REDACTED VERSION: PUBLICATION OF THIS VERSION PERMITTED.

NOTE: ORDER REDACTING PUBLICATION OF PARAGRAPHS [49]–[61], [79]–[120], [147]–[161], [163]–[164] AND [167]–[170] OF THIS JUDGMENT, THE VERSION DELIVERED ON 31 MARCH 2026.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 82/2024
[2026] NZSC 22

	BETWEEN	DAVID WAYNE TAMIHERE Appellant
	AND	THE KING Respondent

Hearing:	18–20 August 2025
Further Submissions:	12 September 2025
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	M S Gibson, J E L Carruthers and S J Bird for Appellant F R J Sinclair and R K Thomson for Respondent
Judgment:	31 March 2026

JUDGMENT OF THE COURT

A **The application to adduce further evidence is dismissed.**

B **The appeal is allowed.**

C **We exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act 1961 to quash Mr Tamihere's convictions. We make an order directing a retrial.**

D **Order redacting paragraphs [49]–[61], [79]–[120], [147]–[161], [163]–[164] and [167]–[170] from the judgment delivered on 31 March 2026.**

E Order prohibiting publication of the unredacted version of the judgment pending final disposition of retrial.

REASONS
(Given by Ellen France J)

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Introduction

[1] David Wayne Tamihere was convicted on 5 December 1990, following a High Court jury trial, of the murders of Sven Urban Höglin and Heidi Birgitta Paakkonen. Mr Höglin and Ms Paakkonen had been visiting New Zealand from Sweden when they disappeared on the Coromandel Peninsula after last being seen on Friday 7 April 1989 in Thames.[1] At that time, Mr Tamihere was living mainly in the bush on the Coromandel Peninsula, having been on the run from police in relation to earlier unrelated offending for about three years.

[2] The Crown case at trial was largely circumstantial, including the inference that Mr Höglin and Ms Paakkonen were dead, as at that time neither body had been found. The Crown case relied on the evidence of two trampers, John Cassidy and Theodore Knauf. They identified Mr Tamihere as the man they met at Crosbies Clearing on the afternoon of Saturday 8 April 1989.[2] This was near to Tararu Creek Road, where Mr Höglin and Ms Paakkonen's car was sighted on Sunday 9 April. They said that the man they encountered was with a young, blonde-haired woman resembling Ms Paakkonen.

[3] The evidence of the two trampers was supported by that of Roberto Conchie Harris, who gave evidence of conversations he said he had with Mr Tamihere whilst both men were on remand in prison. In those conversations, Mr Harris said Mr Tamihere admitted to killing Mr Höglin and Ms Paakkonen. Amongst other matters, Mr Harris reported that Mr Tamihere had talked about being in the bush with Ms Paakkonen and almost being "sprung" by a "couple" while there, the inference advanced by the Crown being that the two trampers were the "couple". Mr Harris also said that Mr Tamihere talked about giving Mr Höglin's watch to one of his sons, which supported other Crown evidence suggesting the watch had been in Mr Tamihere's possession following the couple's disappearance. Two other prisoners gave evidence of conversations they said they had had with Mr Tamihere, while he

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1 A calendar of the year 1989 is provided in Appendix A to assist with understanding the timeline of events.

2 See Appendix B for a topographical map depicting the significant relevant locations in the central and southern Coromandel Peninsula. As we note below at [34], Mr Cassidy kept a written log, so the evidence of timing is precise.

was on remand in prison, relating to his involvement in Mr Höglin and Ms Paakkonen's disappearance.

[4] The Crown also relied on Mr Tamihere's admission he had stolen the couple's distinctive white Subaru four-wheel drive station wagon with a bull bar from Tararu Creek Road, which is on the western side of the Coromandel Peninsula, where it had been seen on Sunday 9 April 1989, and dumped or sold the couple's possessions. Mr Tamihere maintained he had not met Mr Höglin or Ms Paakkonen and knew no details about their disappearance.

[5] Following the trial, Mr Tamihere appealed against his convictions to the Court of Appeal. In October 1991, before Mr Tamihere's conviction appeal was heard, Mr Höglin's remains, along with his watch, were discovered in the Wentworth Valley, on the eastern side of the Coromandel Peninsula some 70 km by road from Crosbies Clearing. There was evidence before the Court of Appeal that Mr Höglin's body had been placed where it was found shortly after suffering what are believed to be his fatal injuries.

[6] The Court of Appeal dismissed Mr Tamihere's appeal on 21 May 1992.[3] In doing so, the Court reached the view the Crown had not tied itself to specific places of murder and disposal and that Mr Tamihere had the wherewithal to move the body to the place where the remains were found.

[7] Subsequently, on 1 September 2017, Mr Harris was convicted of perjury in relation to eight aspects of his evidence at Mr Tamihere's trial. The charges related to the key aspects of Mr Harris's evidence including his evidence that Mr Tamihere had talked of being in the bush with Ms Paakkonen and that he was almost "sprung" while there with her.

[8] The next development was that, on 28 June 2018, Mr Tamihere applied to the Governor-General for the exercise of the Royal prerogative of mercy in respect of the murder convictions. Under s 406(1)(a) of the Crimes Act 1961, the Governor-General

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3 *R v Tamihere* CA428/90, 21 May 1992 [CA 1992 judgment]. An application for leave to appeal to the Privy Council was declined.

in Council could refer the question of a relevant conviction to the Court of Appeal for determination.[4] Such a reference to the Court of Appeal was made in this case in April 2020.[5] The reason given for the Reference was that the location of Mr Höglin's remains and Mr Harris's perjury conviction, in combination:[6]

> (a) may raise doubts about the reliability of an important aspect of the Crown case, namely the trampers' identification evidence …; and
>
> (b) could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.

[9] The Court of Appeal delivered its judgment on the Reference on 10 July 2024 (the 2024 judgment).[7] The Court found that the admission of Mr Harris's evidence at trial may have affected the jury's verdicts and there was therefore a miscarriage of justice. The Court went on to consider whether to apply the proviso to s 385(1) of the Crimes Act.[8] Broadly, the effect of the proviso is that where the Court finds there is a miscarriage of justice, an appeal against conviction may nonetheless be dismissed if the appellate court itself is satisfied of the defendant's guilt beyond reasonable doubt.[9] The Court of Appeal said it was satisfied beyond reasonable doubt of Mr Tamihere's guilt and applied the proviso. The Court accordingly declined to exercise its jurisdiction under s 406(1)(a) of the Crimes Act to quash Mr Tamihere's convictions.

[10] On 20 December 2024, this Court granted Mr Tamihere leave to appeal from the decision of the Court of Appeal.[10] The approved question was whether the Court of Appeal was correct to decline to exercise its jurisdiction to quash Mr Tamihere's convictions. The Court asked counsel to address the issues of principle involved in the following matters:[11]

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4 Section 406 of the Crimes Act 1961 has since been repealed, but it was applied to the appeal in the form it was in at the time of the reference, as is provided for in the Criminal Cases Review Commission Act 2019, s 5 and sch 1 cl 4(1)–(2).

5 "Reference to the Court of Appeal of the Question of the Convictions of David Wayne Tamihere for Murder" (23 April 2020) *New Zealand Gazette* No 2020-ps1580.

6 At sch cl 6.

7 *Tamihere v R* [2024] NZCA 300 (French, Miller and Collins JJ) [CA 2024 judgment].

8 Section 385 was repealed on 1 July 2013: see Crimes Amendment Act (No 4) 2011, s 6 and sch. It was replaced by s 232 of the Criminal Procedure Act 2011. As the proceedings against Mr Tamihere were commenced before this date, the appeal provisions of the Crimes Act continue to apply: Criminal Procedure Act, s 397.

9 See below at [66]–[71].

10 *Tamihere v R* [2024] NZSC 185 (Glazebrook, Williams and Kós JJ) [SC leave judgment].

11 At [1].

> [W]hether the trial was unfair, whether there was (in the light of new evidence or otherwise) a fundamental error at trial and whether, in light of the changes to the [Crown] case, it was right for the Court of Appeal to apply the proviso to s 385(1) of the Crimes Act 1961, given the importance of the constitutional role of the jury.

Summary of our conclusions

[11] As we shall explain in more detail, we have concluded that it was not right to apply the proviso in this case for two reasons: first, because there was a fundamental error at trial which made the trial unfair; and, second, because of the radical recasting of the Crown theory of the case which meant that, in applying the proviso, Mr Tamihere's convictions were upheld on a case raising issues, including questions as to credibility and reliability, that had never been tested before a jury.[12]

[12] As to the first of these reasons, it is settled law that an appellate court cannot apply the proviso where a trial was unfair.[13] That is because, as this Court said in *Lundy v R*, there are some errors which are so serious that the proviso cannot save them.[14] The error in this case resulted from the admission of the perjured evidence of Mr Harris which was directed to the critical issue for the jury's verdicts, was concocted to secure convictions and, by referencing corroborative detail, provided material support for Crown identification evidence.[15] The perjured evidence, along with the evidence of one of the other prisoners, was also highly prejudicial.[16] The trial Judge's directions did not cure the problem.

[13] In terms of the second reason, the change in the Crown case arises in response to the discovery of Mr Höglin's body and the fact the evidence suggests he was killed close to where his body was found.[17] This has required a radically different Crown theory. That theory, as we shall discuss, entails focusing on events connected to the

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12 The appellant submitted he was not made aware of the new theory until November 2023 when the Crown submissions for the appeal in the Court of Appeal were filed.

13 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [28] and see at [29]; *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [25]–[26]; and see also Mathew Downs (ed) *Adams on Criminal Law — Offences and Defences* (looseleaf ed, Thomson Reuters) at [CAS385.20]. See below at [68].

14 *Lundy*, above n 13, at [25].

15 *Taylor v Witness C* [2017] NZHC 2610 (Whata J) at [39].

16 Below at [82] we express reservations about the admissibility of the other prison informant evidence. In this version of the judgment the cross-references may now refer to material which is redacted.

17 See below at [122]–[126].

offending occurring at multiple locations across a different, significantly larger geographical area, and over many hours.[18] There are now also two likely crime scenes. The new Crown theory means other evidence needs to be seen in a new light and raises questions of credibility and reliability about that evidence. Testing of the new evidence is also required. The authorities are clear that it is not generally appropriate to apply the proviso to cases which turn on "an assessment of the honesty and reliability of witnesses".[19] That is because of the disadvantage the appellate court may have in making that assessment "on the sole basis of the transcript of the oral evidence".[20]

[14] There are also broader problems in applying the proviso to the new Crown theory of the case. That is because, in saying the proviso is available here, the Crown is arguing for the convictions to be upheld on the basis of a case which was never tested at all, with all of the procedural protections under the New Zealand Bill of Rights Act 1990 (the Bill of Rights) that would have gone with a jury trial. The constitutional role of the jury is relevant too, as is reflected in the right to trial by jury provided for in the Bill of Rights.[21] It is the extent and fundamental nature of the changes, the evidential and rights-related ramifications of those changes, and the resultant unknowns for the appellate court that differentiate this case from other "new" evidence cases where the proviso may be appropriately applied.

[15] For these reasons, we have determined it was wrong to embark on a consideration of the proviso. Given that conclusion, we have not undertaken the exercise the Court of Appeal undertook of applying the proviso. We emphasise that there are simply too many questions on the Crown's new theory of the case, which have not been tested, for an appellate court to reach a conclusion about guilt.[22] That does not mean that a jury, properly directed, could not possibly be satisfied of guilt, but that would need to be decided on a retrial, which this Court has now

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18 See below at [125]–[126].
19 *Matenga*, above n 13, at [32].
20 At [32].
21 Section 24(e).
22 See below at [147]–[160].

directed.[23] It will, however, be for the Crown to decide whether or not to conduct a retrial.

[16] To explain how these issues arise, we need to say more about the proceedings to date. The narrative of events is set out in detail in the Court of Appeal's 2024 judgment,[24] but it is sufficient for us to focus on the key points at this stage.

Pre-trial rulings on the evidence of the two trampers

[17] The admissibility of the evidence of Mr Cassidy and Mr Knauf, the two experienced trampers, that they saw a man they later identified as Mr Tamihere at Crosbies Clearing on the afternoon of 8 April 1989 with a woman resembling Ms Paakkonen, was the subject of rulings prior to trial. The issues of admissibility arose in part because of potential questions about the reliability of the evidence. Neither Mr Cassidy nor Mr Knauf initially identified Mr Tamihere although Mr Cassidy subsequently recalled that he had met Mr Tamihere at Crosbies Clearing on an earlier occasion, in late 1987. Mr Cassidy said the recollection came back to him in June 1989 but there was a gap in time between that recollection, his evidence he told the police about the prior meeting in July 1989, and his fifth formal statement to the police made on 30 November 1989 (the first statement mentioning the prior meeting). When initially shown photographs of Ms Paakkonen, neither Mr Cassidy nor Mr Knauf said she resembled the woman they saw in the Clearing. Further, the process by which the two men came to identify Mr Tamihere involved serious departures from good practice, even judging that by the standards applicable at the time.

[18] The Court of Appeal's 2024 judgment contains a full description of that process.[25] For present purposes, we need only note the following points. Both trampers were involved in the search for the couple in late May 1989. In that capacity Mr Knauf had been shown photographs of the couple and Mr Cassidy had at least been given a description of Ms Paakkonen. But neither made a link between her and the woman they had seen at Crosbies Clearing, although they told the police on

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23 Below at [162]–[168].
24 CA 2024 judgment, above n 7, at [8]–[35].
25 At [59]–[102].

31 May 1989 of meeting a couple there in April, after having been involved in the search. As at 31 May, nothing was known of Mr Tamihere's potential involvement in the disappearance of the couple.

[19] Events moved along after items of the couple's clothing and other belongings were discovered at Mr Tamihere's house, and the decision was made to charge Mr Tamihere with the theft of the couple's car and belongings. On 12 July 1989, the two trampers were shown a photo montage which included Mr Tamihere with a beard. Neither man identified him. That same morning, Mr Tamihere arrived at the District Court at Auckland for his first court appearance in relation to the theft charges. In a departure from the usual processes, he was taken into court through the public entrance and photographed and filmed by the media. These images were widely publicised, starting with the television news that evening. Mr Cassidy saw one of the photographs in a newspaper on 13 July.

[20] After 20 July 1989, it appears that Mr Cassidy was shown a number of photographs which had been uplifted from Mr Tamihere's home. One of the photographs included Mr Tamihere in a bush setting not wearing a beard. Mr Cassidy recognised him as the man he had seen at Crosbies Clearing on 8 April 1989. It is clear that Mr Cassidy saw these photographs after the media photographs of Mr Tamihere had been published. Mr Knauf was shown the photographs from Mr Tamihere's home on 15 July but could not be sure it was the same man.

[21] The possibility of undertaking a formal identification procedure, the usual (and now generally required)[26] course of action for visual identification in a case such as this, was abandoned. The police considered any identification made would be tainted by the photographs the trampers had already seen. The two men attended the District Court at Thames where Mr Tamihere was to appear again on 26 July 1989. Both men observed Mr Tamihere as he was escorted across the road to the rear court door. Mr Cassidy saw that the man he shortly afterwards identified as Mr Tamihere was handcuffed and Mr Knauf said that, if not handcuffed, he "certainly" had "a close

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[26] Evidence Act 2006, s 45.

escort". Both men then entered the court and watched the hearing. They then advised the police that the man they saw at the Clearing was Mr Tamihere.

[22] In terms of their identification of Mr Tamihere, the Court of Appeal in the 2024 judgment explained that:[27]

> [98] Mr Knauf … recognised the man's appearance, skin colouring and features; his build, the rounding of his shoulders and his height; and the way he walked. Mr Knauf noted the man's quite prominent eyes. He made the identification as … Mr Tamihere walked into the court building.
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> [99] Mr Cassidy … rel[ied] on his walk, his appearance, his colouring and his hair. He noted that Mr Tamihere had a beard, which he had not seen before. He also made the identification as Mr Tamihere entered the court building.

[23] It was not until 30 November 1989 that Mr Cassidy made the further statement identifying Mr Tamihere as a man he had met in the bush in November or early December 1987. He said he had told police in July 1989, before the first Court appearance, about this earlier meeting.

[24] Returning to the progress of the trial, the Crown sought a pre-trial ruling under s 344A of the Crimes Act that, among other matters, the identification evidence of the two trampers was admissible. The High Court in determining admissibility was concerned about the process by which the identifications had been made, highlighting the various departures from practice. Those departures from practice included the fact both men had seen photographs of Mr Tamihere before identifying him and the "unfortunate departure from normal procedure" in terms of Mr Tamihere's entrance into the District Court.[28] The Judge was also concerned that in making his identification Mr Cassidy had relied on a single photograph, a process which had generally been seen as dangerous and potentially unsafe. There was also the failure to hold an identification parade. With these matters in mind, Tompkins J ruled the identification evidence inadmissible. It was important evidence, and the two trampers were "convincing witnesses … [who] impressed as persons of integrity and accuracy

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27 CA 2024 judgment, above n 7.

28 *R v Tamihere (No 3)* (1990) 7 CRNZ 221 (HC) (Tompkins J) [HC pre-trial ruling] at 224.

[and] were meticulous".[29] But, the Judge concluded, "a convincing witness may still be mistaken".[30]

[25] The Crown appealed from that ruling. In this pre-trial appeal, the Court of Appeal was similarly critical of the processes adopted but overturned the decision of the High Court, ruling that the evidence was admissible.[31] Ultimately, as the Court of Appeal in the 2024 judgment explained, on the pre-trial appeal it was considered that the evidence of the trampers "contained much to indicate reliability in matters of detail".[32] The Court of Appeal in the 2024 judgment continued:[33]

> The Court noted Tompkins J's positive view of them. In the Court's view, the Judge gave insufficient weight to the quality of the identification evidence, which is always an important consideration. For those reasons the identification evidence was ruled admissible.

[26] As we shall discuss, the evidence was the subject of directions by the trial Judge in summing up, as the Court of Appeal in the pre-trial ruling had specified would be necessary.[34]

The trial

[27] Mr Tamihere's trial began on 29 October 1990 and concluded over a month later, on 5 December 1990.

The Crown case at trial

[28] There were, broadly, three parts to the evidence for the Crown at trial.[35] The first of these parts linked Mr Tamihere to the Swedish couple's car, their belongings and, as was argued, to the couple themselves.

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29 At 226.
30 At 227.
31 *R v Tamihere* [1991] 1 NZLR 195 (CA) (Cooke P, Hardie Boys and Jeffries JJ) [CA pre-trial judgment].
32 CA 2024 judgment, above n 7, at [114].
33 At [114] (footnote omitted).
34 CA pre-trial judgment, above n 31, at 202; and see below at [116]–[119].
35 The Court of Appeal in *Harris v Taylor* [2018] NZCA 393 [CA *Harris* judgment], the judgment dismissing the appeal by Mr Harris against the sentence imposed on his perjury convictions, helpfully summarises the Crown case: at [5]–[7].

[29] Ms Paakkonen's jacket and wallet were found alongside Tararu Track between the end of Tararu Creek Road and Crosbies Clearing.[36] Other items belonging to the couple were found at the end of Tararu Creek Road. That included a used pair of woman's underwear which had been cut through the crotch. The couple's tent was found in an abandoned shed at the end of Tararu Creek Road with the straps cut off. Further, as the Court of Appeal in its judgment on Mr Harris's appeal against sentence for his perjury convictions explained:[37]

> Mr Tamihere was seen driving the couple's … station wagon on the evening of 10 April, before abandoning it in Mt Eden. He sold some of the couple's belongings, and when police conducted a search of his home, Mr Höglin's jacket, leggings and binoculars were discovered. Mr Tamihere admitted stealing the couple's car, and some of their belongings, claiming to have found those belongings inside the car.

[30] The jury heard evidence of earlier sightings of the couple's car parked at Tararu Creek Road on 9 April 1989. There was some variation in the witnesses' evidence as to exactly when they recalled seeing the car. Two of the four witnesses placed the car there around 2 pm, one said it was there earlier, about 12.30 pm, and another noticed the other three witnesses and the car at the top of Tararu Creek Road "fairly late afternoon", about 3 pm – 4 pm. The Crown said Mr Tamihere's explanation of how he broke into the couple's car at Tararu Creek Road, using a piece of fencing wire, and that he then found a key in the glovebox, was implausible.[38] The Crown case was that if Mr Tamihere had a key, he must have got it directly from the couple. The Crown built on what it said were Mr Tamihere's lies about this and other matters to police.

[31] The Crown also placed emphasis on what it described as Mr Tamihere's "blatant" use of the couple's car after their disappearance. The Crown made the point that Mr Tamihere had generally kept himself out of the limelight over his approximately three-year period on the run. Despite that, on 10 April 1989 he drove

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36 The jacket and wallet were found near to Jam Tins, the local name for a junction at which three tracks intersect. See Appendix B.

37 CA *Harris* judgment, above n 35, at [5].

38 All but one of the witnesses called by the Crown who saw the car parked at the end of Tararu Creek Road said the car windows were closed, although they could not exclude the possibility one was left ajar for ventilation. The remaining witness was not asked. Evidence showed that entry could not be obtained to the car in the way Mr Tamihere initially described. He later advanced a different method which was workable.

the couple's car into Thames and stayed at the Sunkist Lodge, visiting several hotels that night in the town centre, which involved driving through the main street. The Crown case was that these actions were only explicable because Mr Tamihere knew that the owners of the car were dead. Further, before driving the car to Auckland on 12 April, Mr Tamihere had toured the Peninsula on 11 April 1989, with a group of tourists on board, similarly with no regard for the risk of being caught by the car's owners.

[32] Evidence about Mr Höglin's watch also formed part of the evidence about the couple's possessions. A boarder at Mr Tamihere's house, Duane Davenport, gave evidence that he saw Mr Tamihere's son wearing a watch given to him by Mr Tamihere which the Crown said was like Mr Höglin's. Mr Davenport described an exchange in which Mr Tamihere grinned and laughed when his son told Mr Davenport the watch was a present from his father.

[33] Mr Davenport's evidence was admitted at trial after a voir dire. There were questions about its admissibility because, when he was first interviewed by police in August 1989, he said he had no knowledge of any watch. But that interview had "jogged" his memory so that by September that same year he had recalled events concerning the watch, although he was not clear whether it was a silver watch. By the time of the trial in November, he was positive that it was silver. Tompkins J concluded that the evidence was admissible but said that it would be subject to a direction to the jury at trial about its reliability.[39]

[34] The next part of the Crown case connected Mr Tamihere to Ms Paakkonen. This aspect centred on the evidence of the two trampers. As we have noted, they said that on 8 April 1989 they saw a man, whom they later identified as Mr Tamihere, "clearing a tent site with a tomahawk at Crosbies Clearing".[40] They spoke with the man, who was preparing to put up a hooped tent. They could state that they met the man and the woman in the Clearing at exactly 3.12 pm as Mr Cassidy kept a written log of the tramp.

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39 *R v Tamihere* HC Auckland T 99/90, 7 November 1990 at 3 and 6.
40 CA *Harris* judgment, above n 35, at [6].

[35] The evidence of the trampers was that the woman was wearing a poncho and that she sat there but said nothing. Mr Knauf said the woman was wearing makeup and fingernail polish. Mr Cassidy described her as wearing makeup. It was known Ms Paakkonen did not wear makeup whilst in New Zealand and no makeup was found amongst her possessions. They also described Ms Paakkonen as wearing boots. The Crown at trial said she did not own boots and that this aspect of the trampers' description was an anomaly.

[36] Neither of the two trampers described the man as having a moustache although other Crown witnesses who saw Mr Tamihere around this time said he had a bushy or droopy moustache. Mr Cassidy said that when he had met the man in late 1987, he was wearing similar clothes and boots to those of the man on 8 April. The trampers' evidence also tended to link items found at Mr Tamihere's house with items they saw in the Clearing, namely, the hooped tent, the tomahawk and the poncho. Their account was that these items looked like the ones they saw on 8 April.

[37] The final part of the Crown case comprised the evidence of the three prisoners including Mr Harris. They gave accounts of Mr Tamihere speaking to them in custody about how he had sexually assaulted and killed the couple. The admissions of guilt the prisoners described were not consistent with each other. We discuss their evidence fully shortly.[41]

The defence

[38] The defence ultimately accepted that Mr Höglin and Ms Paakkonen must be dead but put the Crown to proof and maintained that their disappearance may have been the result of an accident.

[39] Mr Tamihere gave evidence in his defence. He said he had not met the couple and denied killing them. He described his movements at the relevant times. Mr Tamihere said that he had initially lied to police when he denied theft of the couple's car, but soon after he admitted he had stolen the car and subsequently pleaded guilty to charges of taking the car and stealing property in it. His evidence was that

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[41] Below at [84]–[91]. This discussion is now redacted.

he had come across the car by chance and had broken into it through a partly opened window using a wire and then found a key to the car in the glove box. The defence challenged the trampers' evidence and to support that called evidence from witnesses who said they had seen the couple or their car in the northern part of the Coromandel Peninsula at the critical time. The latter evidence is referred to as the "northern sightings" and we summarise it briefly because it assumes importance in considering the effect of the change in the Crown theory of the case. When considering the effect of that evidence it is useful to bear in mind two time-markers: first, Ms Paakkonen and Mr Höglin were in Thames on 7 April getting haircuts; and second, their car was seen parked at the end of Tararu Creek Road on 9 April.

[40] The evidence of the northern sightings came first from Mr Peter Novis who lived at Stony Bay in the northern Coromandel Peninsula.[42] The east coast road at the northern tip of the Peninsula terminates at Stony Bay. A walking track connects Stony Bay to Fletcher Bay, which is at the end of the road on the north-western extremity of the Peninsula. Mr Novis described his interactions with a blonde woman on either Friday 7 or Saturday 8 April at his property in Stony Bay. The woman accepted his offer of a place to stay on the property. Mr Novis saw the woman later with a man on Stony Bay beach and gave a description of the man. His description of the man as having reddy brown hair was described by the trial Judge as "a fair description" of Mr Höglin. When shown a photograph of Ms Paakkonen, he said she was "the same person" he met.

[41] Mrs Anne Novis gave evidence of meeting a blonde woman wearing boots at Stony Bay on either on Friday 7 or Saturday 8 April. Mrs Novis talked to the woman for about three to four minutes that day, noting that she had an accent. Mrs Novis asked the woman if she was Swedish, to which she replied "[y]ar". Mrs Novis was "certain" that the woman was Ms Paakkonen. She talked to the woman again the next day at around 8.00 am. Both Mr Novis and Mrs Novis said the woman had a pack with her which matched the description of one of the packs the couple were known to

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42 See the map of the northern Coromandel Peninsula reproduced at Appendix C.

have had with them in New Zealand. She said the hair colour of a man she saw on the beach on either 7 or 8 April matched that of Mr Höglin in a photograph she was shown.

[42] Mr Stephen Waters, a tramper, said he saw a couple with a white Subaru station wagon with a bull bar in Fletcher Bay on Saturday 8 April walking towards Stony Bay and then coming back later that day after which they drove off. Mr Waters said the woman looked "very similar" to Ms Paakkonen. He stated that the general physical attributes of the man he saw were similar to those of Mr Höglin.

[43] The jury also heard from two men, Mr Vern McDonald and Mr James Gray, who had travelled to the Coromandel district on Saturday 8 April, about seeing a white Subaru station wagon with a bull bar parked near the Keretā Hill lookout (around 20 km south of Coromandel town on the western side of the Peninsula) and a blonde woman with the car.

Verdicts

[44] We will come back to some of the details of the opening and closing addresses and of the summing up.[43] The jury deliberated for some two days before returning guilty verdicts.

The first conviction appeal

[45] The Court of Appeal in the first conviction appeal had before it new evidence relating to the discovery of Mr Höglin's remains, his watch and clothing. In terms of this evidence, the key points to note are as follows. First, as we have said, the evidence suggested Mr Höglin likely died at or very near the place where his remains and his watch were found. Second, the remains were only partially covered by vegetation so did not appear to have been buried. Third, as to what we now know about Mr Höglin's injuries, the Court of Appeal described the expert evidence as indicating that "Urban Höglin had suffered stab wounds in the neck and shoulder region, with a possible attempt at decapitation. There was no sign of a skull fracture or broken neck."[44]

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43 Below at [100]–[103].

44 CA 1992 judgment, above n 3, at 14; and see CA 2024 judgment, above n 7, at [167].

[46] In dismissing the appeal, the Court of Appeal in 1992 was satisfied the new evidence as to the discovery of Mr Höglin's remains along with his watch, considered with the evidence at trial, was not such as to have reasonably led the jury to return a different verdict. That was essentially because the Court considered the evidence "crucial to the whole case" — namely, the sighting by the trampers of the man and the woman at Crosbies Clearing — was reliable.[45] The Court said this:[46]

> [The trampers] said the man looked like [Mr] Tamihere; he wore a belt with a pouch and was using an axe similar to those items found at [Mr] Tamihere's house; he was putting up a tent of an unusual design and of interest to them, which both regarded as similar to the tent found at his house; the girl was remembered as similar to a photograph of [Ms Paakkonen], with blonde hair and fine features; and she was wearing an unusual poncho, similar again to one found at [Mr] Tamihere's house. The discovery of such a garment and tent at his house would be a most extraordinary coincidence. In conjunction with the other matters just described, it makes the odds against that couple being other than [Mr] Tamihere and [Ms Paakkonen] so high as to put that possibility beyond rational consideration. Conversely, as the Crown pointed out, despite the massive publicity and interest generated by the disappearance of the couple and the extensive searches, nobody else has been found or has come forward to identify themselves as the people seen at Crosbies. Once that identification is accepted, the rest of the Crown's evidence falls into place as convincing circumstantial proof that the couple were murdered by [Mr] Tamihere.

The Governor-General's Reference

[47] As indicated above, s 406(1) of the Crimes Act preserved the availability of the prerogative of mercy. In this case, the Governor-General referred Mr Tamihere's application for the exercise of mercy to the Court of Appeal. The Reference asked the Court of Appeal to reconsider the safety of the convictions in light of new evidence emerging since trial, as set out above.[47] There is no dispute that the Court is asked to assess the impact of the recovery of Mr Höglin's remains and of Mr Harris's perjured evidence on the convictions. As the Court of Appeal said in the 2024 judgment, "[t]he Court's task is to consider the question of the convictions, hearing and determining them as if they were an appeal against conviction."[48]

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45 CA 1992 judgment, above n 3, at 19–20.
46 At 19–20.
47 Above at [8].
48 CA 2024 judgment, above n 7, at [37], and see at [38].

The 2024 judgment of the Court of Appeal

[48] We discuss the Court of Appeal's reasons in the 2024 judgment in our consideration of the issues.[49] The key findings of the Court were that the admission of the evidence of Mr Harris gave rise to a miscarriage of justice but there was no fundamental error at trial and, applying the proviso to s 385(1) of the Crimes Act, the Court was satisfied beyond reasonable doubt as to Mr Tamihere's guilt.

Paragraphs [49]–[61] are redacted.

Was the proviso available?

[62] As the terms on which leave was granted make clear, we need to decide whether the Court of Appeal erred in concluding that it was appropriate to apply the proviso in this case.[50] We deal first with the appellant's argument that the admission of the perjured evidence of Mr Harris gave rise to a fundamental error which meant that the proviso was not available. We then address his submissions that the change in the Crown theory of the case also means that the proviso exercise should not have been undertaken at all.

Was there a fundamental error in this case?

Submissions

[63] The first of the two grounds advanced by the appellant in support of the submission that the 2024 Court erred in entering into the proviso exercise is that the Crown's reliance at trial on the evidence of Mr Harris constituted a fundamental error which has given rise to an unfair trial, precluding application of the proviso. The argument is that the proviso should not be available to "shore up" convictions procured in part by perjured evidence. That is particularly so where the perjured evidence has papered over infirmities in the critical identification evidence of the two trampers and may have led the jury to ignore what counsel says was higher quality identification evidence advanced by the defence of the northern sightings of the

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49 Below at [49]–[50], [52]–[58], [92]–[94] and [150].
50 See above at [10].

couple.[51] These issues were compounded because the directions by the trial Judge on the dangers of identification evidence omitted any reference to the fact experience shows that identification evidence has led to miscarriages of justice.

[64] In response, the respondent submits that, applying factors identified in *Lundy* to test whether wrongfully admitted evidence has given rise to a fundamental error,[52] the evidence of Mr Harris (properly admitted at the time of trial) was not of such importance at trial; the defence cross-examination showed that the evidence of Mr Harris lacked cogency; it did not impact on the conduct of the defence case; and the concerns about this evidence were addressed by the trial Judge's directions. The respondent submits that this means the admission of the evidence of Mr Harris could not have caused an unfair trial.

[65] There is no real dispute about the relevant principles that have been applied to the use of the proviso and the limits in s 385 on its application. We can therefore discuss those principles briefly before turning to their application to this case. There is, however, a difference between the parties as to the impact of the change in the Crown case on the availability of the proviso. We come back to that issue later.[53]

Approach to the proviso — the principles

[66] It is helpful to first set out s 385(1) in full. The subsection provides as follows:

> (1) On any appeal [against conviction], the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or

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51 See above at [39]–[43] for discussion of the northern sightings.

52 See below at [78].

53 See below at [129]–[144]. We also comment briefly on the arguments as to whether *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 remains good law in relation to the impact of new evidence: see below n 81.

> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[67] This Court in *R v Matenga* addressed the approach to the proviso. The Court made the following points of relevance to the present case arising from its interpretation of s 385(1)(c). First, whether there has been a miscarriage of justice is the initial inquiry. The proviso is only engaged where there has been a miscarriage of justice as that term is used in s 385(1)(c), namely, an error "capable of affecting the result of the trial".[54] Not every error or irregularity in the course of a trial will have that effect and the effect is to be assessed in the context of the trial overall.[55]

[68] Second, as is common ground in this case, it is not appropriate for the appellate court to apply the proviso where there has been a fundamental error at trial making the trial unfair, and so in breach of the rights of a defendant as guaranteed by s 25(a) of the Bill of Rights.[56] It is also not generally appropriate to apply the proviso where the outcome turns on the assessment of the credibility and reliability of witnesses.[57] Where the proviso is not available, the appeal must be allowed.[58] The Court in *Lundy* summarised the effect of an unfair trial in the s 385 context in this way:[59]

> [25] Some errors are so serious that they cannot be saved by the proviso … even if the appellate court is satisfied of the defendant's guilt. Such errors are characterised as "fundamental" or "radical" or said to go to "the root of the proceedings" or to "undermine the integrity of the trial" so that it has lost the character of a fair trial according to law.

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54 *Matenga*, above n 13, at [31] (emphasis omitted), and see at [10] and [30]. See also *Watson v R* [2025] NZCA 455 at [53]–[56].

55 *Matenga*, above n 13, at [30]; and *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].

56 *Matenga*, above n 13, at [28] and [31].

57 At [29] and [32]. See also *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425 at [36].

58 The appeal must also be allowed if the prosecution is a nullity: see, for example, *Solicitor-General's Reference (No 1 of 2024)* [2025] NZSC 121, [2025] 1 NZLR 459; or the verdict is unreasonable: *Matenga*, above n 13, at [9]. See also Criminal Procedure Act, s 232(2) and (4).

59 *Lundy,* above n 13 (footnotes omitted).

[69] The majority of the Privy Council in *Howse v R* approved a passage which is to the same effect from the earlier decision of the Privy Council in *Randall v R*, namely:[60]

> … the right of a criminal defendant to a fair trial is absolute. 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. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

[70] This is consistent with the approach in Australia.[61]

[71] Third, as this Court said in *Matenga*, where an appellant is convicted after a fair trial and there has been a miscarriage of justice, the court may dismiss the appeal but only when the verdict of guilt was inevitable. The court itself must be sure of guilt.[62]

[72] Because this part of the appellant's case is based on the submission the proviso is not available as there has been a fundamental error at trial, it is helpful to consider authorities on what constitutes a fundamental error, that is, to use the words we have cited from *Lundy*, something going to "the root of the proceedings".[63]

What constitutes fundamental error

[73] The threshold as to what constitutes fundamental error is deliberately a high one so that the proviso is not "stultified".[64] The proviso was introduced to overcome the formalism of the old Exchequer rule under which, broadly, "*any* departure from trial according to law, regardless of the nature or importance of that departure",

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60 *Howse v R* [2005] UKPC 30, [2006] 1 NZLR 433 at [36] per Lord Hutton, Lord Carswell and Sir Swinton Thomas citing *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

61 See, for example, *Wilde v The Queen* (1988) 164 CLR 365 at 372–373 per Brennan, Dawson and Toohey JJ.

62 *Matenga*, above n 13, at [31].

63 See above at [68].

64 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [36] per Elias CJ and Glazebrook J, citing *Howse*, above n 60, at [37] per Lord Hutton, Lord Carswell and Sir Swinton Thomas.

constituted a miscarriage of justice.[65] There is "no rigid formula"[66] or "single universally applicable description"[67] for what constitutes a fundamental error. This Court in *Lundy* accordingly observed there was no "taxonomy of errors".[68]

[74] One of the issues here is the impact of Mr Harris's evidence which is now accepted to be untrue.[69] The Privy Council in *R v Barlow* made the well-settled point that a trial is not made unfair "simply because some potentially misleading evidence has been admitted".[70]

[75] *R v Southon* provides a helpful illustration of a case where the wrongful admission of evidence was found to have given rise to a fundamental error.[71] Mr Southon was found guilty of murder. The victim had been stabbed. Mr Southon challenged his conviction on the basis passages from his police video interview which were played to the jury were prejudicial. He argued these passages meant he was deprived of the opportunity of a verdict of manslaughter and of his right to a fair trial. The Court of Appeal accepted his argument that this was not an appropriate case for the application of the proviso. He had run the defences of provocation and self-defence and the trial Judge accepted there was an evidential basis to leave these defences to the jury. The challenged parts of the video statement undermined those defences because they made it plain the appellant had been "up for … stabbing before" and had been in prison where he attended an anger management course.[72]

[76] To illustrate the impact of this evidence on intent, the Court said that what the jury wrongly learnt about the appellant's earlier actions may have led it to think he would have known the consequences of stabbing the victim and had a propensity to stab people. Hence it was more likely the jury might have decided he intended to cause the deceased bodily injury by stabbing which he must have known was likely to

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65 *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300 at [18] (emphasis in original); see also *Matenga*, above n 13, at [21]–[22].

66 *Wilde*, above n 61, at 373 per Brennan, Dawson and Toohey JJ.

67 *Weiss*, above n 65, at [44].

68 *Lundy*, above n 13, at [26] citing *Gassy v The Queen* [2008] HCA 18, (2008) 236 CLR 293 at [33] per Gummow and Hayne JJ.

69 Under s 49(1) of the Evidence Act, the perjury convictions are conclusive proof the perjured evidence is false. In terms of s 7(2) of that Act, the perjured evidence cannot be relevant.

70 *R v Barlow* [2009] UKPC 30, [2010] 1 LRC 272 at [58].

71 *R v Southon* CA34/06, 19 September 2006.

72 At [9] and [26].

cause death, and that he was reckless about that as he had stabbed before. The prejudicial effect of the inadmissible evidence was exacerbated by the omission of any directions from the trial Judge on the topic and where counsel's failure to object was contrary to the appellant's instructions.

[77] The Court of Appeal in *Southon* rejected the Crown submission the proviso to s 385 should nonetheless be applied on the basis it was unlikely the jury placed weight on the inadmissible evidence, and because there was sufficient evidence for the jury to infer murderous intent from the nature and number of the wounds and from the general circumstances. The Court said "the gravity and significance" of the evidence was such as to drive the conclusion the error was fundamental so that the proviso was unavailable.[73] The appeal was allowed and a new trial directed.

[78] More recently, in a passage from *Lundy* cited by the Court of Appeal in the 2024 judgment, this Court summarised the factors relevant to assessing whether the effect of the inadmissible evidence has been such as to mean the trial was rendered unfair, constituting a fundamental error. There, the Court said:[74]

> [42] The authorities establish that when considering the significance of inadmissible evidence in the context of the trial, an appellate court may inquire into whether the evidence went to an issue on which the verdict turned, how strong was the Crown case otherwise, how cogent or prejudicial was the evidence and whether it was met by defence evidence, what impact the inadmissible evidence had on the conduct of the defence case, how counsel handled the evidence, and whether the trial judge's directions mitigated or cured the irregularity. … [I]t may be possible to take into account what the actual jury did with the evidence, if that is ascertainable.

Paragraphs [79]–[120] are redacted.

[121] Having found that there was a fundamental error making the trial unfair, we must allow the appeal, the proviso can have no application. In this situation, we do not have to consider the further submission made by the appellant, resisted by the Crown, that the very fact the evidence of Mr Harris is perjured compounds the significance of the error. We do however go on to address the arguments we heard

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73 At [37].

74 *Lundy*, above n 13 (footnotes omitted).

about the impact of the new Crown theory on the application of the proviso here as they raise issues of importance for criminal appeals.

The impact of the new Crown theory on the availability of the proviso

[122] To provide the context for our consideration of the appellant's submissions as to the impact of the new Crown theory on the availability of the proviso, it is necessary to first summarise the Crown's new theory of the case and highlight some differences from the theory advanced at trial.

The new Crown case

[123] At trial, the jury heard evidence that the couple had spoken about their travel plans for the critical period from Thursday 6 April 1989. Graham Manning gave evidence that on 6 April he had talked to a couple, whom he later identified as Mr Höglin and Ms Paakkonen, when they came into his grocery store in Thames. He said they told him they wanted to do the Tararu bush walk which they said they would enter via Tararu Creek Road. They also spoke to him about going to Table Mountain and then down into Kauaeranga Valley and out through the Karaka Track, and made reference to the possibility of travel to the Cape. The latter is presumably a reference to Cape Colville at the tip of the Peninsula on the road to Fletcher Bay. Mr Manning advised them against going to Table Mountain because it would be too muddy.

[124] Merilyn Round identified Ms Paakkonen as the woman who came into her salon for a haircut on Friday 7 April. She said Ms Paakkonen told her "they were going [north] to tour the Peninsula" before going on to Auckland and then flying home. Mr Höglin told the other hairdresser at the salon, Paula Johnson, they were going to travel around the Coromandel Peninsula. Ms Johnson also recalled Mr Höglin saying that he and Ms Paakkonen were "on their way to Coromandel".[75]

[125] On the Crown's new theory, events connected to the offending occurred at multiple locations across a large geographical area and over many hours. Instead of

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[75] The Coromandel township is north of Thames, approximately halfway up the Coromandel Peninsula.

going a few minutes north to Tararu Creek Road, or further north to Coromandel or "the Cape" as they had mentioned, the couple left Thames on Friday 7 April and drove 70 km south-east across the Peninsula to the Wentworth Valley.[76] None of the witnesses the couple spoke to about their plans made any reference to plans to undertake that journey. On this new theory the couple met Mr Tamihere at Wentworth, and it is there that Mr Höglin was killed, his body disposed of and where Ms Paakkonen was abducted. Mr Tamihere then drove 70 km back across the Peninsula through Thames[77] with Ms Paakkonen in the distinctive white Subaru, walked her some 9 km up a popular public track to Crosbie's Clearing on the western side of the Peninsula to set up camp in time for the trampers to come upon them on 8 April. From Crosbie's Clearing they presumably moved on to some other scene or scenes where Ms Paakkonen was murdered and her body disposed of.

[126] As is apparent from this description, on the Crown's new theory, events connected to the offending occurred over a large geographical area with two likely crime scenes, and over a 24–27 hour period. The latter point also gives rise to new issues as to timing. The various events would have had to have occurred after the couple's visit to the hairdressers on Friday 7 April and prior to the sighting at Crosbie's Clearing on Saturday 8 April at 3.12 pm.

Submissions

[127] The argument for Mr Tamihere is that his convictions have been upheld on the basis of a new Crown case, reflecting the need to address the fact the new evidence suggests Mr Höglin was likely killed near Wentworth. The new Crown theory has not been tested before a jury, an approach which the appellant says usurps the role of the jury and the cardinal right to a trial by jury. Mr Tamihere says this is a fundamental error as to process which has adversely affected the integrity of the trial.

[128] The respondent submits that nothing raised by the appellant indicates the trial was unfair. Proper process was followed at trial. The exercise undertaken by the

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76 See Appendix B.

77 We understand, drawing from the affidavit of Detective Sergeant Norman which was admitted by the Court of Appeal in the 2024 judgment, that this journey would have required Mr Tamihere to drive through Thames following State Highway 25.

Court of Appeal in the 2024 judgment reflects the usual approach to fresh evidence. Such evidence may be admitted at the appellate stage both for the defence and the Crown. Its admission implies that a new interpretation is possible and the issue is whether it establishes a miscarriage of justice. The respondent says the present case is distinguishable from *Haunui v R*, relied on by the appellant, where the Crown asked the Court to make a factual determination on a basis the Crown had deliberately chosen not to leave open to the jury.[78] The respondent contrasts this to evidence discovered post-trial which adds further strands to a circumstantial Crown case, as was the case in *R v Hanratty*, where the new evidence reinforced the appellant's guilt.[79]

The legal principles

[129] In terms of the principles applicable to this part of the argument we begin with further consideration of the discussion about the proviso in *Matenga*. The respondent relies on *Matenga* for the submission that applying the new Crown theory in the context of the proviso does not comprise usurpation of the jury function but, rather, illustrates the ordinary working of a fresh evidence appeal.

[130] The respondent correctly notes that *Matenga* (and the decision of the High Court of Australia in *Weiss v The Queen* which the Court endorsed in this respect in *Matenga*) reflects a shift from the historical notion that the proviso impinged on the jury function.[80] That is because *Matenga* rejected an approach where, in exercising the proviso, the appellate court put itself in the shoes of the jury.[81]

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78 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189.

79 *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534 at [102]–[103] and [211].

80 *Matenga*, above n 13, at [27] and [29]; and see generally *Weiss*, above n 65.

81 To the extent that the Privy Council in *Bain*, above n 53, emphasises the importance of looking at the proviso from the perspective of the jury, that line of reasoning has been superseded by *Matenga*, above n 13. See also *Barlow*, above n 70, at [15]–[21], where the Privy Council noted the potential for difference but did not have to resolve the question whether there was in fact a conflict between the approach in *Bain* and that in *Matenga*. This does not however undercut the undoubted importance of the constitutional role of the jury in determining whether, in this case, the proviso was available.

[131] The relevant excerpt from *Matenga* on the respondent's first proposition is as follows:[82]

> [28] … The Bill of Rights Act guarantees of a trial by jury and an appeal do not require that a further jury trial should *necessarily be* ordered if a miscarriage at the first trial has been identified. Nothing in that Act prevents the appellate court from considering whether, despite the miscarriage, the verdict already rendered by a jury should stand.
>
> [29] Following conviction, after a fair trial by jury, Parliament has given the appeal courts an ability to uphold the conviction despite there being a miscarriage of justice in some respect. While the jury is in general terms the arbiter of guilt in our system of criminal justice, *the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies.*

[132] The Court went on to say that:[83]

> 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.

[133] These passages do not preclude the possibility that it may not be appropriate for a court to apply the proviso because the case considered by the jury at trial is too different to that now advanced before the appellate court. This situation may arise, for example, where the evidence given at trial has to be assessed in a new light given a critical change in the case.

[134] The respondent also draws support from the statement in *Matenga* that the appellate court is to consider all admissible evidence in undertaking the proviso exercise.[84] However, the Court in *Matenga* was dealing with a case where Crown evidence had been wrongly admitted.[85] Not surprisingly then, the Court was making it clear that, in exercising the proviso, the Court would only look at the admissible evidence remaining. Nor does it follow that the Crown will always be able to rely on fresh evidence to bolster difficulties with its case at trial. Rather, whether that is

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82 Emphasis added and footnote omitted.

83 *Matenga*, above n 13, at [31] (footnote omitted).

84 At [31]. The respondent also relies on statements to the same effect in *Mallard v The Queen* [2005] HCA 68, (2005) 224 CLR 125 at [13] per Gummow, Hayne, Callinan and Heydon JJ.

85 Nor do we see *Mallard*, above n 84, as assisting this part of the respondent's argument. That case was focused on the impact of a range of things that had gone wrong at trial and the approach the appellate court was to take to its assessment of whether there had been a miscarriage.

possible will turn on compliance with the procedural protections in s 25 of the Bill of Rights, and on the extent and significance of any new evidence advanced to support the new theory.

[135] As to the last point, it is clear from the passages from *Matenga* set out above that the Court was not precluding the possibility of cases where the Bill of Rights guarantees may prevail and require a retrial. The use of the word "necessarily" makes that plain. That is unsurprising given the importance of those rights and the absolute nature of the right to a fair trial.

[136] The reality that there may be situations where, despite the existence of the proviso, a retrial may be necessary, is also apparent from the recognition in *Matenga* that the exercise of the proviso is not generally appropriate in cases turning on witness honesty and reliability.[86] *Matenga* plainly contemplates there will be situations where the appellate court should not embark on that exercise at all.

[137] The Crown is right that fresh evidence appeals necessarily involve considering aspects of a case that the jury has not heard. It will be a matter of degree and most new evidence cases are not likely to throw up the issues we are faced with here, in particular the fundamental shift in the Crown case including two likely crime scenes and a larger geographical area. Further, it is necessary to keep in mind the need not to stultify the purpose of the proviso and so avoid pointless retrials.

[138] The decision of this Court in *Guy v R* is helpful in this context.[87] Mr Guy's appeal against conviction was allowed by a majority on the basis that material, not called in evidence at Mr Guy's trial, was improperly provided to the jury. The majority found this gave rise to a miscarriage of justice. Because the trial Judge did not know about the material, no direction was given to the jury to counter the potential prejudice. Two of the Judges in the majority, Elias CJ and Glazebrook J, considered the error in process was sufficiently fundamental to deprive the appellant of a fair trial. The proviso was accordingly unavailable. The third member of the majority, O'Regan J, also considered the case was not suitable for the proviso but for a different

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86 *Matenga*, above n 13, at [32].
87 *Guy,* above n 64.

reason, namely, that the case turned on the credibility and reliability of the complainant and other witnesses.

[139] While there was no majority on this point, the reasons of Elias CJ and Glazebrook J are helpful in considering the approach to the present case. Elias CJ and Glazebrook J noted that in determining whether an error has given rise to an unfair trial, the "minimum standards of criminal procedure" protected in s 25 of the Bill of Rights and the right to the observance of the principles of natural justice in s 27 are relevant.[88] Those minimum standards relevantly include the right "to present a defence" in s 25(e) and the right to "examine the witnesses for the prosecution" in s 25(f). Also of significance is the right of a person charged with an offence to a trial by jury for serious criminal offences.[89] In *Guy*, Elias CJ and Glazebrook J found these rights were breached by the provision of the material to the jury without the knowledge of the defendant, counsel, or the Judge.[90]

[140] The decision in *R v Stafford* relied on by the appellant, while in a different context, has some analogies with the present case.[91] Mr Stafford was convicted of murder. The essentially circumstantial Crown case was that he killed the victim in the bathroom by repeatedly hitting her on the head with a hammer. He cleaned up the blood and then put her body in his car boot before dumping the body. Important strands of the evidence at trial were the traces of human blood which forensic examination showed in the bathroom, and expert evidence that a maggot found in the boot of Mr Stafford's car matched those taken from the victim's body in terms of species and age. The latter evidence was relied on as relevant to establishing the time of death and so the appellant's opportunity to have committed the crime. It also indicated a physical connection between the appellant and the murder.

[141] New evidence emerged after trial to show, significantly, there was insufficient blood left in the bathroom to be consistent with the Crown case. Further, it transpired the maggot comparison was not meaningful in any sense.

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88 *Guy,* above n 64, at [39].
89 New Zealand Bill of Rights Act 1990, s 24(e).
90 *Guy,* above n 64, at [43].
91 *R v Stafford* [2009] QCA 407.

[142] In allowing Mr Stafford's appeal against conviction and ordering a retrial, a majority of the Court of Appeal of Queensland considered that, on the basis of the new evidence, the jury at trial should simply not have been asked to treat the central aspects of the Crown case as fairly open on the evidence. Keane JA, with whom Fraser J agreed, made the point the evidence improperly relied on:[92]

> … offered a seemingly coherent, internally consistent theory of the case. Coherence and consistency gave the Crown case a strength in the important areas of opportunity and means which was apt to compensate for its weaknesses in the area of motive and in explaining how the body was disposed of. And it was apt materially to mislead the jury.

[143] Keane JA concluded that in Mr Stafford's trial there had been a resulting "failure of process" departing from the essential requirements of a fair trial.[93] That was because the jury "[was] misled in a material way as to the case that could fairly be made by the Crown".[94] That failure was seen as "apt to deprive Mr Stafford of the benefit of the jury's verdict at the conclusion of a fairly conducted trial".[95] Keane JA said that the focus of the majority of the Court of Appeal in Mr Stafford's earlier unsuccessful conviction appeal on the substantive effect of the fresh or new evidence:[96]

> … obscured the point that the procedural defect which gave rise to a miscarriage of justice involved in the presentation by the Crown of a scenario substantial elements of which were, as the new evidence showed, apt to mislead the jury in performing their function.

[144] The respondent seeks to distinguish *Stafford* on the basis that there the new evidence contradicted the Crown case. By contrast, here, the Crown argues, the new evidence adds strands to the Crown's circumstantial case. Because of the differences from the case presented at trial, there is a lack of evidence on key points. It is simply not possible at this stage to reach a concluded view as to whether the Crown is right about the effect of the new strands or not.

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92 At [141]. The third of the Judges, Holmes JA, agreed Mr Stafford had "not had a fair trial on the charge of murder, the Crown case as put at trial having been fundamentally undermined by evidence since adduced". Holmes JA did not consider there was a basis on which the jury could find Mr Stafford guilty and would have entered an acquittal: at [172] and [208].

93 At [150].

94 At [150].

95 At [150].

96 At [151].

[145] Against this background we briefly discuss the approach of the Court of Appeal to this issue and then turn to apply the principles to this case.

The approach of the Court of Appeal

[146] It does not appear that the appellant's argument in this Court about the effect of the new Crown theory was put in quite the same way in the Court of Appeal or, if it was, it was not put as clearly. We say that because the Court of Appeal described Mr Tamihere's submission as a complaint that the "significant shifts in the Crown's case illustrate … that too much was, and remains, unknown".[97] That was certainly a part of the submission made to us about the new theory. But the appellant is also saying that, in this way, the trial process has gone awry to the extent that meant that the proviso was unavailable. We have considered this part of the argument in this fresh context.

Paragraphs [147]–[161] are redacted.

Retrial

[162] As we are exercising our jurisdiction to quash Mr Tamihere's convictions, that raises a question as to whether we should make an order directing a retrial.[98]

Paragraphs [163]–[164] are redacted.

The relevant principles

[165] This Court in *H (SC 49/2021) v R*[99] confirmed that the correct approach to determining whether to order a retrial is that taken by the Privy Council in the leading case of *Reid v The Queen*.[100] Essentially, that requires "a factual inquiry as to where the interests of justice lie".[101]

[166] The Court in *H (SC 49/2021)* accepted that if a conviction appeal was allowed on the basis that the verdict was unsustainable on the evidence, then, "ordinarily"

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97 CA 2024 judgment, above n 7, at [256].
98 Crimes Act, s 385(2).
99 *H (SC 49/2021) v R* [2022] NZSC 42, [2022] 1 NZLR 21 at [38], and see at [36].
100 *Reid v The Queen* [1980] AC 343 (PC).
101 *H (SC 49/2021)*, above n 99, at [38].

acquittal would follow.[102] That is not this case. It is not argued that the appeal should be allowed on the basis the evidence was insufficient to support the guilty verdicts. Nor, as we have also found, is this a situation where the better approach is to apply the proviso. Lord Diplock, writing for the Board in *Reid* said that for cases which are in between these two "extremes" several factors for consideration arise as follows:[103]

> The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of a defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.
>
> The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in [the relevant jurisdictions] … There may be cases where, even though the [court] considers that upon a fresh trial an acquittal is on balance more likely than a conviction,
>
> > "It is in the interest of the public, the complainant, and the [defendant] himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of defect in legal machinery."

Paragraphs [167]–[170] are redacted.

Application to adduce further evidence

[171] In seeking leave to appeal to this Court, Mr Tamihere applied for leave to adduce new evidence. The evidence is an affidavit from the late Sir Robert Jones. In the judgment granting leave to appeal, this Court admitted the affidavit

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[102] At [39]; and see *Reid,* above n 100, at 349–350.

[103] *Reid*, above n 100, at 350, citing *Ng Yuk Kin v The Crown* (1955) 39 HKLR 49 (FC) at 60.

provisionally for the purpose of allowing the parties to make submissions on the admissibility and relevance of this evidence at the hearing.[104]

[172] Sir Robert recounts, amongst other matters, an encounter with the late Detective Inspector John Hughes, the officer in charge of the case against Mr Tamihere and the person responsible for the police inquiries leading to the charges laid against Mr Tamihere.[105] Sir Robert says that the encounter took place the night after Mr Tamihere was convicted of the murders. He describes being grabbed by a "very drunk" Detective Inspector Hughes who told Sir Robert that he "got" Mr Tamihere on three points and had "made them all up".

[173] Mr Tamihere submits that this evidence is fresh, credible and cogent and so meets the test for the admission of new evidence.[106] The Crown submission is that the evidence is unreliable on its face, vague and inadmissible.

[174] We have not found it necessary to refer to the affidavit in our consideration of the case. We have reached a conclusion that the appeal should be allowed without needing to do so. The evidence is accordingly not cogent to an issue that has arisen on the appeal.

Suppression

[175] Mr Tamihere sought suppression of parts of the judgment. The Crown abided the Court's decision on suppression. We are satisfied, having considered the submissions, that paragraphs [49]–[61], [79]–[120], [147]–[161], [163]–[164] and [167]–[170] of the judgment should be redacted from the publicly available judgment pending final disposition of the retrial. These redactions are necessary to protect fair trial rights as these paragraphs traverse factual matters that may be in issue on a retrial or which would be irrelevant on a retrial but are prejudicial. We have made orders accordingly. We note that Mr Tamihere can apply for takedown orders in relation to

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104 SC leave judgment, above n 10, at [2].
105 Detective Inspector Hughes passed away in 2006.
106 *R v Bain* [2004] 1 NZLR 638 (CA) at [18]–[19] and [22]–[24].

publicity about the 2024 judgment of the Court of Appeal and any other material that might affect his fair trial rights.[107]

Result

[176] The application to adduce further evidence is dismissed.

[177] The appeal is allowed.

[178] We exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act to quash Mr Tamihere's convictions. We make an order directing a retrial.

[179] Order redacting paragraphs [49]–[61], [79]–[120], [147]–[161], [163]–[164] and [167]–[170] from the judgment delivered on 31 March 2026.

[180] Order prohibiting publication of the unredacted version of the judgment pending final disposition of retrial.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

[107] See *Exley v NZME Publishing Ltd* [2025] NZSC 90, [2025] 1 NZLR 184.

Appendix A — 1989 calendar

1989

JANUARY						
M	T	W	T	F	S	S
30	31					1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

FEBRUARY						
M	T	W	T	F	S	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28					

MARCH						
M	T	W	T	F	S	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

APRIL						
M	T	W	T	F	S	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

MAY						
M	T	W	T	F	S	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

JUNE						
M	T	W	T	F	S	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

JULY						
M	T	W	T	F	S	S
31					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

AUGUST						
M	T	W	T	F	S	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

SEPTEMBER						
M	T	W	T	F	S	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

OCTOBER						
M	T	W	T	F	S	S
30	31					1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

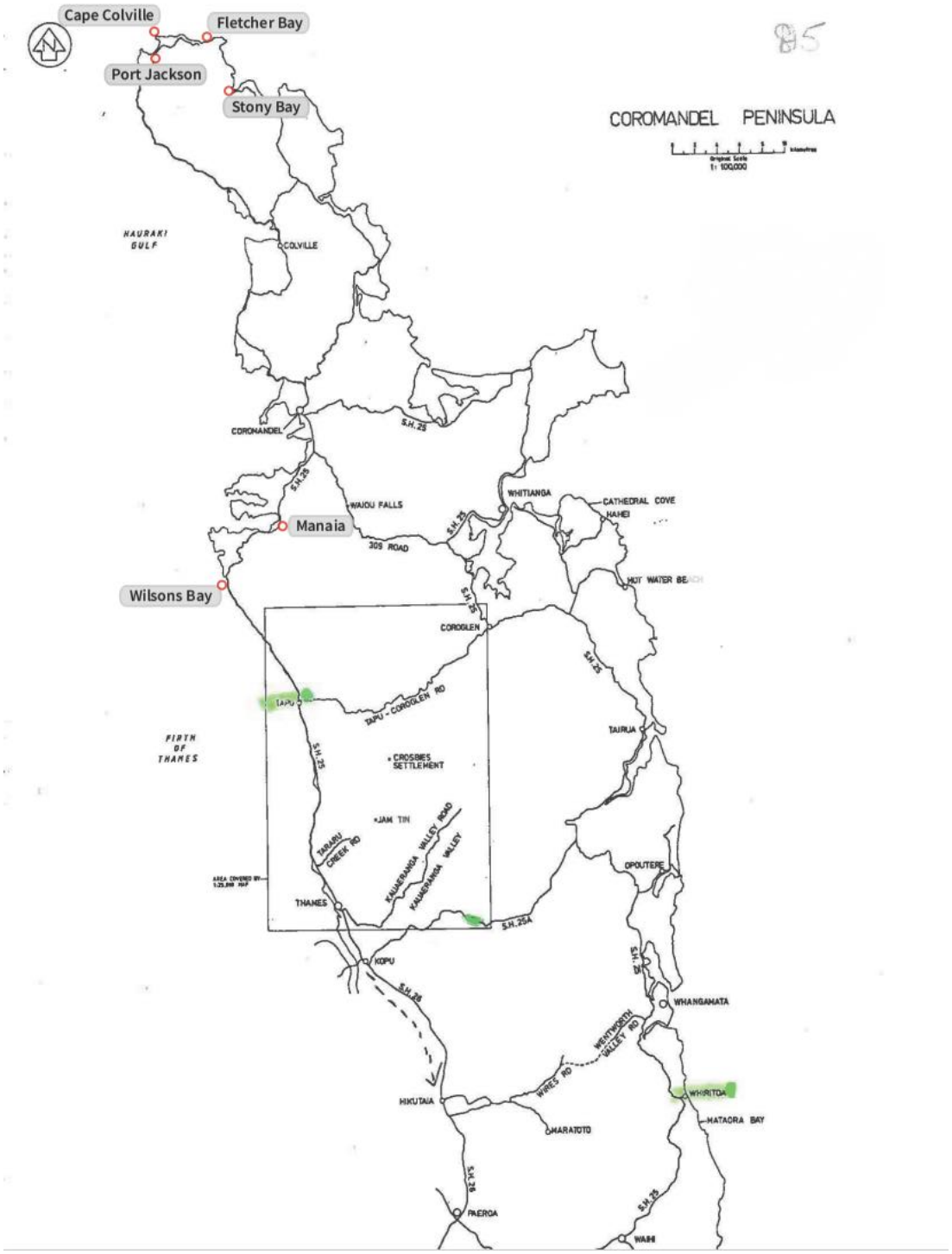
NOVEMBER						
M	T	W	T	F	S	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

DECEMBER						
M	T	W	T	F	S	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Appendix B — Labelled map: central and southern Coromandel Peninsula[108]

108 This map was first prepared by the Crown on request of the Court of Appeal following the hearing in that Court. Counsel for Mr Tamihere declined to participate in that exercise on the basis they did not wish be party to a map not used in evidence at trial, but did not suggest the map was incorrect. To contextualise this Court's discussion above at [123] and [153] we have added the locations of the Kauaeranga Valley, the Karaka Track and Tairua Forest. These are approximations intended only to assist in conceptualising the locations relevant to these discussions.

Appendix C — Labelled map: northern Coromandel Peninsula



Appendix D — Comparative map of Mr Tamihere's accounts of his movements between 2–10 April 1989[109]

This is the exhibit marked **"D"** referred to in the annexed Affidavit of **BENJAMIN LUKE NORMAN** sworn at **MORRINSVILLE** this day of **August 2023** before me:

Deputy Registrar the District Court of New Zealand

109 In red is the route Mr Tamihere said he walked between 2–10 April 1989 in his evidence at trial. In blue is the route Mr Tamihere said he walked in the week leading up to 10 April 1989 in his initial police statements.