contents to the circumstances in which the statement was made, to support the Court's conclusion that individual assertions within the statement were unlikely to be concocted. In this sense, it combined elements of the inquiries provided for under s 16(1)(b) and (c) and complied with the statutory test.

[516] Where the Court in *Mills* erred was in its later reference to other Crown-led evidence to corroborate the hearsay statement — that is, the forensic evidence that petrol had been poured on Ms Delzoppo and the house, the circumstantial evidence that the appellant had in fact left the scene, and the evidence given by the appellant to the interviewing detective.[642] This was not evidence directly related to the statement but rather evidence that tended to corroborate its content. In this respect, the Court's approach was inconsistent with the statutory provisions when properly interpreted and applied. It is an approach that undermines one of the purposes of the Evidence Act, as captured in s 6(a), in that it does not involve the application of logical rules. Once the boundary of circumstances directly related to the statement is crossed, it is difficult to draw a new boundary line. As a result, the test under ss 16(1) and 18(1)(a) becomes difficult to apply in any logical or principled way, suggesting that it is for the individual judge to decide what evidence they use to check the accuracy of the statement. A search for corroboration also undermines the clear statutory intention; as the Court of Appeal itself said in *Mills*, the inquiry is focused on "reliability rather than accuracy".[643] And finally, where corroboration is sought, the twinned risks are created that reliable evidence is excluded because it conflicts with other evidence, and that unreliable evidence is admitted because it is corroborated by other evidence. The likelihood of such a test contributing to miscarriages of justice is obvious. The Law Commission saw this risk and formulated the test to avoid it.[644]

[517] As the Law Commission also saw, requiring a judge to check the statement against other evidence to which it does not directly relate will tend to displace the role of the fact-finder at trial in assessing the reliability and the accuracy of the statements

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642 At [11(a)], [16] and [20]; see also at [4]–[6].
643 At [21].
644 See above at [496] and [501]–[502].

against the whole of the evidence.[645] It also raises obvious practical issues as to how a judge is to discharge such a task in advance of trial.[646]

[518] When undertaking the s 18(1)(a) reliability assessment, a series of Court of Appeal cases since *Mills* has reinforced the judge's ability to refer to evidence not directly related to the circumstances of the hearsay statement as being supportive of, or conflicting with, the statement. In *Anderson v R*, the Court of Appeal recited the submission made by the Crown in that case that reliance on "other extraneous evidence" had been sanctioned by the Court of Appeal decisions in *Preston v R*, *Nisha v R* and *Reid v R*.[647] Observing that the appellant did not dispute that the trial Judge was entitled to rely on confirmatory evidence in conducting the reliability assessment as a matter of law, the Court went on to find that the various consistencies in the case before it provided reasonable assurance of threshold reliability.[648]

[519] Commentaries on the Evidence Act have attempted to make sense of the resultant confusion. *Cross on Evidence*, for instance, cites *Mills* in support of the proposition that while reliability does not depend on congruences between what the statement maker asserted and the overall facts of the case, the overall facts may still be relevant to assessing the veracity of the person and the accuracy of their observations.[649] Ellen France and Miller JJ approvingly refer to that commentary at [432] above in support of what they term "a broader inquiry", and go on to refer to "the need for some external reference".[650] Glazebrook and Kós JJ state that context may be relevant and, in this regard, "consistency between the core aspects of the statement and other evidence is the most helpful".[651] The authors of *Mahoney on Evidence* narrate the *Anderson* line of authority and locate the Court of Appeal decision in the present appeal within that line.[652]

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645 See above at [497].
646 See above at [498].
647 *Anderson v R*, above n 573, at [74] citing *Preston v R* [2016] NZCA 568, [2017] 2 NZLR 358 at [72], *Nisha v R* [2015] NZCA 178 at [19]–[23] and *Reid v R* [2015] NZCA 175 at [24].
648 *Anderson v R*, above n 573, at [75] and [78]–[80].
649 Andru Isac (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA18.2] citing *Mills v R*, above n 570, at [16] and [21].
650 Above at [432]–[434].
651 Above at [193]; see also at [104].
652 Optican and McDonald, above n 591, at [EV16.03.03].

[520] In my view, this approach to corroboration is wrong. Reference to extraneous evidence — that is, evidence which does not go directly to circumstances that relate to the statement — is not permitted under the test set out in ss 16(1) and 18(1)(a). As explained at [463]–[491] above, to look to broad matters of context which are unconnected to the statement or its maker — and which are then used to corroborate the statement's contents — is to depart from the evaluative framework supplied by ss 16–18 and the wider statutory scheme.

R v Gwaze

[521] I comment on one further aspect of the majority's approach to interpreting the scope of the circumstances inquiry under s 16(1). Ellen France and Miller JJ take the Supreme Court's 2010 decision in *R v Gwaze* to suggest that a broader inquiry which considers evidence beyond that related to the statement or its maker may be needed.[653] The evidence at issue in *Gwaze* engaged the opinion and expert evidence rules in ss 23–26 of the Act as well as the hearsay rule. However, the trial Judge had proceeded to determine admissibility under ss 16–18 with reference only to the s 16(1)(d)–(e) indicia of reliability — that is, circumstances relating to veracity and accuracy.[654]

[522] By the time it addressed the hearsay provisions in ss 16–18, the Court in *Gwaze* had already considered various aspects of the nature, contents and making of the statement in its s 7 assessment and had determined that the statement was not relevant.[655] In referring to the preceding analysis of those factors when discussing ss 16–18, Elias CJ, writing for the Court, simply affirmed that "the circumstances of this informal and limited communication could not give reasonable assurance that any opinion of consistency of symptom was reliable in terms of s 18(1)(a)".[656] *Gwaze* cannot be said to have extended the s 16(1) inquiry beyond the statutory wording in this respect. It simply illustrated that there may be some degree of overlap between the types of inquiry conducted under ss 7 and 16(1)(a)–(c), and that if a hearsay statement has failed to pass the s 7 relevance gateway then it will be

653 Above at [433] citing *R v Gwaze*, above n 585, at [45].
654 *R v Gwaze*, above n 585, at [45].
655 At [37]–[42].
656 At [45].

immaterial whether the circumstances related to it provide reasonable assurance as to its reliability.

Application of the ss 16–18 test in this case

Court of Appeal

[523] The Court of Appeal correctly directed itself that the assessment as to whether the circumstances relating to the hearsay statements provide reasonable assurance that the statements are reliable is not to be conflated with the role of the jury or fact-finder in assessing at trial the credibility and reliability of the hearsay evidence.[657] Nevertheless, when concluding that Mr Maney's three statements were admissible, the Court said:

> [67] When we assess all of the circumstances relating to the statements made by Rex Maney, and in particular the evidence of other witnesses, the forensic evidence and the evidence from the pathologist, we are satisfied that the circumstances provide reasonable assurance that the statements were reliable. That is to say, the threshold for admissibility under s 18 of the Evidence Act was satisfied and it was for the jury to decide what aspects of Rex Maney's statements they accepted and what aspects they found unreliable and/or lacked credibility.

[524] This summary makes it clear that the Court of Appeal took into account evidence well beyond that related to the circumstances of the statement. The extent to which that evidence corroborated the key aspect of the statements — that is, its apparent tendency to confirm that the appellant had killed Mr Rikihana — was treated by them as overcoming the powerful indicators of unreliability set out in the judgments of the majority in the present appeal.

Reasons of Glazebrook and Kós JJ

[525] Much of the analysis performed by Glazebrook and Kós JJ is restricted to the types of circumstances listed in s 16(1). But, as I note above at [503], their analysis pivots on *Mills* and proceeds on the basis that context may be relevant. They state that the context considered must be relevant to one or more of the circumstances as defined

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657 CA judgment, above n 577, at [55]–[56] citing *Adams v R*, above n 573, at [26] and McDonald and Optican, above n 577, at [EV18.02].

in s 16(1).[658] Notwithstanding that qualifier, they take up Mr Stevenson's invitation to assess the evidence of Mr Jury's movements as captured in the CCTV footage. Finding an inconsistency which they take to raise "an inescapable inference that Mr Maney was lying",[659] they go on to state:[660]

> [173] That Mr Maney was prepared to lie in such a fundamental way in the second police statement throws doubt on the whole of his account in both the letter and the second police statement and in particular his assertion of Mr Jury administering an additional beating in the car.

[526] As noted above, Glazebrook and Kós JJ later state that context may be relevant, and in particular consistency between the core aspects of the hearsay statement and other evidence is the most helpful indicator of reliability.[661] That analysis takes them to the following proposition:[662]

> In this case we accept that Mr Maney's statements were broadly consistent with the Crown case that Mr Rikihana was badly beaten at his house by Mr Jury and transported first to Mr Maney's house before being dumped in Mr Te Aonui's driveway. However, there was no other evidence consistent with the core aspects of Mr Maney's statements (that is, what allegedly happened at his house, including the alleged threat and the additional beating in the car).

[527] At [196], they conclude that "the major inconsistency" between the second police statement and the CCTV evidence is "arguably the most significant factor affecting reliability", and they treat as significant the fact that the High Court had not been made aware of this issue in arriving at its view on reliability. I disagree that evidence such as CCTV footage which is proposed to be introduced by the Crown should be taken at face value in advance of the trial as being objectively reliable in respect of events, movements, actions, objects and identities that remain to be established by the fact-finder. While such evidence will certainly be for the jury to take into account when assessing hearsay that has been admitted, it is material that it falls outside the scope of the threshold assessment undertaken by the judge.

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658 Above at [104].
659 Above at [172].
660 Footnote omitted.
661 At [193].
662 At [193] (footnote omitted).

Reasons of Ellen France and Miller JJ

[528] Ellen France and Miller JJ begin by undertaking an analysis guided by the s 16(1) criteria. But they then turn to other Crown evidence in support of their analysis. This includes the evidence of Ms Eketone, the evidence of the pathologist and the forensic evidence. Their reasons note points of inconsistency between the hearsay statements and other trial evidence, in particular inconsistencies with the CCTV footage.[663]

[529] Ellen France and Miller JJ caution against a wide-ranging review of the trial evidence and say that they have restricted themselves to the key evidence.[664] They comment:[665]

> As we have said, it is not a review of the Crown case but a more focused inquiry. Further, in this context, recognising the gatekeeping responsibility of the judge, it can be expected the judge would give evidence as to circumstances a hard look.

[530] It is nevertheless difficult to discern what principle they have used to determine which evidence could legitimately be considered and which could not — that is, what was in bounds and what was out of bounds.

[531] It follows from the analysis I have set out above that I do not consider it is permissible to cross-check hearsay statements against evidence that is not related to those statements. Moreover, as I now come to, the evidence of unreliability in this case which could legitimately be taken into account under ss 16(1) and 18(1)(a) sufficed to raise serious doubts about its reliability. It is necessary to resist the "temptation" to go further than that, as the Court in *Mills* put it.[666]

My assessment

[532] As to s 16(1)(a), which concerns the nature of the statement, each of Mr Maney's statements consists of a written record. One is in the form of a letter to

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663 At [454].
664 At [455].
665 At [455].
666 *Mills v R*, above n 570, at [21]; and see above at [512].

Mr Maney's son in prison, and two take the form of signed police statements.[667] As Glazebrook and Kós JJ describe, Mr Maney's first police statement was taken before the letter purporting to have been written on an earlier date was discovered during a search of his house.[668] None of the three statements had been confirmed on oath.

[533] As to their contents, which fall to be considered under s 16(1)(b), Mr Maney's statements are, to a greater or lesser extent, contradictory of each other. I do not traverse the many contradictions and am content to rely upon Glazebrook J's consideration of them.[669] I simply observe that based on the contents of the statements alone, there is every indication that Mr Maney has lied in this context. That he was prepared to lie to the police is an inevitable inference, whether or not one accepts either of the police statements as being true.

[534] Because the three statements were produced at trial simultaneously and had been made by the same person, I consider that their contents — and, indeed, the circumstances of their making under s 16(1)(c) — legitimately fall to be cross-checked against each other as a means of assessing their reliability. This approach is consistent with the scheme of ss 16(1) and 18(1)(a) and with *TK v R*, an appeal from a pre-trial ruling where a batch of hearsay statements was likewise sought to be produced in evidence.[670] It is of note that in *TK v R*, one hearsay statement was ruled inadmissible for lack of reasonable assurance of reliability while the others were assessed as meeting the statutory threshold.[671]

[535] As to the circumstances that relate to the making of the statement under s 16(1)(c), Mr Maney made the two police statements in the knowledge that they could be relied upon in court proceedings. Where the maker of the statement may be thought to respect the solemnity of such proceedings, that is a possible indication of reliability. A letter to a son might also be thought to have some degree of reliability — as an unguarded familial communication evidencing no apparent motivation to lie. As noted above, however, it is not possible to ascertain the date when Mr Maney's letter was

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667 See above at [127] per Glazebrook and Kós JJ.
668 Above at [127]–[132].
669 Above at [127]–[134] and [161]–[164].
670 *TK v R*, above n 573.
671 At [26]–[28].

commenced or the timespan of its writing, which raises distinct difficulties in assessing the circumstances of its making.

[536] In the case of each statement, however, any indication of reliability is very substantially undermined by consideration of matters relating to Mr Maney's veracity as contemplated by s 16(1)(d). The evidence of Mr Maney's conviction for attempting to pervert the course of justice is a powerful indicator of unreliability. That is particularly so in light of the information about the circumstances of his conviction, which bear some resemblances to this case.

[537] As to s 16(1)(e), the accuracy of Mr Maney's observation, there is little here that helps with an assessment of the reliability of the statements. As contemplated by the Act's drafters, there is no need to pursue this evaluative line in the absence of relevant circumstantial information.[672]

[538] In summary, and as the Court of Appeal observed in *Mills*, it is tempting to search for other trial evidence against which hearsay statements can be checked for accuracy.[673] But it is clear that to have reference to such evidence would be to step outside the task set for the court under s 18(1)(a). The fundamental point is that the statutory scheme proceeds on the basis that evidence may be admitted under the hearsay provisions if the requisite reliability threshold is met by reference to evidence of circumstances directly related to the statement, even though the statement may be contradicted or not corroborated by the other evidence to be called.

[539] Overall, there are obvious and strong indicia of unreliability in respect of Mr Maney's hearsay statements, meaning a judge could not therefore be reasonably assured as to their reliability. On that basis, in agreement with the majority but by means of a different interpretative route, I conclude that the statements should not have been admitted.

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672 See above at [489].

673 See *Mills v R*, above n 570, at [21]; and above at [512].

Disposition of this appeal

[540] The disposition of this appeal turns on the application of s 232(4) of the Criminal Procedure Act 2011. Section 232(4) provides the definition of "miscarriage of justice" to assist the court in determining whether it must allow an appeal under s 232(2)(c) of that Act because "in any case, a miscarriage of justice has occurred for any reason". Section 232(4) states:

> (4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

[541] This Court is unanimous in finding that Mr Maney's hearsay statements were inadmissible.[674] The majority find that the admission of that evidence caused a miscarriage of justice in the sense that the admission of the hearsay statements created a real risk that the outcome of the trial was affected.[675] To that extent, I agree.

[542] The majority also reject the appellant's submission that Mr Maney's statements were central to the Crown case.[676] They conclude that the wrongful admission of the hearsay statements was not a fundamental error that meant the trial was unfair "or even perilously close to unfair".[677] On their analysis, s 232(4)(b) is therefore not engaged.

[543] The majority proceed to consider, and then ultimately apply, the proviso to s 232(4)(a), which was formerly enacted in s 385(1) of the Crimes Act 1961. In *Haunui v R*, the Supreme Court accepted that the fact that the proviso was not expressly carried over from s 385(1) to its equivalent in s 232(2) does not alter the task for the appellate court.[678] The proviso may be applied in cases where the error, irregularity or occurrence has created a real risk that the outcome has been affected

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674 See above at [189] per Glazebrook and Kós JJ and [456] per Ellen France and Miller JJ.

675 Above at [211] per Glazebrook and Kós JJ; and see at [457] per Ellen France and Miller JJ. Ellen France and Miller J consider that the admission of the hearsay evidence would not have occasioned a miscarriage of justice had a reliability warning been given.

676 At [208] and [227] per Glazebrook and Kós JJ; and see at [458] per Ellen France and Miller JJ.

677 At [254] per Glazebrook and Kós JJ; and see at [458] per Ellen France and Miller JJ.

678 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [50]; and see *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [47] and [54]–[55].

but the court is nevertheless sure of guilt — such that the error at trial did not in fact give rise to that risk.[679] The effect of applying the proviso is to confirm a jury verdict, despite something having gone wrong at trial, because the appellate court considers a guilty verdict was inevitable on the basis of the whole of the admissible evidence.[680] The Supreme Court explained in *R v Matenga* that:[681]

> The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused. Before applying the proviso the Court must also be satisfied that the trial was fair and thus that there was no breach of the right guaranteed to the accused by s 25(a) of the Bill of Rights Act.

[544] I disagree with the majority's conclusion as to the disposition of this appeal on the basis that, in my view, the Court cannot be reasonably satisfied that the trial was fair.

[545] The New Zealand approach to unfair trial has been guided by the Privy Council's 2002 decision in *Randall v The Queen*.[682] There, Lord Bingham, delivering the judgment of the Board, explained that:[683]

> There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.

That approach, which was affirmed in 2019 by the Supreme Court in *Lundy v R*, requires the appellate court to assess the significance of the error in the context of the trial.[684] The Court in *Lundy* noted that there exists no taxonomy of errors classified as fundamental.[685] Tracing the *Randall* statement through *R v Matenga* and

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679 *Haunui v R*, above n 678, at [67].

680 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [28]. While *R v Matenga* was decided under s 385(1) of the Crimes Act 1961, the approach remains the same.

681 At [31] (footnotes omitted).

682 *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237.

683 At [28].

684 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [25]–[27].

685 At [26] citing *Gassy v The Queen* [2008] HCA 18, (2008) 236 CLR 293 at [33] per Gummow and Hayne JJ.

R v Condon, the Court noted that a "fundamentally flawed" trial is an unfair trial for the purposes of s 25(a) of the Bill of Rights.[686] That approach has recently been affirmed by the Supreme Court in *Tamihere v R*.[687]

[546] I consider that the threshold of an unfair trial is reached in this case. First, Mr Maney's hearsay statements purported to provide detailed eyewitness evidence that the appellant committed the offending with which he had been charged. The significance of the hearsay evidence to the Crown case can be seen in the Crown closing. The Crown relied upon Mr Maney's statements to provide a narrative of events and to corroborate aspects of the evidence of the critical Crown witness, Ms Eketone. The Crown also relied upon Mr Maney's explanation of an issue over a car as being the reason for the attack on Mr Rikihana. Moreover, Mr Maney's hearsay evidence provided the Crown with a response to the appellant's main line of defence, namely that it was Mr Maney who had in fact attacked Mr Rikihana.

[547] Second, evidence of Mr Maney's conviction for attempting to pervert the course of justice was not before the jury. As Glazebrook J and Kós JJ recount, this appears to have been due to trial counsel's erroneous view as to the application of s 38 of the Evidence Act.[688]

[548] Third, the Crown failed to produce information regarding that conviction to trial counsel prior to trial.[689] Although the Crown said it could not locate the information, it was in fact located by this Court on a publicly available database. The fact of the conviction, and the details of it, were highly material to Mr Maney's veracity. That information should have been before the jury.

[549] And fourth, the trial Judge failed to give a reliability warning as should have occurred under s 122 of the Evidence Act. The jury therefore received no warning about the evidence being hearsay, and no warning about Mr Maney having a motive to give false evidence.

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686 *Lundy v R*, above n 684, at [26]–[27] citing *R v Matenga*, above n 680, at [28], *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78] and *Randall v The Queen*, above n 682, at [28].

687 *Tamihere v R* [2026] NZSC 22 at [68].

688 See above at [238].

689 See above at [124] and [249] per Glazebrook and Kós JJ.

[550] The admission of Mr Maney's hearsay evidence undoubtedly had an impact upon the course of the trial. It was not peripheral evidence. The subsequent errors compounded the unfairness to the appellant that flowed from its admission. As Glazebrook and Kós JJ observe, the extent of the impacts on the defence case, such as whether the appellant would have elected to give oral evidence at trial had the hearsay statements not required facing and countering, are unknown.[690] In the present appeal, I am of the view that the Court cannot be satisfied that no breach of s 25(a) of the Bill of Rights has occurred. Indeed, such is the extent of the unfairness involved in the cumulative errors that the appellant's rights under paras (d), (e) and (f) of s 25 of the Bill of Rights are potentially engaged as well.

[551] As the Court found in *Haunui v R* and *R v Condon*, there cannot be any recourse to the proviso where there has been an unfair trial since the right to a fair trial is absolute.[691] Here, I consider that the errors were fundamental and that they went to the heart of the fair trial right, such that the proviso is unavailable and there is no requirement to make further inquiry.

[552] Even had I agreed with the majority that the appeal fell to be determined under s 232(4)(a), I consider the evidence admitted at trial to be inconclusive as to the fact and degree of the appellant's culpability. Absent the cumulative procedural errors in respect of the hearsay evidence, it may have been open to the jury to arrive at alternative findings of fact when weighing the admissible evidence. The errors did therefore create a real risk that the outcome of the trial was affected.

[553] I would also have accepted the appellant's submission that this case may depend upon an assessment of the credibility of a witness. As the appellant puts it, the crucial question is whether Ms Eketone's evidence is so powerful that it overwhelms the appellant's account so as to render it incapable of belief. I note too that the Court in *R v Matenga* urged caution before resorting to the application of the proviso in cases where the ultimate issue depends upon the assessment of a witness.[692]

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690 Above at [210].

691 *Haunui v R*, above n 678, at [51], n 46; and *R v Condon*, above n 686, at [77]–[78]. See also *Wiley v R*, above n 678, at [34] and [37]; and *Lundy v R*, above n 684, at [25].

692 *R v Matenga*, above n 680, at [29], [32] and [34]–[35].

[554] In disposing of the appeal, I would therefore have quashed the appellant's conviction and ordered a retrial.

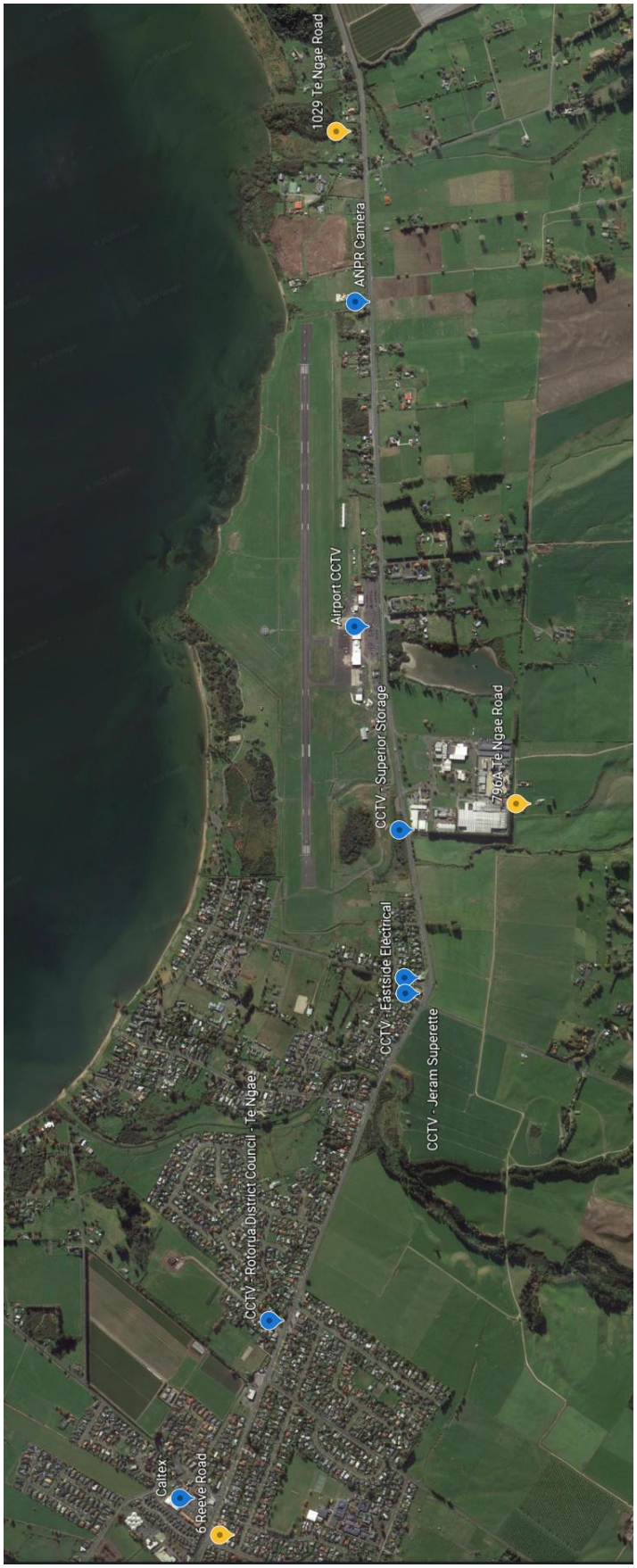
Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

Appendix A: tabulated CCTV evidence

Time	Event	Camera	Window
First southbound trip: period at Mr Rikihana's			First Maney window _
22.58	Southbound Te Ngae	ANPR	
23.00	Southbound Te Ngae	Airport	
23.01	Southbound Te Ngae to eastbound Pukepoto	Super Storage	First Rikihana window: 8 minutes
23.09	Westbound Pukepoto to southbound Te Ngae	Super Storage	
23.09	Southbound Te Ngae	Eastside/Jeram	
23.10	Southbound Te Ngae to eastbound Wharenui	DC	First Te Aonui window: 40 minutes
First northbound trip: period at Mr Rikihana's			
23.50	Enters Caltex on Te Ngae	Caltex	
_	[Leaves Caltex northbound Te Ngae]	_	
_	[Stops outside FreshChoice]	_	
23.57	Leaves FreshChoice [northbound Te Ngae]	DC	
00.00	Northbound Te Ngae	Eastside/Jeram	
00.01	Northbound Te Ngae to eastbound Pukepoto	Super Storage	Second Rikihana window: 91 minutes
01.32	Westbound Pukepoto to northbound Te Ngae	Super Storage	
01.33	Northbound Te Ngae	Airport	Second Maney window: 51 minutes
Second southbound trip: no period at Mr Rikihana's			
02.24	Southbound Te Ngae	ANPR	
02.25	Southbound Te Ngae	Airport	
02.26	Southbound Te Ngae	Eastside/Jeram	Second Te Aonui window: 27 minutes
Second northbound trip: period at Mr Rikihana's			
02.53	Northbound Te Ngae	Eastside/Jeram	

Time	Event	Camera	Window
02.54	Northbound Te Ngae to eastbound Pukepoto	Super Storage	Third Rikihana window: 5 minutes
02.59	Westbound Pukepoto to northbound Te Ngae	Super Storage	
02.59	Northbound Te Ngae	Airport	Third Maney window: 27 minutes
Third southbound trip: no period at Mr Rikihana's			
03.26	Southbound Te Ngae	ANPR	
03.27	Southbound Te Ngae	Airport	
03.29	Southbound Te Ngae	Eastside/Jeram	
03.29	Southbound Te Ngae	DC	Third Te Aonui window: 3 minutes
Southbound departure from Rotorua			
03.32	Southbound Te Ngae	DC near BP	
03.33	Southbound Te Ngae to southbound Sala	DC Sala	
03.36	Southbound SH30 leaves Rotorua	DC SH5/SH30	
Presence in Taupō			
04.24	At Z Energy in Tauhara, Taupō	Z Energy	

Appendix B: map of Te Ngae Road adduced at trial



Appendix C: simplified diagram of Te Ngae Road

