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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 60/2023
[2026] NZSC 88**

BETWEEN JAMES HENRY WILSON
Appellant

AND THE KING
Respondent

STUFF LIMITED
Intervener

SC 77/2023

BETWEEN MARK JOSEPH HOGGART
Appellant

AND THE KING
Respondent

STUFF LIMITED
Intervener

Hearing: 6–8 August 2024

Court: Winkelmann CJ, Glazebrook, Williams, Kós and Miller JJ

Counsel: C W J Stevenson KC, E A Hall and O H Fredrickson for
Appellant in SC 60/2023
Q Duff, S L McColgan and G T R Duff for Appellant in SC
77/2023
C A Brook, M J Lillico, W J Harvey and O A Jessop Boivin for
Respondent
E D Nilsson for Stuff Limited as Intervener

Judgment: 7 July 2026

JUDGMENT OF THE COURT

- A** The appeals are allowed.
- B** The appellants' convictions are set aside.
- C** An order is made under ss 233(3)(a) and 241(2) of the Criminal Procedure Act 2011 that judgments of acquittal be entered.
- D** The interim order suppressing Mr Wilson's name and any identifying particulars made on 9 June 2023 is to expire on the release of this judgment.
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REASONS

	Para No
Winkelmann CJ, Williams, Kós And Miller JJ	[1]
Glazebrook J	[77]

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

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Introduction

[1] Late at night on Saturday 24 October 1987, two armed men held up the Red Fox Tavern in Maramarua, a village on the road between South Auckland and the

Coromandel Peninsula. During the robbery, one of the assailants shot and killed the publican, Mr Christopher Bush, with a sawn-off shotgun.

[2] Almost 30 years later, in August 2017, the appellants, Messrs Wilson and Hoggart, were charged by the police with murder and aggravated robbery. The essential issue at trial was identity. The Crown case that Messrs Wilson and Hoggart were the Red Fox robbers was circumstantial. No direct forensic or eye-witness evidence placed them at the crime scene. They were found guilty by a jury of murder and aggravated robbery in March 2021. Their appeals to the Court of Appeal failed in May 2023.¹ This Court granted leave to appeal in December 2023.²

Background

[3] We adopt the background facts helpfully summarised by the Court of Appeal at the start of its judgment.³

[4] At approximately 11.30 pm on Saturday 24 October 1987, two well-disguised men burst into the lounge bar of the Red Fox Tavern at Maramarua, which lies on State Highway 2 about halfway between Pukekohe and Thames. It was Labour Day weekend.

[5] One of the intruders was armed with a sawn-off, side-by-side shotgun. The other intruder carried a baseball bat. Present in the bar were Mr Bush, the tavern manager, and three staff: Ms Prisk, Ms Soppet and Mr Bill Wilson. Mr Bush and the staff were enjoying a drink after tidying up the Tavern following its closure for the evening. The man with the gun announced he and his accomplice were there to rob the Tavern.

[6] Very shortly after the intruders entered the lounge bar, Mr Bush stood up. At almost the same time, the gun was fired at Mr Bush, hitting him with 215 shotgun pellets, many of which pierced his lungs and heart. He died less than a minute after

¹ *Wilson v R* [2023] NZCA 155 (French, Gilbert and Collins JJ) [CA judgment].

² *W (SC 60/2023) v R* [2023] NZSC 164 (Glazebrook, O'Regan and Kós JJ) [SC leave judgment]. The approved questions are explained below at [14].

³ CA judgment, above n 1, at [1]–[10]. This summary substantially repeats the Court of Appeal's (with some revisions).

he was shot. The gunman then told the remaining bar staff to do as they were instructed.

[7] The bar staff were told to lie on the floor. The offenders then demanded the keys to the safe. Ms Prisk crawled over to Mr Bush's body and found a set of keys in one of his pockets. While this was happening, the offender with the gun kicked Mr Bush's prone body and berated him.

[8] The other offender stood over Ms Prisk with the baseball bat raised above his head. When the keys were located, Ms Prisk was told to stand up and open two locked doors leading to the manager's office.

[9] Ms Prisk was not able to identify the keys to the locked doors. The intruder with the baseball bat then kicked the locked doors open. He also threatened Ms Prisk and told her that if the alarm went off, she was "history".

[10] None of the keys found by Ms Prisk were for the safe. The offender with the baseball bat then marched Ms Prisk back to the lounge bar where the man with the gun continued to threaten Ms Soppet and Mr Bill Wilson. Ms Prisk was ordered to lie face down on the floor beside Ms Soppet and Mr Bill Wilson. The man with the baseball bat returned to the manager's office and found the keys to the safe in a desk.

[11] The offenders then cleared out the safe, removing close to \$31,000 in cash and coins, and approximately \$4,900 in cheques. The coins weighed approximately 42 kg. After the contents of the safe were removed, the offenders tied up the bar staff with lengths of yellow rope, which the offenders had brought with them to the Tavern.

[12] When the offenders left, they told the bar staff not to move for eight minutes or they would return and finish the staff off. The offenders left through the backdoor of the Tavern, which was the door they used when they entered the premises. The staff listened for the sound of a vehicle leaving the car park but heard nothing. Ms Soppet managed to loosen the rope around her hands and struggle free. She then helped free Ms Prisk and Mr Bill Wilson. Mr Bill Wilson checked on Mr Bush but realised he

was dead. Ms Soppet then telephoned 111. She also telephoned her husband and a Mr Poa, who lived nearby.

[13] The police conducted a large-scale investigation which ran from the night of the offending and wound up in mid-1988. After reviewing the evidence gathered during the investigation a decision was made that there was not sufficient evidence to prosecute anyone for the murder of Mr Bush or the aggravated robbery. A further review of the evidence was conducted by the police in 1999–2000. Again, it was decided that there was insufficient evidence to charge anyone with what had occurred at the Red Fox Tavern. In 2016, the police opened a new investigation into the Red Fox robbery and murder. Following this reinvestigation, Messrs Wilson and Hoggart were charged in August 2017 with the murder of Mr Bush and the aggravated robbery of the Red Fox Tavern.

This is an unreasonable verdict appeal

[14] In giving leave to appeal, this Court specified two approved questions. The first related to the necessity for a takedown order relating to media reports of prior offending by Mr Wilson. We agree with Glazebrook J’s conclusion that it was necessary that one be made in this case, but that it is unnecessary to decide whether failure to do so caused a miscarriage of justice. That is because of our conclusion on the second question.⁴ The second question was:⁵

Whether the Court of Appeal was correct to conclude that the verdicts were not unreasonable in light of admissible evidence relating to the potential culpability of Lester Hamilton (deceased).

[15] That question was effectively enlarged at the hearing—by the word “including” being read in after the word “unreasonable”—and subsequently unreasonableness of the verdicts became the primary issue for this Court.⁶

⁴ See in particular below at [630]–[634].

⁵ SC leave judgment, above n 2.

⁶ The appeal therefore turns to be evaluated under s 232(2)(a) of the Criminal Procedure Act 2011: see s 240(2). Sensibly, no issue was taken by the Crown at the hearing to that enlargement. While the Crown in its written submissions had expressed disagreement with this approach, it nevertheless met the appeal on its merits.

[16] The Crown case depended on two fundamentals—*both* of which the Crown had to prove:

- (a) first, that the combined effect of the Crown’s 10 strands of circumstantial evidence (which became 12 through the course of the trial) had to place the appellants at the crime scene, beyond a reasonable doubt; and
- (b) secondly, that it was not a reasonable possibility that an alternative suspect, Mr Lester Hamilton, had committed the robbery and murder.⁷

[17] If the verdicts delivered were unreasonable, that determines the appeal. Issues of admissibility of evidence, the propriety of judicial direction, or other error, fall away. We prefer to analyse the reasonableness of verdicts on the basis that all the evidence the jury saw and heard was properly before them, confining discrimination to the weight to be given to each piece of it. For these same reasons, we postpone discussion of another issue raised for the appellants, relating to the admissibility of the evidence of a proposed defence witness, Mr Hartshorne.⁸ Ultimately, that question proves immaterial in resolving the appeal.

[18] Although the Crown’s two fundamental obligations set out above are to an extent interdependent, we consider they are best addressed separately, and in the order set out above. The primary question is whether a reasonable jury could conclude that the evidence against Messrs Wilson and Hoggart established their guilt beyond reasonable doubt. If it does, then it is not reasonably possible that Mr Hamilton was one of the robbers, because it is common ground that their culpabilities are mutually exclusive.⁹ But before reaching a final conclusion on the primary question, the jury would need to be satisfied that the potential involvement of Mr Hamilton was eliminated. Messrs Wilson and Hoggart being the ones on trial, we prefer to approach

⁷ In company with an unidentified offender.

⁸ Mr Hartshorne was Mr Hamilton’s neighbour. His evidence concerned the latter’s actions before, and would have concerned his statements after, the crime at the Red Fox Tavern: see below at [69].

⁹ It is common ground that *either* Messrs Wilson and Hoggart were the robbers *or* Mr Hamilton and another man were, *or* another unknown pair entirely was. There is no potential overlapping culpability.

the analysis in that way, which means we postpone the analysis of Mr Hamilton’s involvement.

[19] By s 232(2)(a) of the Criminal Procedure Act 2011, Parliament continued an essential check and balance on criminal process formerly found in s 385(1)(a) of the Crimes Act 1961.¹⁰ An appellate court “must” allow a conviction appeal from a jury verdict if, “having regard to the evidence, the jury’s verdict was unreasonable”.¹¹ This Court stated the test for an unreasonable verdict in *R v Owen*, namely that a verdict will be unreasonable where, “having regard to all the evidence”, it is one that “no jury could reasonably have reached to the standard of beyond reasonable doubt”.¹² The question here is not whether the jury might have entertained doubt about whether the accused was guilty, but whether it ought to have done so.¹³

[20] That critical statutory appellate obligation, an essential protection underpinning trial by jury, may not be abdicated by retreating to a headline proposition that “the weighing of evidence is a matter for the jury”. That is not what this Court meant in *Owen* when it said that “weight to be given to *individual* pieces of evidence is *essentially* a jury function”.¹⁴ The Act requires an appellate court to assess the *whole* of the evidence according to the statutory standard. An essential element of appellate review of any prior decision of a tribunal of fact is to ascertain that the tribunal’s determination has a sufficient evidential underpinning. That review function assumes especial importance in the case of an appeal from a criminal trial where the liberty of the subject is at issue. In such cases it is not the appellate function to stitch together scraps of evidence and declare them a rope. Each item of evidence may bear only the weight it may reasonably bear. An appellate court must step back from the detail to make an assessment as to whether, particularly in a wholly circumstantial case, a reasonable jury could conclude that guilt is proved beyond reasonable doubt.

¹⁰ First introduced as s 4 of the Criminal Appeal Act 1945, in turn modelled on s 4 of the Criminal Appeal Act 1907 (UK) 7 Edw VII c 23: see *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [6].

¹¹ See also Criminal Procedure Act, s 240(2).

¹² *R v Owen*, above n 10, at [14]–[15], citing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [86]–[87] per Glazebrook, Chambers, Arnold and Wilson JJ.

¹³ *Pell v The Queen* [2020] HCA 12, (2020) 268 CLR 123 at [43]–[45]; and *Libke v The Queen* [2007] HCA 30, (2007) 230 CLR 559 at [113] per Kirby and Callinan JJ.

¹⁴ *R v Owen*, above n 10, at [13(c)] (emphasis added).

[21] In undertaking its statutory responsibilities, the appellate court must recognise and give appropriate weight to advantages the jury may have in seeing the evidence adduced in person, and in assessing the credibility of contested evidence.¹⁵ But evidence varies, and jury advantage may ebb here, and flow there. Circumstantial evidence may conceivably be more susceptible to appellate review than direct evidence of facts in issue where there is a material credibility contest.

[22] In this case, as in *R v Munro*, *Kuru v R* and *Iongi v R*, the exercise required by s 232(2)(a) necessitates an extensive review of the whole of the evidence.¹⁶ Such an exercise is more likely to be necessary on appeal where the Crown case at trial was wholly or largely circumstantial. But those are also the cases in which the risk of a miscarriage of justice is greater.

The verdicts were unreasonable and cannot stand

[23] As we said, the Crown had to establish *both* (1) that the evidence placed Messrs Wilson and Hoggart at the crime and (2) that the reasonable possibility that Mr Hamilton committed the Red Fox robbery and murder was excluded. We consider the Crown case failed to establish either to the required standard of proof.

The ten (twelve) strands

[24] As noted, the Crown's 10 strands—which Ms Brook submitted were strong enough to establish guilt beyond reasonable doubt—became 12 at the trial.¹⁷ The 12 strands can helpfully be sorted into three categories:

- (a) *presence*: descriptions, association, movements, shotgun, gloves and shoe print;

¹⁵ See at [13].

¹⁶ See *R v Munro*, above n 12, at [233] per Glazebrook, Chambers, Arnold and Wilson JJ; *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 at [205]–[208] per Glazebrook J, with whom the rest of the Court agreed on this issue; and *Iongi v R* [2025] NZSC 191, [2025] 1 NZLR 900 at [61]–[63] per Winkelmann CJ, Williams and Kós JJ.

¹⁷ The 11th strand was evidence of a shoe print. The 12th strand was alleged hinted admissions made by both appellants. While the Crown had not identified these as key strands in its opening address, the Crown by closing treated them as such. As noted by the trial Judge, some of these strands related only to Mr Wilson. But as Mr Hoggart was charged as a party, it is appropriate to review the evidence against the appellants as a whole.

(b) *motive and interest*: motive, propensity and prior statements; and

(c) *subsequent conduct*: lies, money and hinted admissions.

[25] We will analyse them under those headings. Before doing so we note two important points of chronology:

(a) Mr Hoggart was released from prison on 17 August 1987; and

(b) Mr Wilson was released on 7 October 1987—two weeks before the Red Fox robbery.

A Presence

[26] *Descriptions*: The Crown case was that Messrs Wilson and Hoggart's appearance was generally consistent with the description of the robbers. The Red Fox robbers were heavily disguised. Description evidence was given by the three surviving staff members who were present at the robbery—Ms Prisk, Ms Soppet and Mr Bill Wilson—and was confined to gender, height, build, attire and voice. Only voice gave any clue as to ethnicity and, of the bar staff, only Ms Prisk had any extended interaction with the offenders (the others being face down on the floor the entire robbery). All of this is carefully reviewed in Glazebrook J's reasons.¹⁸

[27] Ms Prisk gave evidence of a height differential between the robbers, which was broadly consistent with the height difference between Mr Wilson (who was approximately five feet, eight inches tall) and Mr Hoggart (who was approximately five feet, 10 inches to five feet, 11 inches tall); Ms Soppet did not see a differential; and Mr Bill Wilson could not judge as he had only seen one robber, who he said was approximately six feet tall. As Mr Duff submitted, the height evidence is so generic as to capture a significant proportion of the New Zealand male population.

[28] Attire was equivocal. Both offenders wore balaclavas, gloves and dark, nondescript clothing, meaning no actual identification was possible. Ms Prisk initially

¹⁸ Below at [173]–[183].

described the second offender as having worn orange gloves with red and white fishnet and blue-edged pads, although gave a subsequent description of gloves that were tan or orange and having cream netting and blue or red braiding. Ms Soppet simply thought he was wearing gloves.

[29] Voice evidence was also equivocal: Ms Prisk thought both were Māori from their voices, but she accepted their voices were muffled. By contrast, Ms Soppet and Mr Bill Wilson thought neither were (although the latter only witnessed one robber and was not certain). The appellants are both Pākehā. A forensic linguistics expert gave evidence that, while most New Zealanders can identify the Māori-English vernacular—spoken usually by Māori but sometimes by non-Māori—errors can be made, and error may have been more likely in the circumstances of the robbery.

[30] *Association*: There was evidence that Messrs Wilson and Hoggart served time together at Auckland Prison (Pāremoremo) in 1983 and in Whanganui Prison in 1987. More relevantly, in police interviews both acknowledged being in each other’s company during Labour Weekend 1987.¹⁹ We may take it that the Crown had proved they were associates at the time of the robbery. The evidence did not establish that they had been criminal associates, however.²⁰

[31] *Movements*: The movement evidence is analysed in extensive detail by Glazebrook J.²¹ Mr Wilson was in the Waikato area in the first part of Labour Weekend 1987. He was dropped off in Taupō late at night on Thursday 22 October by his brother-in-law, and arrived back at the family vineyard where he had been staying “first thing Sunday morning” on Sunday 25 October, the day after the robbery and shooting.²² When interviewed by the police on 22, 23 and 25 January 1988, he gave inconsistent accounts of what he had done during the intervening period.²³ Mr Hoggart, who was interviewed on 22–24 January 1988, said that he thought he was in Ngāruawāhia with a Ms Rautangata that Labour Weekend. As noted, both

¹⁹ See below at [207]–[210] and [213] per Glazebrook J.

²⁰ In the sense of having committed prior crimes together.

²¹ Below at [200]–[280].

²² Accounts varied as to the time of his arrival on the Sunday morning: Mr Wilson said it was “first thing Sunday morning”, about 8.30 or 9 am; family members placed his arrival earlier, somewhere between 6.30 and 8 am.

²³ See below at [207]–[211] per Glazebrook J.

Messrs Wilson and Hoggart acknowledged being in the company of the other in the course of the weekend. Two witnesses (Ms Northcott and Mr Jeffries) gave evidence of seeing them together in Cambridge on what we conclude was Friday 23 October 1987.²⁴ There was also reliable evidence placing Mr Hoggart in Hamilton on the afternoon of Saturday 24 October, the day of the robbery. We agree with Glazebrook J that statements placing both Messrs Wilson and Hoggart at Ms Rautangata’s house in Ngāruawāhia early in the morning of Sunday 25 October 1987, right after the Red Fox robbery, were insufficiently reliable to be given any weight by the jury.²⁵

[32] The upshot of the movement evidence discussed above, however, is that the jury could reasonably have concluded that the appellants had the opportunity to commit the robbery. We turn now to other evidence which might place Messrs Wilson and Hoggart directly at the Red Fox Tavern.

[33] Apart from the “descriptions” evidence referred to above, the only such evidence is a written statement given by a Mrs Pyle relating to a car seen outside the Red Fox robbery the night before the offending. Mrs Pyle had died before the trial and her two police statements given on 26 and 27 October 1987 were read to the jury. She was not of course cross-examined. There are significant problems with Mrs Pyle’s evidence.²⁶ It concerned a car and its two occupants, stopped near the Tavern at about 8.45 pm on Friday 23 October 1987. Her description of the relative builds of the passenger and driver was inconsistent with those of Messrs Wilson and Hoggart—she said the passenger—on the Crown case Mr Wilson—was “[s]lightly bigger than the driver”. She described the vehicle as a “[b]ig car”, “a wreck”, coloured both green and brown. She did not identify its make or model. Mrs Pyle said she saw it again three days later, on Monday 26 October, and described it as “[p]redominantly a greenish brown colour” with large brown patches. Her husband and a friend, Mr McCardy, were both present on the second occasion. Mr McCardy said the car was a 1956 model Vauxhall. Mr Pyle initially thought it was an old Holden, but in his statement (given in 2017 and read aloud at trial) he agreed it was a Vauxhall, “about a

²⁴ We agree with Glazebrook J’s analysis in this regard: see below at [214]–[217].

²⁵ Below at [250]–[276].

²⁶ See Glazebrook J’s analysis below at [237]–[243].

1958 model”, and olive to sage green in colour. Mr McCarty did not make a statement or give evidence.

[34] Mr Hoggart’s car was one of two green Vauxhall Victors owned by an acquaintance, one of which was given to Mr Hoggart. It is unclear which Vauxhall Victor Mr Hoggart was driving—either a solid, dark green “roughly 1978” model quite different to the car seen by the Pyles or another Vauxhall Victor of unknown year and a more faded green. Whichever car it was, however, it could not have been at Maramarua on Monday 26 October because Mr Hoggart had left it parked at a Ms Hargreaves’ house on Saturday 24 October—an unusual instance of a car having a watertight alibi. If the car seen on the Friday before, and the Monday after, the robbery and shooting was the same, then it could not have been Mr Hoggart’s. The trial Judge warned the jury to exercise caution about what weight to give Mrs Pyle’s evidence, highlighting potential issues with its reliability.

[35] We agree with Glazebrook J that a jury could not put any reasonable reliance on Mrs Pyle’s statement.²⁷ It was insufficiently reliable to permit an inference to be drawn that Mr Wilson and Mr Hoggart had travelled to Maramarua to “scope out” the Red Fox Tavern on Friday 23 October, the day before the robbery.

[36] *Shotgun*: Mr Wilson admitted in his police interview that he had acquired a sawn-off shotgun on 19 or 20 October 1987—just a few days before the robbery. The gun was acquired from an associate, a Mr Ross, who had stolen it. Mr Ross was one of Mr Wilson’s co-offenders in the armed robbery of the Birkenhead Licensing Trust, in respect of which offending Mr Wilson had recently been released on parole. Mr Ross’ evidence was that Mr Wilson wanted it as security for a motorcycle he was acquiring, and that most bikies had sawn-off shotguns to protect their bikes. Mr Wilson’s brother-in-law, who ran the vineyard where Mr Wilson was living and did some unpaid work, thought the gun might be useful to shoot blackbirds at work (although he already had a full-barrel shotgun he used for this purpose). After the three of them test-fired the gun, he indicated to Mr Ross that he was interested in keeping it, but after the test-firing he did not see it again (Mr Ross having given it to

²⁷ See below at [243].

Mr Wilson). Mr Wilson made the same claim about shooting birds in his police interview.

[37] After the robbery, Mr Wilson disposed of the gun, which was never located. During his police interview, he initially said that he had thrown the gun away “a few days” after acquiring it because “[i]t was no good”. Once he became aware that he was being interviewed about his possible involvement in the Red Fox Tavern robbery, he gave a further explanation, which was that he had thrown it away on the morning of Sunday 25 October, after hearing about the robbery on the radio. He said he thought he and Mr Ross would come under police suspicion due to the similarities between the Red Fox offending and their prior armed robbery of the Birkenhead Licensing Trust in 1983.²⁸

[38] Mr Wilson’s brother-in-law said that after the Red Fox robbery, Mr Wilson told him that he would get rid of the gun. His sister likewise gave evidence that Mr Wilson had commented on the Sunday that he thought the police would come and “check [him] out” in relation to the Red Fox offending. Mr Ross said that his first thought, when he heard about the robbery on the news, was that “it was only a matter of time” before he came under police suspicion. He remembered Mr Wilson coming to his house after Labour Weekend and saying Mr Ross had to dispose of papers and plates, and that he (Mr Wilson) had already disposed of the shotgun. Mr Wilson’s evidence was that the papers and plates were given to him by Mr Ross “for an earn”.²⁹

[39] We consider this evidence shows the following. First, Mr Wilson had a shotgun at the time of the Red Fox robbery, the form of which was generally consistent with that described by witnesses present at the robbery but which was not uncommon at the time amongst bikies and criminals. Forensic testing revealed that the shotgun pellets recovered from the crime scene were not inconsistent with those used in the vineyard test-firing, but this revealed nothing about the shotgun itself. Secondly, Mr Wilson gave inconsistent explanations for its acquisition, and for its disposal. These constitute a circumstantial strand supporting guilt.

²⁸ See below at [44].

²⁹ Meaning an illegal way to make money.

[40] *Gloves*: The gloves evidence is described by Glazebrook J in her reasons.³⁰ We need not spend time on it. For the reasons she gives, we agree that the gloves evidence was inconsistent, and not probative, not least because there was no evidence that Mr Wilson possessed gloves of the kind described at the time. For the reasons given by Glazebrook J, we agree also that no weight could be placed on this evidence by a jury deliberating reasonably.³¹

[41] *Shoe print*: Again, we need not spend time on this evidence—the 11th strand. It adds nothing at all, and the Crown’s investment in it as having any probative value is somewhat troubling. The short point is that the grassy shoe print located inside the Tavern cannot be connected to the offenders, nor was it measured accurately.³²

[42] *Conclusion on presence*: The Crown was obliged to demonstrate the presence of Messrs Wilson and Hoggart at the Red Fox robbery, as the offenders. To state the obvious, their presence was something the Crown needed to prove beyond reasonable doubt. The presence evidence reviewed above shows opportunity and means, but does not, in our assessment, discharge the burden of establishing presence beyond reasonable doubt. At its highest, it showed Messrs Wilson and Hoggart were in the region but there was no reliable evidence that they were at Maramarua, or at the scene of the robbery and murder. We turn now to the remaining strands to see if their addition makes a difference to that conclusion.

B Motive and interest

[43] *Motive*: The evidence established interest on the part of both Messrs Wilson and Hoggart in membership of the Filthy Few motorcycle gang. Full patch membership required ownership of a (usually) British or American motorcycle. Neither of the appellants owned such a motorcycle. Both had until recently been in prison, and had limited funds. Whether for that reason or another, the appellants’ straitened circumstances gave them motive to undertake a crime that would generate funds, as Mr Wilson had acknowledged in his police interview. What form that might have taken is a matter of speculation.

³⁰ See below at [337]–[342].

³¹ See below at [345].

³² See below at [347]–[373] per Glazebrook J.

[44] *Propensity*: In agreement with Glazebrook J, we conclude that the jury was entitled to take into account Mr Wilson’s prior robbery of the Birkenhead Licencing Trust in 1983.³³ They could also take into account the fact that there were a number of similarities, including the involvement of sawn-down, double-barrelled shotguns; the use of disguises; the targets both being large, licensed premises robbed after closing time, but when staff were on site to open the safe; one of the offenders subduing staff who were made to lie on the floor while another offender escorted the remaining staff member to open the safe; and the fact that some victims were kicked while on the floor.

[45] Use of this as propensity evidence, demonstrating a tendency on Mr Wilson’s part to act in a particular way, is questionable. It concerns a single armed robbery by Mr Wilson: the Birkenhead job. The index offending at Maramarua does not form part of the propensity evidence, because of s 40(1)(b) of the Evidence Act 2006. In any case, this is generic, undistinctive evidence of a singular armed robbery of premises where the targeted funds were held in a safe.³⁴ There is no question that Mr Wilson had been an armed robber, and the jury could bear that in mind. But so too, as we will note shortly, had Mr Hamilton.

[46] *Prior statements*: These substantially concern statements made by Mr Wilson to two prison or criminal associates, Mr Dunbier and Mr Ross. We accept that the credibility of these witnesses is a matter in which the jury had the benefit of assessing directly, whereas this Court must rely on the written notes of evidence. Mr Dunbier’s manifest psychological difficulties, including a personality disorder and tendency to manipulate and lie, were acknowledged by him before the jury. He had a motive to incriminate the appellants. Much of this was before the jury, but not before this Court when it ruled Mr Dunbier’s evidence admissible in 2020.³⁵ In our view, his evidence,

³³ See below at [380].

³⁴ We agree therefore with the conclusions Glazebrook J reaches below at [378]–[379].

³⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 (Winkelmann CJ, Glazebrook, O’Regan, Ellen France and Williams JJ). This Court noted research showing that jurors are often affected by “fundamental attribution error”—meaning a tendency to attribute the behaviour of witnesses to dispositional factors (such as the desire to be a good person) rather than situational factors (such as malice or incentive to lie): at [80] per Glazebrook, O’Regan and Ellen France JJ and [237] per Winkelmann CJ and Williams J. See also this Court’s subsequent and unanimous decision on directions that must be given in the case of cellmate confession evidence in *Jetson v R* [2023] NZSC 150, [2023] 1 NZLR 629.

including as to Mr Wilson planning a robbery “outside of Auckland” for after he left prison, is barely admissible under s 7 of the Evidence Act due to the issues identified above, and could be given no substantial weight by the jury.

[47] Mr Ross was a criminal associate of Mr Wilson; as noted earlier, he had participated with him in the 1983 Birkenhead Licensing Trust armed robbery. He and Mr Wilson were incarcerated together from February 1983 to January 1987, except for a short period in April 1983. The relevant statements he alleged were made by Mr Wilson are related in Glazebrook J’s reasons at [426]–[429]. He said that whilst in prison Mr Wilson had expressed interest in doing another armed robbery. While Mr Wilson mentioned the Red Fox Tavern as a possible target, Mr Ross said it was commonly discussed by numerous other prison inmates. Mr Ross did not mention Mr Wilson’s alleged interest in the Red Fox until 2018, despite having made a statement to police during the initial investigation. His explanation for not revealing this, and other parts of his evidence, at the time was that he was trying to distance himself “from the whole thing”. Mr Ross had, however, noted in his initial police statement that Mr Wilson had told him shortly after leaving prison that he had an “earn” planned “up north”. The Crown submission was that this was the Red Fox robbery.

[48] For the reasons Glazebrook J gives, the jury were entitled to place some weight on certain parts of Mr Ross’ evidence, subject to the manifold warnings properly given by the trial Judge (including as to the potential for him to have been incentivised to give evidence against Mr Wilson).³⁶ Real caution was required before any weight whatever was placed on matters raised for the first time in 2018.

[49] *Conclusion on motive and interest:* The evidence established that both appellants were short of money and interested in gaining it by criminal activity. Mr Wilson at least had a past as an armed robber, and there was a foundation for the jury finding he was interested in renewing that activity (and, along with others, he had discussed the Red Fox Tavern while in prison). None of the latter implicated

³⁶ See below at [435] and [447]–[449].

Mr Hoggart. There was no direct evidence of planning a robbery of the Tavern by either man.

C Subsequent conduct

[50] *Money*: The evidence as to the appellants' finances is set out in detail in Glazebrook J's reasons.³⁷ Mr Wilson acquired a Ford Falcon car and two Triumph Bonneville motorcycles in the weeks after Labour Weekend (the first on a "chopper frame", the second a newer bike). There is no evidence whether he purchased the car or stole it—this being one of his habits. One of the motorcycles he purchased from a Mr Fitzgerald (paying \$1,500 in \$10 and \$20 notes)—most likely the one on the "chopper frame"—and he still owed the balance of \$3,000 at the time of his January police interview. As Glazebrook J observes, it appears he had savings which might have been sufficient to pay the deposit.³⁸ Mr Wilson also claimed to have made funds as the prison tattooist—this was confirmed by Mr Ross—and through "earns" since his release. As to the second, newer bike, the defence submission was that it was stolen. Mr Hoggart paid \$4,395 for a Triumph Tiger motorcycle on 9 November 1987, also in cash. He claimed to have had funds for that purpose from savings (\$1,200–\$1,800), and from selling drugs and contraband in prison (about \$2,000).³⁹

[51] It was a matter properly for the jury to consider whether the alternative sources of purchase or acquisition were plausible. If it considered they were not, then the acquisition of those vehicles was a circumstantial strand supporting guilt.

[52] *Lies*: We can be relatively brief on this subject. We agree with Glazebrook J that an alleged lie by Mr Wilson about being in Tauranga over Labour Weekend is equally consistent with erroneous recall—bearing in mind that the interview took place three months after the Red Fox robbery.⁴⁰ Unlike Glazebrook J, in our view no weight could be placed on Mr Wilson's alleged lie regarding a visit to Ms Northcott in Cambridge.⁴¹ As to the day of the visit and length of the stay, nothing turns on this

³⁷ Below at [388]–[393] and [399]–[401].

³⁸ Below at [395].

³⁹ Glazebrook J notes there is still a shortfall: see below n 314.

⁴⁰ Below at [312]–[315].

⁴¹ Contrast below at [319]–[322].

as, whatever day it was he still had time to commit the robbery. But importantly, other witnesses were initially incorrect about the day and Mr Wilson was uncertain in his interview as to what day it was. Mr Wilson had been with Ms Northcott when he went into prison and had only just been released. Ms Northcott gave a similar account of Mr Wilson's visit (that he wanted to rekindle their relationship). Mr Wilson's family members gave similar accounts. As Glazebrook J notes, the Cambridge visit on its own could not comprise an alibi. As Mr Stevenson KC submitted, it was not established that Mr Wilson's statements about his whereabouts were intentionally false. They may or may not have been. It is impossible to know what the jury made of these matters. The jury must, however, have found that Mr Wilson lied about hitch-hiking back to Napier on Saturday and Sunday, sleeping in the roadside bush at the time the robbery took place. That was an inference it could draw, although given the passage of time, especially by trial, it was probably impossible in any case to find those alleged to have given him lifts. Given also that people may lie for many reasons, as the jury was told, if it did find a lie had been told it could serve only as a background consideration, no straight-line conclusion from lie to guilt being able to be drawn.⁴² The same is true also of the lie Mr Wilson clearly did tell as to getting rid of the gun because "[i]t was no good." We note that when Mr Wilson told this lie, he had not yet been told the interview was in respect of the Red Fox offending and so it is entirely understandable he did at this stage say he disposed of the gun out of fear of being wrongly implicated in that offending. In these circumstances, this lie is not suggestive of guilt at all.

[53] As to Mr Hoggart, the material alleged lie concerns the date of his acquiring his Triumph Tiger motorcycle. Interviewed on 22 January 1988, he said he had bought it "5–6 months ago"—that is, in July or August 1987. In fact, as noted earlier, he bought it on 9 November 1987—shortly after the Red Fox robbery. The jury was entitled to find he had lied about the date, the interview taking place less than three months after purchase. Again, while generating suspicion, it could at best be only a background consideration in deciding guilt beyond reasonable doubt.

⁴² Although, it is not the case that lies can never be evidence of guilt: see Evidence Act 2006, s 124. We agree with the reasons of Glazebrook J in this respect: see below at [154]–[159].

[54] *Hinted admissions*: The Crown alleged that Mr Wilson had made veiled admissions of involvement in the Red Fox robbery to both Messrs Ross and Dunbier, as detailed in Glazebrook J's reasons.⁴³ In our view, the statements said to comprise hinted admissions were not capable of bearing that label. The statement to Mr Ross was merely a passing comment on the robbery, made in what Mr Ross (reluctantly) described as a sarcastic manner. And the statement to Mr Dunbier was an express *denial* of involvement in the offending, made on an occasion when Mr Dunbier had visited Mr Wilson at the instigation of the police, knowing "exactly the type of thing the police wanted [him] to report back". There was also an alleged alibi request by Mr Wilson to Mr Ross, which was not divulged by the latter until 2018.⁴⁴ Given the reliability issues with Messrs Ross and Dunbier's evidence, addressed earlier, as well as the fact the Crown's submission was entirely reliant on their interpretations of Mr Wilson's facial expression or manner of speaking, no substantial weight could be given by the jury to these statements.

[55] *Conclusion on subsequent conduct*: If the jury decided the claimed alternative sources of purchase or acquisition were not plausible, acquisition of the abovementioned vehicles soon after the robbery would serve as a circumstantial strand supporting guilt. Somewhat less substantial support is given by the evidence of alleged lies told by the appellants, and none whatsoever from the alleged hinted admissions.

Conclusion on the twelve strands

[56] We have concluded that the presence evidence established, circumstantially, opportunity and means, but not presence. The question is therefore whether the addition of the remaining circumstantial evidence could establish Messrs Wilson and Hoggart's presence at the robbery beyond a reasonable doubt. Without such proof, they were entitled to be acquitted.

⁴³ Below at [418]–[419], [423] and [431]–[432]. We put aside an intercepted communication in 2017 involving Mr Hoggart and a Mr Talbett-Lovelace. It is barely admissible, for the reason Glazebrook J gives below at [454].

⁴⁴ See below at [430] and [433] per Glazebrook J.

[57] In our clear view it fails to bear that load.⁴⁵ The motive and interest evidence established, at a general level, need and interest in gaining funds by criminal activity. Mr Wilson's acquisition of a sawn-off shotgun, in its full context, does not add substantially to culpability in the absence of compelling forensic evidence. The subsequent conduct evidence of asset acquisition and lies was capable of supplying two circumstantial strands in support of guilt. But, standing back as we must, we do not consider a jury, acting reasonably, could conclude that was sufficient to close the evidential gap and prove presence beyond reasonable doubt.

[58] And even if that circumstantial evidence *could* bear that load, the Crown case still had to confront the possibility that Mr Hamilton was in fact one of the offenders. As we have explained, the Crown had also to exclude a reasonable possibility that Mr Hamilton committed the Red Fox robbery and murder. We turn to that now.

Mr Hamilton

[59] As Glazebrook J explains, Mr Hamilton was a career criminal.⁴⁶ He died in 2003. He had a background as an armed robber. Evidence at trial demonstrated that he and two (or perhaps three) accomplices had been planning an armed robbery of the Red Fox Tavern in late June to early July 1987 (and possibly later). After the Labour Weekend robbery, he created two, or perhaps three, false alibis. At the time, the police considered him likely to be one of the assailants. Even after eliminating him as a suspect in late 1987, the police continued to receive nominations as to his involvement as late as 2004.

[60] We summarise the relevant evidence. In October 1980, Mr Hamilton and two accomplices committed an armed robbery at the Manurewa South Post Office. Mr Hamilton was the getaway driver and remained in the car the entire time. The incident bore distinct similarities to the Red Fox robbery. In both cases the offenders were heavily disguised, wore gloves, and were armed with a sawn-off shotgun and a baseball bat. On both occasions the gun was discharged: at Manurewa,

⁴⁵ This would not necessarily be true of any given circumstantial case lacking direct evidence as to presence, provided the circumstantial evidence *as a whole* is capable of supporting an inference of presence at the crime.

⁴⁶ See below at [536]–[541].

one of the accomplices lost his arm; at Maramarua, Mr Bush lost his life. Then, just eight months before the Red Fox robbery, Mr Hamilton and an accomplice committed an armed burglary of a chemist shop at Manurewa, the firearm being discharged in the course of escaping from police officers.⁴⁷ While these features were generic for an armed robbery, if Mr Wilson's Birkenhead job qualified as propensity evidence, Mr Hamilton's Manurewa jobs certainly did too.

[61] The evidence also established that Mr Hamilton had been planning an armed robbery of the Red Fox Tavern in the months leading up to Labour Weekend 1987. His accomplices were Messrs Hughes and Wawatai. In September 1987 police executed a search warrant at Mr Hughes' home. It turned up two sawn-off shotguns and a "robbery kit", comprising gloves, disguises made from black jerseys and shotgun cartridges. Mr Hughes later told police the guns were to be used at the Red Fox Tavern. According to Mr Hughes, he and Mr Hamilton had previously visited Maramarua to scope out the Tavern and check its layout. On the way home from a trip to Auckland in early October 1987, Mr Hamilton made a further visit to the Tavern along with Messrs Hartshorne and Wawatai.

[62] Following the Red Fox robbery, Mr Hughes and Mr Wawatai were interviewed. Their statements demonstrated a degree of detailed planning of an armed robbery of the Tavern. There were notable differences between their accounts, including as to timing (late Sunday night when the Tavern would have the most money or early Monday morning when the owner would be out), who would be involved (three robbers or two robbers and a getaway driver) and use of weapons (knives and steel bars or baseball bats, or sawn-off shotguns). Mr Hughes told police the idea had been dropped because of the September search warrant.

[63] Mr Hamilton was then interviewed by Detective Sergeant Webb on 11 November 1987. He admitted planning a robbery of the Tavern with those accomplices, and with a sawn-off shotgun and a baseball bat or metal bar, but said he "did not follow it through" and "called it off because [he] thought it was too risky".

⁴⁷ This incident is also important in challenging Mr Hamilton's claim that he would never have taken a loaded shotgun to carry out the Red Fox robbery after the "[***]-ups" he made at the post office job when his accomplice got shot.

He provided police with three different alibis as to his movements. None persuade us that Mr Hamilton lacked opportunity and was not involved. The first two were certainly false, Mr Hamilton himself having resiled from them. The final alibi was likewise replete with inconsistencies.⁴⁸ We do not consider that the jury was entitled to consider the possibility of Mr Hamilton's involvement was excluded on the basis of alibi. Without alibi, the question is whether Mr Hamilton could have made the journey from Mount Roskill—where he had dropped off two acquaintances at 10 pm, or later, that Saturday night—to the Red Fox in sufficient time to commit the robbery. That and other timings given in evidence were estimates and, while a later departure might have made Mr Hamilton's presence at the robbery less likely, it would have been speculative for the jury to rule it out altogether.

[64] We note four further matters. First, for what it is worth, in the week before the Red Fox robbery occurred, one of Mr Hamilton's associates, a Mr Thompson, told police that Mr Hamilton said he had "something big" planned for Saturday. Secondly, Mr Hamilton went looking for Mr Hughes in November 1987, angry that Mr Hughes had "narked" on him, presumably about the Tavern job. Thirdly, there is evidence that he freely confessed (or claimed) involvement in the Red Fox robbery to seven criminal associates. Mr Hamilton's motivation in doing so is unclear, and "jailhouse confessions" must be treated with reserve.⁴⁹ Fourthly, as we noted earlier, at the time of the crime the police considered Mr Hamilton likely to be one of the assailants and, even after police eliminated him as a suspect after their initial investigation, they continued to receive nominations as to his involvement.

[65] We do not overlook the fact that Mr Hamilton's vehicle at the time, an unreliable, old, grey Mini, was an unsuitable getaway vehicle for an armed robber—and a poor vehicle to make a speedy drive to Maramarua in beforehand. But as Glazebrook J notes, if Mr Hamilton was involved, it would have been with a co-offender who may have had access to a better vehicle.⁵⁰ Additionally, contemporaneous heroin importation activity Mr Hamilton was engaged in, and his continued impecuniosity after the robbery, are factors that cut both ways.

⁴⁸ See below at [581] per Glazebrook J.

⁴⁹ See, for example, the discussion in *Jetson v R*, above n 35, at [34]–[38].

⁵⁰ Below at [584].

[66] It was common ground that unless the Crown could establish the presence of Mr Hamilton at the scene was *not* a reasonable possibility, a reasonable doubt must exist as to the presence of Messrs Wilson and Hoggart. There was no narrative for the presence at the scene of either or both of them *and* Mr Hamilton. They were not shown to be associates at the time of the crime. Mr Hamilton does not feature in the narrative of any association between Messrs Wilson and Hoggart.

[67] Standing back, our assessment is that the evidence against Mr Hamilton is of much the same order as that against the appellants. In one respect it is weaker—namely, the absence of evidence of money and expenditure after the robbery, although that is a point that cuts both ways. In at least one respect, the case against Mr Hamilton is significantly stronger—being the detailed planning that he had already put into committing a robbery of the Tavern, and that he had visited the scene approximately two weeks prior to Labour Weekend.⁵¹ With that remarkable coincidence, and with the Crown case against Messrs Wilson and Hoggart both circumstantial and relatively weak, Mr Hamilton needed to be eliminated as a potential offender. The task for the jury was not whether it was more likely that Mr Hamilton was one of the robbers, but whether there remained a reasonable possibility that he was. In our clear view, the Crown case failed to eliminate this. The presence of Mr Hamilton—rather than the appellants—at the scene remained a reasonable possibility.

[68] For these reasons we conclude that no jury could reasonably have been satisfied of Messrs Wilson and Hoggart's guilt beyond reasonable doubt. While appellate courts must be careful not to usurp the function of the jury as fact-finder, this is not a case where there was a plausible route for a jury to convict the appellants beyond reasonable doubt. There was no direct evidence against them. The remaining strands of circumstantial and other evidence established opportunity, means and perhaps gain, but they are insufficiently robust to withstand the alternative possibility, not displaced by the Crown, that Mr Hamilton (with an associate) was the offender.

⁵¹ The original plan differed as to the day of the week, involving robbery on Sunday night or Monday morning.

Evidence of Mr Hartshorne

[69] Mr Hartshorne was a neighbour of Mr Hamilton. He was related by marriage to Mr Wawatai, Mr Hamilton's accomplice in the planned Tavern robbery. Mr Hartshorne was not, however, a criminal, which may enhance the reliability of his evidence. On the other hand, some of what he had to say did not emerge for 34 years, which may diminish it. As Glazebrook J relates below at [483], in October and November 1987, after the Red Fox robbery, he told police (1) that he and Mr Hamilton had visited the Tavern in early October 1987 (it not being suggested Mr Hartshorne was an accomplice) and (2) that he had given Mr Hamilton some yellow rope similar to that used by the Red Fox robbers. Then in 2021 he told a private investigator retained by the defence (3) that after the robbery, Mr Hamilton had come to his house looking for Mr Wawatai and—in talking about the robbery—had said: “Well, the stupid bastard shouldn't have moved.” While items (1) and (2) were before the jury, item (3) was ruled inadmissible by the trial Judge.⁵²

[70] We agree with Glazebrook J that the evidence of this statement was wrongly excluded.⁵³ We regard (1) and (2) as the more probative evidence, being freshly disclosed and relevant to the potential culpability of Mr Hamilton. Item (3) was late-disclosed and entirely equivocal in any case because by the time the conversation occurred, it was a matter of public record that Mr Bush had moved immediately before being shot.⁵⁴ The hearsay statement attributed to Mr Hamilton was then equally consistent with commentary on a remote event as with observation of the event itself. But while of low probative value, item (3) was at least relevant, sufficiently reliable and admissible. By parity of treatment with like low-probative-value evidence adduced by the Crown, it should have been allowed in.

[71] Because, however, that evidence would have made no practical difference in the result, its omission may be put to one side here.

⁵² *R v W* HC Auckland CRI-2017-092-10119, 18 March 2021 (Bench Note No 7 of Woolford J) at [3].

⁵³ Below at [503].

⁵⁴ Bench Note No 7 of Woolford J, above n 52, at [4].

Takedown order and name suppression

[72] We agree with Glazebrook J's reasons as to the takedown order required and expiry of name suppression for Mr Wilson.⁵⁵

Disposition

[73] The appeals are allowed.

[74] The appellants' convictions are set aside.

[75] An order is made under ss 233(3)(a) and 241(2) of the Criminal Procedure Act that judgments of acquittal be entered.

[76] The interim order suppressing Mr Wilson's name and any identifying particulars made on 9 June 2023 is to expire on the release of this judgment.

GLAZEBROOK J

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Introduction

[77] On 29 March 2021, a jury found the appellants, Mr Wilson and Mr Hoggart, guilty of the murder of Mr Christopher Bush.⁵⁶ The murder was committed in the course of the robbery of the Red Fox Tavern on 24 October 1987. The appellants were also found guilty of aggravated robbery.⁵⁷

[78] Their appeals against conviction were dismissed by the Court of Appeal on 5 May 2023.⁵⁸ Leave to appeal against that decision was granted by this Court on 12 December 2023.⁵⁹ Three grounds were identified:⁶⁰

- (a) the verdicts were unreasonable, there being reasonable doubt about the identity of the offenders;
- (b) a Mr Hartshorne’s evidence about the alleged confession to murder by a Mr Hamilton (deceased) was wrongfully excluded; and

⁵⁶ Under the Crimes Act 1961, ss 66, 158, 160, 167 and 168.

⁵⁷ Under s 235(b). Mr Wilson was sentenced to life imprisonment for murder and a concurrent term of eight years’ imprisonment for aggravated robbery. Mr Hoggart was sentenced to life imprisonment for murder and a concurrent term of seven years’ imprisonment for aggravated robbery: *R v W* [2021] NZHC 1010 (Woolford J) at [37]–[38].

⁵⁸ *Wilson v R* [2023] NZCA 155 (French, Gilbert and Collins JJ) [CA judgment].

⁵⁹ *W (SC 60/2023) v R* [2023] NZSC 164 (Glazebrook, O’Regan and Kós JJ) [SC leave judgment].

⁶⁰ At [4], and see at [2] and [6].

(c) the trial Judge should have issued a takedown order.⁶¹

[79] The first two grounds on which leave was granted were effectively combined in the second approved question:

Whether the Court of Appeal was correct to conclude that the verdicts were not unreasonable in light of admissible evidence relating to the potential culpability of Lester Hamilton (deceased).

Nevertheless, it is clear from the leave judgment that the first ground as to unreasonable verdicts was a general one and not confined merely to considering whether the evidence meant that there was a reasonable possibility that Mr Hamilton had been one of the robbers.

[80] Before I deal with these issues, I set out the background, including relating to the police investigation and the pre-trial appeal on the admissibility of the evidence of certain proposed witnesses. After this, I outline the respective cases at trial as well as the applications made for a stay or a discharge under s 147 of the Criminal Procedure Act 2011. I then summarise the Judge's directions to the jury in summing up and the Court of Appeal decision.

Background

*The aggravated robbery and murder*⁶²

[81] The Red Fox Tavern is situated on State Highway 2 in Maramarua and is around halfway between Pukekohe and Thames. The aggravated robbery and murder took place around 11.30 pm on the Saturday of Labour Weekend, 24 October 1987.

[82] Mr Bush, the tavern manager, was in the lounge bar at the time of the robbery, along with three staff: Ms Prisk, Ms Soppet and Mr Bill Wilson. Two men wearing balaclavas and gloves came in through the unlocked backdoor. One was armed with

⁶¹ Stuff Ltd was an intervener only in this third ground relating to the takedown order sought by Mr Wilson. Leave to appeal on other grounds presented, including a further ground put forward by Mr Hoggart relating to name suppression, was dismissed: at [5], and see at [2]–[3] and [6]–[9].

⁶² See also CA judgment, above n 58, at [1]–[11]; and *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 (Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ) [SC admissibility judgment] at [5]–[8] per Glazebrook, O'Regan and Ellen France JJ.

a sawn-off, double-barrelled shotgun (the gunman) and the other carried a baseball bat (the second offender). The second offender was wearing overalls.⁶³ The gunman announced their intention to rob the Red Fox. Mr Bush confronted the gunman, who discharged the gun, killing Mr Bush.

[83] The three remaining bar staff were told to lie on the floor. The offenders then demanded the keys to the safe. Ms Prisk crawled over to Mr Bush's body and retrieved a set of keys from one of his pockets. She was told to stand up and open the locked doors leading to the safe in the manager's office. She was unable to identify the correct keys. The second offender kicked the doors open and went with her into the office.

[84] None of the keys found by Ms Prisk fitted the safe. The second offender took her back to the lounge bar area and told her to lie face down on the floor beside the other staff members. The second offender returned to the office and found the key to the safe in a desk.

[85] The offenders cleared out the safe, removing around \$31,000 in cash and around \$4,900 in cheques. They tied up the bar staff with lengths of yellow rope they had brought with them. The bar staff were told not to move for eight minutes. The offenders then left the bar, although the staff did not hear a vehicle leaving. Eventually, Ms Soppet managed to free herself and assisted the others. The police, Ms Soppet's husband and Mr Poa, a friend who lived nearby, were then called. Police officers were directed to the Red Fox at 12.21 am. They arrived at 12.42 am and sealed off the lounge bar at 12.48 am.

The police investigation

[86] The initial police investigation began the night of the offending. Some 230 people, including the appellants, were investigated as persons of interest (in the appellants' case, as a result of a nomination made by a Crown witness, Mr Dunbier). The police did not consider there was sufficient evidence to prosecute anyone for the aggravated robbery and the murder. The investigation wound down in mid-1988.

⁶³ Ms Prisk was unsure about the gunman's clothing but thought he had worn a black jacket or jumper and jeans. Ms Soppet thought both offenders were possibly wearing dark-coloured overalls.

The file was not, however, formally closed and, from mid-1988 until 1999, whenever new information was received, it was assessed and relevant records were placed on the file.

[87] In 1999–2000, a review of the file occurred, including into new leads received since 1988. Further investigation was undertaken, including in relation to the appellants. The police again determined there was insufficient evidence to charge anyone at that time. Following this, the police continued to receive information about the Red Fox robbery and murder.

[88] In October 2016, the police opened a new investigation named “Operation Lion”. As a result of that investigation, in August 2017, the decision was made to charge the appellants.

[89] Detective Senior Sergeant (DSS) Hayward was responsible for the day-to-day investigative responsibilities of Operation Lion. He said in his statement, which he read aloud at trial, that:

- (a) [Mr Wilson and Mr Hoggart] did not begin to be investigated until late January 1988, after 3 months of extensive investigation into other individuals;
- (b) They were not charged in 1988, or in 2000 following further investigation when again they were the prime suspects;
- (c) Indeed they were not charged until almost 30 years after the homicide — following further investigation and some new evidence being obtained.

[90] Mr Wilson submits that the decision to charge the appellants was made without any new evidence. DSS Hayward said some new evidence was obtained, although he did not specify what the new evidence was or how it affected the decision to charge the appellants.

[91] Mr Wilson says that, in making the 2017 decision to charge, police and prosecutors placed significant weight on statements from “incentivised” witnesses. By contrast, the Crown submits that a key factor in that decision was that police considered for the first time that evidence of a prior aggravated robbery committed by Mr Wilson could be admitted as propensity evidence.

[92] The Court was not provided with any written record of the findings of Operation Lion.

Pre-trial admissibility appeal to this Court

[93] Before the trial commenced, Mr Wilson appealed to this Court, challenging the admission of the evidence of Mr Goodall, Mr Dunbier, Mr Moran, Mr Ross, Mr Richardson and Ms Green, all either former associates or fellow prison inmates of Mr Wilson. Leave was also granted to the Crown to cross-appeal against the Court of Appeal’s decision ruling the evidence of Mr Bolt and Mr Emery, also former prison associates of Mr Wilson, inadmissible.⁶⁴

[94] The Crown intended that the proposed witnesses would give evidence that Mr Wilson had made statements implicating himself in the Red Fox robbery. Mr Wilson contended that the witnesses were, in one way or another, “incentivised” and that their evidence was unreliable and unfairly prejudicial.⁶⁵

[95] This Court dismissed both Mr Wilson’s appeal and the Crown’s cross-appeal.⁶⁶ In its discussion of the principles governing the admissibility of informant evidence, this Court noted that the Crown “plays a critical role” in addressing the risk of illegitimate prejudice, and its “responsibilities include not adducing ‘blatantly unreliable evidence of little probative value but considerable prejudicial effect’”.⁶⁷

[96] As it transpired, the Crown decided not to call Mr Goodall.⁶⁸ Mr Moran had died before trial and the Crown’s application to admit his evidence as hearsay was declined.⁶⁹ When the trial began, Mr Richardson and Ms Green were going to be

⁶⁴ SC admissibility judgment, above n 62, at [2]–[3] per Glazebrook, O’Regan and Ellen France JJ.

⁶⁵ At [46], [75] and [99] per Glazebrook, O’Regan and Ellen France JJ and [185] per Winkelmann CJ and Williams J.

⁶⁶ At [184] per Glazebrook, O’Regan and Ellen France JJ.

⁶⁷ At [90] per Glazebrook, O’Regan and Ellen France JJ citing *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [39]–[40] per Blanchard, Tipping, McGrath and Wilson JJ, in turn citing *R v Vagaia* [2008] 2 NZLR 516 (HC) at [15].

⁶⁸ It is not clear why Mr Goodall did not ultimately give evidence, but this Court had noted that the admissibility of his evidence could be revisited in the High Court before trial if any further information came to light as to any sentence reduction he might have received: SC admissibility judgment, above n 62, at [119] per Glazebrook, O’Regan and Ellen France JJ.

⁶⁹ *R v W* [2020] NZHC 3114 (Woolford J).

called to give evidence about alleged confessions by Mr Wilson that he was responsible for the Red Fox robbery and murder. Neither in the end gave evidence.

[97] After the trial had commenced, the Crown applied for suppression and mode of evidence orders relating to Ms Green. Those applications were largely unsuccessful, and Ms Green then advised she no longer wished to give evidence.⁷⁰

[98] Mr Richardson had gone to the police in June 2017 and explained that he did so to “get this tidied up now”, as he was at that stage terminally ill with cancer.⁷¹ The Crown had indicated in the pre-trial admissibility appeal that it would reassess whether or not it wished to call Mr Richardson in light of further information filed by the defence relating to whether or not he had cancer. This Court said a further application could be made to the trial Judge if issues still remained as to the admissibility of his evidence.⁷² Apparently, Mr Richardson did not in fact have terminal cancer. The Crown still wished to call his evidence, but after an application by the defence, his evidence was excluded by the trial Judge.⁷³

[99] This meant that only Mr Ross and Mr Dunbier gave evidence at trial. I summarise their evidence below,⁷⁴ focusing here only on this Court’s reasons as to its admissibility.

[100] With regard to Mr Dunbier, the argument was that his evidence should be excluded as unfairly prejudicial because of the possibility he was improperly incentivised; because he had an alleged motive to harm Mr Wilson (as he believed Mr Wilson had raped his girlfriend); and because of the significant delay preceding Mr Dunbier’s more recent allegations.⁷⁵

⁷⁰ *R v W* HC Auckland CRI-2017-092-10119, 11 March 2021 (Ruling No 6 of Woolford J) at [36].

⁷¹ See SC admissibility judgment, above n 62, at [168] and [174] per Glazebrook, O’Regan and Ellen France JJ.

⁷² At [174] per Glazebrook, O’Regan and Ellen France JJ.

⁷³ *R v W* HC Auckland CRI-2017-092-10119, 15 March 2021 (Ruling No 9 of Woolford J) at [10]–[12].

⁷⁴ Below at [285]–[288] and [416]–[434].

⁷⁵ SC admissibility judgment, above n 62, at [150]–[152] per Glazebrook, O’Regan and Ellen France JJ and [357]–[358] per Winkelmann CJ and Williams J. It was also argued that the lack of detail about Mr Dunbier’s offending reduced the ability of the defence to challenge the evidence: at [358] per Winkelmann CJ and Williams J.

[101] This Court held by majority (with Winkelmann CJ and Williams J dissenting on this point) that Mr Dunbier’s evidence was admissible and had “high probative value”.⁷⁶ The majority agreed with the Court of Appeal’s conclusion that the evidence should not be excluded as the defence could challenge it at trial “by, amongst other things, reference to Mr Dunbier’s motivation and his veracity given his criminal history”.⁷⁷ As Mr Dunbier was not in custody at the time of making his statements, and there was no record of him receiving any benefits other than receipt of his expenses, his evidence was not prison informant evidence in the classic sense.⁷⁸ As to the alleged ill motive, this Court said that was “not so problematic as to warrant exclusion”, adding that “[i]t can be addressed by judicial direction and consideration of such a motive is within the realm of decisions that juries regularly make.”⁷⁹ Finally, as to delay, this Court agreed with the Court of Appeal that delay on its own is usually dealt with by judicial warning rather than exclusion.⁸⁰

[102] With regard to Mr Ross, this Court noted that the only challenge was to Mr Ross’ additional statement made in 2018 where he said that, while the two of them were in prison together, Mr Wilson allegedly told Mr Ross “the Red Fox Tavern might be a good one to have a look at”.⁸¹ This Court did not see this factor as critical: Mr Ross was not a prison informant and he could be cross-examined about why he did not mention this conversation earlier.⁸²

⁷⁶ At [151] per Glazebrook, O’Regan and Ellen France JJ. Contrast at [359]–[374] per Winkelmann CJ and Williams J.

⁷⁷ At [149], and see at [151] per Glazebrook, O’Regan and Ellen France JJ.

⁷⁸ At [151] per Glazebrook, O’Regan and Ellen France JJ. Winkelmann CJ and Williams J thought it “more likely that he was seeking to ingratiate himself with the police in the hope of future advantage”: at [360].

⁷⁹ At [151] per Glazebrook, O’Regan and Ellen France JJ.

⁸⁰ At [153] per Glazebrook, O’Regan and Ellen France JJ.

⁸¹ At [164] and [167] per Glazebrook, O’Regan and Ellen France JJ.

⁸² At [167] per Glazebrook, O’Regan and Ellen France JJ. Winkelmann CJ and Williams J noted the other significant change in Mr Ross’ statement — that he said Mr Wilson had come to his house on the Monday of Labour Weekend looking for an alibi: at [332]. They assessed Mr Ross’ evidence as being of high probative value and agreed with the majority that it was admissible as any risks associated with the delay could be explored in cross-examination: at [338]–[339] and [341].

The respective cases at trial

Crown case at trial

[103] The Crown, in its opening address at trial, divided the Crown evidence against the appellants into 10 strands. In closing the Crown said that the 10 strands were an oversimplification (there being “literally dozens and dozens of smaller or big strands which weave together to make the separate cases against the [appellants]”). The 10 strands were:

- (a) *Descriptions*: the descriptions of the offenders were consistent with the appearance of the appellants.
- (b) *Association*: the appellants were known to have been associating at the time.
- (c) *Movements*: the appellants’ known movements either side of Labour Weekend were consistent with them being the offenders. Evidence of these movements included that of members of Mr Wilson’s family, his ex-girlfriend (Ms Northcott) and that of Mr Hoggart’s ex-girlfriend, Ms Rautangata, and her flatmate, Ms Harris. The Crown also relied on evidence from Mrs Pyle, who worked in a dairy near the Red Fox, to claim that the appellants had scoped out the Red Fox Tavern on the Friday night.
- (d) *Lies*: the appellants lied to the police about their whereabouts that weekend and about other matters.
- (e) *Motive*: the appellants were motivated to commit a robbery by their impecuniosity and had reasons to want or need money, including in order to buy classic motorbikes as a way into the Filthy Few Motorcycle Club.
- (f) *Prior statements*: including the statements made by Mr Wilson to Mr Ross and Mr Dunbier. I interpolate here that in the Crown opening

it was said that Mr Wilson had previously discussed his plans to rob the Red Fox Tavern, but the evidence led ultimately did not go this far.⁸³

- (g) *Propensity evidence*: Mr Wilson had previously committed a similar aggravated robbery of the Birkenhead Licensing Trust, and the Red Fox offending took place just 17 days after his release from custody, following the sentence he had been serving for the Birkenhead robbery.
- (h) *Shotgun*: at the time of the robbery Mr Wilson had access to a shotgun matching the description of the one used by the gunman.
- (i) *Gloves*: Mr Wilson had been staying at a winery near Napier where he had access to gloves similar in appearance to the gloves worn by the second offender and which could have made the handprint impression found on the Red Fox safe.
- (j) *Money*: both appellants inexplicably came into money shortly after the robbery.

[104] Another evidence strand relied on in closing was evidence of a grassy shoe print found at the Red Fox and allegedly the same size shoe as worn by Mr Wilson.⁸⁴

[105] The Crown case was that the evidence relating to the possible involvement of Mr Hamilton in the robbery and murder did not stand up to scrutiny and could be disregarded.

⁸³ See above at [96]–[99] and below at [417] and [426]–[429].

⁸⁴ The Crown in its submissions before us relies on the same 10 strands, although it also notes that there was other evidence not sufficiently probative to be a strand on its own. The Crown says that this other evidence was nevertheless relevant to the extent it was consistent with guilt: it was admissible but not a key plank of the Crown case. The other strands of evidence relied on, apart from the shoe print and hinted admissions allegedly made by Mr Wilson to Mr Dunbier and to Mr Ross, were not identified. It is therefore not possible for me to assess the validity of this submission.

Mr Wilson's case at trial

[106] The points made for Mr Wilson in closing included:

- (a) Mr Hamilton was the one who had committed the robbery and murder.
- (b) There was no forensic link between the gun Mr Wilson disposed of and the gun used to kill Mr Bush, and the fact that Mr Wilson disposed of a shotgun does not indicate he was involved in the robbery.
- (c) The evidence of the glove impression and the grassy shoe print was weak and could not be connected to Mr Wilson.
- (d) The statements of Mr Ross and Mr Dunbier were unreliable, as Mr Ross was a proven liar and Mr Dunbier's statement did not incriminate Mr Wilson at all.
- (e) Mr Wilson explained his movements to the police and any inconsistency in his statements as to dates was merely by mistake. The two men seen by Mrs Pyle scoping out the Red Fox in a brown and green vehicle on the Friday night of Labour Weekend were not the appellants. Nor was the car they were seen in Mr Hoggart's green Vauxhall.
- (f) There were alternative explanations as to how Mr Wilson acquired a motorbike and money after the robbery: Mr Wilson had stolen the motorbike and he had made money by providing tattooing services.
- (g) The similarities between the Birkenhead robbery and the Red Fox offending were overstated.

Mr Hoggart's case at trial

[107] Mr Hoggart's counsel, in closing, emphasised the scarcity of evidence suggesting Mr Hoggart was the second offender. The description evidence was general and inconclusive, and contrary to Ms Prisk's description of the

second offender, Mr Hoggart did not speak in a Māori-English vernacular. Although the two were friends, there was no evidence that Mr Hoggart was a follower of Mr Wilson. Further, Mr Hoggart's movements either side of the robbery were not irregular and the evidence of Mr Hoggart having a motive to join the Filthy Few was pure speculation. There was an explanation for how Mr Hoggart had money: he had earned it in prison. He had consistently denied any involvement in the robbery for 30 years. Finally, the other strands of evidence relied on by the Crown did not apply to the case against Mr Hoggart.

Applications for stay and for dismissal under s 147 of the Criminal Procedure Act

Mr Wilson

[108] At the end of the Crown closing, Mr Wilson made an application for a stay of proceedings, or alternatively for dismissal under s 147 of the Criminal Procedure Act, on the basis that he had suffered prejudice as a result of the delay in prosecuting him.⁸⁵

[109] As to the s 147 application, Woolford J noted that the weight or reliability of the components of the Crown case were matters for the jury and its constitutional role must be respected.⁸⁶ After traversing the evidence given at trial, and the various alleged issues with it, the Judge dismissed the application, noting that the jury had been given careful directions concerning the weight to be given to various aspects of the evidence.⁸⁷

[110] As to the stay application, Mr Wilson had pointed out eight areas where delay could be said to seriously undermine his defence, including that a number of witnesses could not be cross-examined, a number of potential defence witnesses were no longer available and other lines of inquiries were no longer able to be pursued.⁸⁸ Mr Wilson also argued the Crown had unfairly prejudiced him by referring in opening to evidence that would be given of statements made by Mr Wilson about his involvement in the offending. Mr Wilson said this was a reference to the statements of Ms Green and

⁸⁵ An application for stay was initially made before trial, but it was accepted that it would not be heard until there was some certainty about the witnesses to be heard and evidence to be led: *R v W* HC Auckland CRI-2017-092-10119, 3 September 2020 (Minute of Woolford J).

⁸⁶ *R v W* HC Auckland CRI-2017-092-10119, 18 March 2021 (Ruling No 10 of Woolford J) at [5].

⁸⁷ At [18].

⁸⁸ At [19(a)–(h)].

Mr Richardson, who were not in fact called.⁸⁹ This had led to defence counsel acknowledging in opening that the prosecution's case rested on evidence that Mr Wilson had made incriminating statements to associates.⁹⁰

[111] Woolford J dismissed Mr Wilson's application, noting that, despite the over 30-year delay, all potential witnesses were interviewed at the time as part of a thorough investigation.⁹¹ Mr Wilson had not been disadvantaged in terms of his ability to respond to the allegations, as he was able to do so in his police interview at the time.⁹² The police made inquiries of possible witnesses at the time, where Mr Wilson had given enough information for them to be able to do so.⁹³

Mr Hoggart

[112] Pre-trial, Mr Hoggart applied for an order for dismissal of the charges against him under s 147 of the Criminal Procedure Act on the basis of evidential insufficiency.⁹⁴ Woolford J dismissed that application,⁹⁵ stating:

[53] ... I am of the view that there are facts which cumulatively are capable of supporting the inference that Mr Hoggart was the second man with the baseball bat. It is not my role on a s 147 application to decide whether such an inference should be drawn.

[54] For those reasons, I consider the two charges should be permitted to proceed to trial. The position can be reviewed at the end of the Crown case, when the actual evidence given by the Crown witnesses will be known. At that point, it will be possible to consider the inferences that might reasonably be drawn from the evidence with more certainty than is currently the case.

[113] At the conclusion of the Crown case, Mr Hoggart made a renewed s 147 application. After hearing from counsel, Woolford J dismissed that application. He explained that, although the case against Mr Hoggart was a weaker circumstantial

⁸⁹ See above at [96]–[98].

⁹⁰ Ruling No 10 of Woolford J, above n 86, at [20].

⁹¹ At [21].

⁹² At [23].

⁹³ At [28], and see at [21]–[22] and [34]. The Crown, for example, accepted in its submissions on Mr Wilson's s 147 application that there were no efforts by police to find the people who Mr Wilson alleged picked him up when he was hitchhiking back to Napier. The Judge noted this but said that Mr Wilson's vague descriptions of the people he said picked him up made it "difficult for the Police to undertake meaningful inquiries at the time": at [28].

⁹⁴ *R v W* [2020] NZHC 2671 (Woolford J) at [1].

⁹⁵ At [55].

case than the case against Mr Wilson, there was sufficient evidence of motive, association with Mr Wilson, opportunity, access to money after the robbery, lies in Mr Hoggart's police statement and a general description of the second offender consistent with Mr Hoggart's appearance to leave the case to the jury.⁹⁶

Summing up

[114] Aspects of the Judge's summing up were challenged in the Court of Appeal but did not form part of the grounds on which leave to this Court was granted. I summarise some general points in the summing up here, and below I cover the portions relevant to particular strands of evidence.

[115] Woolford J said that while the jury had to be satisfied that all the elements of the offences of aggravated robbery and murder were made out, the real issue in the case was the identity of the two offenders. He said that the jury had to consider the cases of Mr Wilson and Mr Hoggart separately because not all of the evidence related to both. He stressed that the statements made by Mr Wilson in the absence of Mr Hoggart were only relevant to Mr Wilson and vice versa. The Judge outlined the 10 evidential strands from the Crown's opening address and identified those which did not apply to Mr Hoggart.⁹⁷

[116] Woolford J, in his summary of the defence case, said that before the jury considered the position of Mr Wilson and Mr Hoggart, it first needed to be satisfied that the Crown had proved beyond reasonable doubt that Mr Hamilton was not one of the robbers.

[117] I mention here that the Judge in his summing up noted that the statements of three witnesses who were unable to give evidence were read to the jury, not by the consent of the parties, but at the Judge's direction.⁹⁸ These were the statements of

⁹⁶ *R v W* HC Auckland CRI-2017-092-10119, 1 April 2021 (Ruling No 11 of Woolford J) at [22].

⁹⁷ The jury were not given a list in writing setting out the evidence relating to both appellants and that relating only to Mr Wilson.

⁹⁸ These statements were all admitted as hearsay, the Judge being satisfied the s 18 test described below at [146]–[149] was met in respect of each statement: *R v W* HC Auckland CRI-2017-092-10119, 9 March 2021 (Ruling No 5 of Woolford J); *R v W* HC Auckland CRI-2017-092-10119, 16 March 2021 (Ruling No 8 of Woolford J); and *R v Hoggart* [2018] NZHC 1416 (Jagose J) [*R v Hoggart* (HC)], upheld in *R v Hoggart* [2019] NZCA 89 (Gilbert, Dobson and Brewer JJ) [*R v Hoggart* (CA)] at [66].

Mr Watene and Mr Fitzgerald (the former and then-current Presidents of the Rotorua Filthy Few)⁹⁹ and the statement of Mrs Pyle (who was, by then, deceased).¹⁰⁰ The Judge gave specific directions in relation to their evidence, which I discuss below in my analysis of the evidence.¹⁰¹

[118] The Judge also directed the jury that there was “a particular need for caution in assessing the evidence” due to the over 30-year delay in bringing the charges to trial. The Judge noted that delay may have affected witnesses’ memories — highlighting in this respect the extra information provided by Mr Ross in 2018 — as well as the defence’s ability to call witnesses who may have been able to rebut the evidence of Crown witnesses or locate other evidence to support the defence case.

[119] The jury were given a question trail to guide them to their verdict on each charge. The Judge explained that the Crown had the burden of proving each element, highlighting again that the crucial issue was the identity of the offenders.

[120] Questions one and two concerned whether the Crown had proved beyond reasonable doubt that Mr Wilson and Mr Hoggart, respectively, were one of the armed men who had entered the Red Fox Tavern on the evening of 24 October 1987. The jury were told that it did not matter in which order they answered questions one and two as “the cases against the defendants are quite separate”.

[121] Questions three to five and questions six to eight, respectively, related to the aggravated robbery charge and the murder charge against Mr Wilson. Questions nine to 11 concerned the aggravated robbery charge against Mr Hoggart and questions 12 to 16 related to the murder charge against Mr Hoggart.

[122] In respect of each defendant, the jury were told they should only consider whether the murder charge was made out if satisfied that the aggravated robbery charge was proved. Regarding Mr Hoggart’s murder charge, a note was added that the jury were only to consider whether Mr Hoggart was guilty as a party to murder or

⁹⁹ Mr Fitzgerald’s evidence is summarised below at [308]–[311].

¹⁰⁰ Mrs Pyle’s evidence is summarised below at [219]–[224].

¹⁰¹ See below at [233], [308] and n 259.

manslaughter if they had concluded that Mr Wilson was guilty of murder or manslaughter.

Court of Appeal decision

[123] Both Mr Wilson and Mr Hoggart appealed against their convictions to the Court of Appeal on multiple grounds, some of which overlapped.¹⁰² The following is a general summary of the Court’s decision. I discuss particular aspects of the decision below as they relate to my assessment of the issues.

[124] The Court first dealt with Mr Wilson’s argument that the over 30-year delay in bringing the charges had occasioned a miscarriage of justice.¹⁰³ The Court noted that Woolford J had dismissed Mr Wilson’s application made at the end of the Crown case for a stay of proceedings or a s 147 discharge on the basis of prejudice due to delay.¹⁰⁴ Applying the principles underpinning this Court’s judgment in *CT v R*,¹⁰⁵ the Court of Appeal concluded that, while the 30-year delay was “very long”,¹⁰⁶ the Crown’s circumstantial case was, assessed cumulatively, not a weak case. It was therefore not a situation involving both a very long delay and deficiencies in the Crown case.¹⁰⁷ Woolford J had provided comprehensive directions to the jury on the effect of the delay, and the matters referred to by Mr Wilson¹⁰⁸ did not, singularly or cumulatively, cause an unfair trial.¹⁰⁹

[125] Mr Wilson’s argument that his statements made to police were inadmissible was likewise rejected. This had been the subject of earlier decisions by the High Court and Court of Appeal.¹¹⁰ Mr Wilson renewed his argument on the basis of this Court’s decision in *Hall v R*, which had been released since those decisions and which held

¹⁰² CA judgment, above n 58, at [96]. Mr Wilson’s second ground of appeal addressed in the Court of Appeal was the refusal by Woolford J to make a takedown order. I summarise the Court of Appeal’s decision on this point below when I am considering the third ground of appeal: see below at [611]–[614].

¹⁰³ Under the Criminal Procedure Act 2011, s 232(2)(c) and (4)(b).

¹⁰⁴ CA judgment, above n 58, at [99]; and see above at [108]–[111].

¹⁰⁵ *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465.

¹⁰⁶ CA judgment, above n 58, at [121(a)].

¹⁰⁷ At [121(b)].

¹⁰⁸ See at [100].

¹⁰⁹ At [121(c)–(d)]. Mr Wilson did not seek leave to appeal to this Court against this aspect of the Court of Appeal decision.

¹¹⁰ *R v W* [2019] NZHC 927 (Woolford J); and *W (CA226/2019) v R* [2019] NZCA 558 (Stevens, Mallon and Moore JJ).

that police interviews by Detective Sergeant White — who also conducted much of Mr Wilson’s interview — should have been excluded at trial as they were conducted in an oppressive and unfair manner.¹¹¹ The Court rejected Mr Wilson’s argument that the same factors were present in Mr Wilson’s case, noting the High Court’s finding that Detective Sergeant White had not abused Mr Wilson, which could not be overturned without fresh evidence. Mr Wilson had also made very similar statements to his friends and family, which pointed against the exclusion of his police statements.¹¹²

[126] The Court of Appeal also rejected Mr Wilson’s challenges to the admissibility of certain other evidence,¹¹³ the Crown’s closing address,¹¹⁴ and the Judge’s summing up.¹¹⁵ In addition, the Court of Appeal rejected Mr Wilson’s ground of appeal that the Crown misled the jury in its opening remarks by saying the defendants had “hinted at involvement” in the robbery and murder and, in Mr Wilson’s case, “went further than mere hints”. The Court found that, although Ms Green and Mr Richardson did not end up giving evidence, no miscarriage of justice arose through the way the Crown phrased its opening remarks.¹¹⁶

[127] In terms of Mr Wilson’s submission that the verdict was unreasonable, the Court reiterated that the Crown case against the appellants was circumstantial, meaning the individual strands of admissible evidence did not have to establish their guilt beyond reasonable doubt. It was the combined strength of the strands that had to be assessed by the jury when deciding whether or not the Crown had proven its case beyond reasonable doubt.¹¹⁷ The Court noted that all of the evidence the Crown had adduced was admissible and the Judge had properly excluded Mr Hartshorne’s

¹¹¹ *Hall v R* [2022] NZSC 71, [2022] 1 NZLR 131 at [36]–[37].

¹¹² CA judgment, above n 58, at [195]–[209]. Leave to appeal on this ground was sought and refused: SC leave judgment, above n 59, at [2], [5] and [7].

¹¹³ CA judgment, above n 58, at [215]–[222]; and see below at [362]–[363], [437]–[438] and [486]–[487].

¹¹⁴ At [156]–[160]; and see below at [394].

¹¹⁵ At [245]–[259].

¹¹⁶ At [152]–[155]; and see above at [96]–[99] and [110].

¹¹⁷ At [264].

evidence of Mr Hamilton’s hearsay statement. The Judge’s directions to the jury on the law and the evidence were “entirely orthodox”.¹¹⁸

[128] The Court of Appeal said the weight to be “placed on individual strands of circumstantial evidence was a quintessential jury function”, which it was required to respect. It was not the Court’s task to substitute its view for that of the jury.¹¹⁹ The Court concluded that, viewing the strands of evidence cumulatively, the Crown’s circumstantial case against Mr Wilson was convincing: “The verdicts were readily available and far from unreasonable.”¹²⁰

[129] With regard to Mr Hoggart, the Court accepted that there were fewer strands of circumstantial evidence than there were against Mr Wilson. The key strands of evidence against Mr Hoggart were the appearance of the offenders; their association and movements, including being seen by Ms Rautangata in the early morning one to two hours after the offending; Mr Hoggart’s changed financial circumstances after the robbery; and the false alibi he tried to create by telling the police he was drinking with Ms Rautangata at the pub on the night of the robbery.¹²¹ The Court said all of that evidence was admissible and it was for the jury to decide what weight they placed on individual strands, and whether their combined strength satisfied them beyond reasonable doubt that Mr Hoggart was guilty.¹²² The Court concluded that, despite the case against Mr Hoggart being less powerful than that against Mr Wilson, the jury could reasonably have concluded that Mr Hoggart was guilty.¹²³

Structure of these reasons

[130] I will deal with the issues in the following order:

¹¹⁸ At [265]. In their submissions to the Court of Appeal, both appellants had submitted that the Crown had not excluded the reasonable possibility that Mr Hamilton was one of the robbers. The Court of Appeal did not address this submission except to say, about the circumstantial evidence generally, that the weight given to individual strands was for the jury: at [266].

¹¹⁹ At [266].

¹²⁰ At [267].

¹²¹ At [286].

¹²² At [287].

¹²³ At [288]. The Court of Appeal also dismissed Mr Hoggart’s three remaining grounds of appeal, which concerned the appellants’ trials being heard together and not severed, the brevity of Mr Hoggart’s counsel’s closing address at trial and the admissibility of the expert evidence of Dr Innes, a forensic linguist: at [269]–[285]. Leave to appeal to this Court was not sought in respect of any of these grounds.

- (a) the reasonableness of the verdicts;
- (b) whether Mr Hartshorne’s evidence of an alleged confession should have been admitted at trial;
- (c) whether the jury were entitled to consider that there was no reasonable possibility that Mr Hamilton was one of the offenders;
- (d) whether a takedown order should have been made; and
- (e) whether suppression of Mr Wilson’s name should continue.

[131] Before discussing these issues, I set out the relevant legal principles related to unreasonable verdicts, circumstantial evidence, general admissibility of evidence, hearsay statements, judicial directions on reliability and lies.

Legal principles

Unreasonable verdicts

[132] If the jury’s verdicts were unreasonable, the appeals must be allowed.¹²⁴ The test for an unreasonable verdict was set out by this Court in *R v Owen*, adopting the Court of Appeal’s statement in *R v Munro*:¹²⁵

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

[133] This Court also endorsed the following aspects of the decision in *Munro*:¹²⁶

- (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

¹²⁴ Criminal Procedure Act, ss 232(2)(a) and 240(2).

¹²⁵ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [14]–[15] quoting *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [87] per Glazebrook, Chambers, Arnold and Wilson JJ.

¹²⁶ *Owen*, above n 125, at [13]. See also *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 at [206] per Glazebrook J, [67] per Winkelmann CJ, Ellen France and Williams JJ and [314] per Kós J; and *Longi v R* [2025] NZSC 191, [2025] 1 NZLR 900 at [62] per Winkelmann CJ, Williams and Kós JJ. This Court in *Owen* also endorsed the Court of Appeal’s rejection in *Munro* of the English “lurking doubt” test, which was based on a ground of appeal referring to the verdict being “unsafe or unsatisfactory” rather than “unreasonable”: *Owen*, above n 125, at [17]; and see *Munro*, above n 125, at [41] per Glazebrook, Chambers, Arnold and Wilson JJ.

- (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
- (c) The weight to be given to individual pieces of evidence is essentially a jury function.
- (d) Reasonable minds may disagree on matters of fact.
- (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
- (f) An appellant who invokes s 385(1)(a) [of the Crimes Act 1961¹²⁷] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

Circumstantial cases

[134] The Crown’s case against Mr Wilson and Mr Hoggart rests entirely on circumstantial evidence.¹²⁸ The question in a circumstantial case is the same as in any other: considering the totality of the evidence, are the elements of the offence proved beyond reasonable doubt?¹²⁹ This means any reasonable possibility other than guilt must be excluded.

[135] The Crown is not normally required to prove the individual facts in a circumstantial case beyond reasonable doubt.¹³⁰ If a “disputed circumstance” is an “element of the offence charged”, it must, however, be proved beyond reasonable doubt. Otherwise, there must be some “exceptional reason particular to the case” justifying the giving of a direction that proof beyond reasonable doubt of a disputed

¹²⁷ The predecessor of s 232(2)(a) of the Criminal Procedure Act.

¹²⁸ Meaning evidence from which the prosecution asks the jury to infer the presence of one or more elements of the offence: Mathew Downs (ed) *Adams on Criminal Law: Evidence – Archived Evidence Commentary pre Evidence Act 2006* (looseleaf ed, Thomson Reuters) at [EC2.06].

¹²⁹ *Kuru*, above n 126, at [27] per Winkelmann CJ, Ellen France and Williams JJ, [312] per Glazebrook J and [314] per Kós J.

¹³⁰ *Iongi*, above n 126, at [7], n 6 per Winkelmann CJ, Williams and Kós JJ citing *Thomas v The Queen* [1972] NZLR 34 (CA) and *R v Gee* [2001] 3 NZLR 729 (CA) at [27].

circumstance is required.¹³¹ This would arise if, without such proof, “there must necessarily be a reasonable doubt about the verdict of guilty”.¹³²

[136] Circumstantial cases rely on the jury drawing inferences from particular strands of evidence and from the evidence as a whole. The normal approach applies: when drawing inferences, the jury “must only draw logical conclusions ... and must not speculate or guess”.¹³³ If the jury could draw two equally available inferences from the evidence, deciding between them would require impermissible speculation.¹³⁴

[137] In a circumstantial case, there may be evidence that would require the jury to speculate if relied on standing alone but that “when considered along with other evidence at trial, would give rise to no doubt at all”.¹³⁵ The jury is not precluded from drawing an inference from a piece of evidence if, when considered in the context of the whole case, any competing inference(s) can be displaced by reasoning, rather than

¹³¹ *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412 at [8] citing *Thomas*, above n 130.

¹³² *Milner*, above n 131, at [8]. The commonly cited example is *The Queen v Dehar*, in which the allegations of lies by the defendant were such an important element of the Crown case that, without them, while there was enough evidence to found a “grave suspicion”, there was not enough to support a conviction: *The Queen v Dehar* [1969] NZLR 763 (CA) at 764. By contrast, in *Milner*, which was a case of murder by poisoning, the method of administration did not have to be proved beyond reasonable doubt as the other circumstantial evidence against the defendant was “substantial”: *Milner*, above n 131, at [10]. I note that *Dehar* was decided prior to s 124 of the Evidence Act 2006, which altered the legal position regarding reliance on evidence of lies: see below at [154]–[155]. But that does not diminish the point made.

¹³³ *Hutchins v R* [2016] NZCA 173 at [31].

¹³⁴ *Iongi*, above n 126, at [110] per Winkelmann CJ, Williams and Kós JJ; *Kuru*, above n 126, at [284] per Glazebrook J concurring (and with whom the rest of the Court agreed on this point: see at [67] per Winkelmann CJ, Ellen France and Williams JJ and [314]–[315] per Kós J); and *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647; and see *Hutchins*, above n 133, at [31].

¹³⁵ Nevertheless, some evidence may “be unsafe to rely on because it is of a character that can never gain in its value from the context”: *Milner v R* [2014] NZCA 366 at [15] citing *R v Goodman* [2008] NZCA 384 at [12]–[13], in turn discussing *Thomas*, above n 130. Evidence that is unsafe to rely on cannot be put before a jury and must therefore also be inadmissible. The caselaw does not clarify when evidence will be of such a character. I suggest it would only be in rare circumstances where a strand of evidence both has minimal probative value and is unrelated to any other strands so that there would be no related context within which to assess its value.

speculation or guesswork.¹³⁶ There is no requirement for the jury to draw the inference most favourable to the defendant.¹³⁷

[138] The extent to which a jury must be directed on inferential reasoning will depend on the significance of that issue in the particular case.¹³⁸ In *Iongi v R*, this Court approved the Court of Appeal’s observation in *R v Maxwell* that, where proof of an issue essential to the case depends on the drawing of an inference from circumstantial evidence, the judge should:¹³⁹

- (a) direct the jury that they must be sure the inference the Crown advances is the only reasonably available inference (and that it is not sufficient that it shows merely a strong possibility of guilt); and
- (b) canvass other possible inferences raised by defence counsel (and any inferences which might be drawn from the Crown’s failure to adduce direct evidence of the matter in issue).

[139] While the approach in *Maxwell* should usually be adhered to, there is no requirement for a judge to have “correctly recited a particular formula”.¹⁴⁰ The issue is “whether the jury has been adequately directed as to the case before it and the proper execution of its role”.¹⁴¹ The essential point to be emphasised is “whether the jury can be *sure* the defendant is guilty, in light of the competing evidential inferences — having adequately reviewed them”.¹⁴²

[140] The Judge did not give the *Maxwell* direction in this case. The Judge did, however, give the standard direction on inferences that an “inference is a conclusion

¹³⁶ *Iongi*, above n 126, at [110] per Winkelmann CJ, Williams and Kós JJ. See also *Hutchins*, above n 133, at [31]: the jury might, for instance, consider that only one inference is reasonably open, or is of much greater weight than any competing inference(s). I note too that, while the evidence must be considered in its totality, in both *Kuru* and *Iongi* this Court assessed individual strands of evidence before deciding whether an inference of guilt could be drawn from the evidence as a whole: *Kuru*, above n 126, at [210]–[250] per Glazebrook J; and *Iongi*, above n 126, at [82] per Winkelmann CJ, Williams and Kós JJ.

¹³⁷ *Hutchins*, above n 133, at [30]–[31]; and *Dunn v R* [2025] NZCA 216, [2025] 2 NZLR 786 at [77].

¹³⁸ *Iongi*, above n 126, at [106] per Winkelmann CJ, Williams and Kós JJ citing *Puttick*, above n 134, at 647.

¹³⁹ At [107] per Winkelmann CJ, Williams and Kós JJ (footnotes omitted) referring to *R v Maxwell* (1988) 3 CRNZ 644 (CA) at 647. In *Iongi*, the alternative defence inference was not capable of displacement by reasoning to the degree required, which was in that case that the jury had to be *sure*: at [110] per Winkelmann CJ, Williams and Kós JJ. This level of certainty was required because the inference to be drawn was an element of the offence itself (whether the jury were sure that the appellant participated in the plan): see above at [135].

¹⁴⁰ *Iongi*, above n 126, at [109] per Winkelmann CJ, Williams and Kós JJ.

¹⁴¹ At [109] per Winkelmann CJ, Williams and Kós JJ.

¹⁴² At [109] per Winkelmann CJ, Williams and Kós JJ (emphasis in original).

drawn from proven facts. It is not a guess.” In terms of circumstantial evidence, the Judge gave the commonly invoked rope analogy: “Any one strand may not support a particular weight, but the combined strands are sufficient to do so.” The jury were reminded to consider defence circumstances and to distinguish between the evidence applicable to each defendant as the cases needed “to be considered quite separately”. The jury were told that the overall logic underpinning a circumstantial case was “that the defendants are either guilty or the victims of an unlikely series of coincidences”. The Judge also gave the standard direction on the onus and burden of proof — that the Crown had to prove the charges against each defendant beyond reasonable doubt.

[141] The adequacy of the Judge’s directions was not a ground of appeal. I therefore do not need to decide whether the directions given were sufficient.

General admissibility of evidence

[142] Sections 7 and 8 are the “engine room” of the Evidence Act 2006.¹⁴³ Section 7 contains the Act’s fundamental principle that all relevant evidence is admissible and provides that evidence that is not relevant is not admissible.¹⁴⁴ Evidence is relevant “if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding”.¹⁴⁵

[143] Section 8 contains an exclusionary rule: evidence must be excluded if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding or needlessly prolong it.

[144] In the pre-trial admissibility appeal in this case, this Court clarified the approach to be taken to ss 7 and 8 when the reliability of evidence is at issue. This Court held that exclusion under s 7 for lack of reliability would only be warranted “where the evidence is so unreliable that it could not be accepted or given any weight at all by a reasonable jury or a judge in a judge-alone trial”.¹⁴⁶ That might include

¹⁴³ *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [61] per Winkelmann CJ and Ellen France J.

¹⁴⁴ Section 7(1)–(2).

¹⁴⁵ Section 7(3).

¹⁴⁶ SC admissibility judgment, above n 62, at [41] per Glazebrook, O’Regan and Ellen France JJ, and see at [191], n 199 per Winkelmann CJ and Williams J, agreeing with this point.

circumstances where accepting the evidence would be speculative or where the fact-finder, even taking the evidence at its highest, could not reasonably accept it as tending to prove or disprove anything of consequence to the determination of the proceeding.¹⁴⁷

[145] In most cases, reliability will only be relevant at the later stage of the admissibility inquiry: the s 8 balancing exercise. Judges have a “gatekeeping role” in assessing admissibility of evidence.¹⁴⁸ Judges must keep in mind the scheme of the Evidence Act, the respective roles of judge and jury, and the fact that the assessment is at this stage preliminary and lacking full context.¹⁴⁹ When assessing the probative value of proposed evidence, questions about reliability may relate either to the circumstances in which the evidence was generated or to the content of the statement.¹⁵⁰

Hearsay statements

[146] There are special rules applying to hearsay statements. 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.

[147] 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 defined there too and “means a person who gives evidence and is able to be cross-examined in a proceeding”.

¹⁴⁷ At [41] per Glazebrook, O’Regan and Ellen France JJ.

¹⁴⁸ At [69]–[70] per Glazebrook, O’Regan and Ellen France JJ.

¹⁴⁹ At [70] per Glazebrook, O’Regan and Ellen France JJ. The exercise is not a “mini trial” and there are real difficulties assessing these matters pre-trial. The fact-finder at trial can assess the evidence in the context of the whole body of evidence and may accept part of a witness’ evidence even where it considers some of that evidence is unreliable or a lie: at [71] per Glazebrook, O’Regan and Ellen France JJ.

¹⁵⁰ At [72] per Glazebrook, O’Regan and Ellen France JJ. Winkelmann CJ and Williams J agreed with the “general principles ... [applicable] to all classes of evidence, to guide the s 8 assessment” set out by the majority but took the further step of formulating a list of considerations relevant to the s 8 exercise as it relates to incentivised secondary confession evidence: at [253], and see at [254]–[270].

[148] A hearsay statement is admissible under s 18(1) if “the circumstances relating to the statement provide reasonable assurance that the statement is reliable” and either “the maker of the statement is unavailable as a witness” (for example, because they are deceased), or “undue expense or delay would be caused if the maker of the statement were required to be a witness”.

[149] 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

[150] The phrase “reasonable assurance” is also used in s 90(7)(a), which governs the admissibility of statements containing information a witness cannot recall. 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), relating to hearsay, “circumstances” is not a defined term in s 90(7).

Judicial directions on reliability

[151] In this case, there are issues as to the reliability of some of the evidence, given some 30 years had elapsed between the date of the offending and the appellants’ trial, and given the reliance on hearsay evidence and on statements of prison informants. This means s 122 is relevant:

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—
 - (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:
 - (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
 - (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
 - (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
 - (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
 - (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.
 - (5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.
 - (6) This section does not affect any other power of the Judge to warn or inform the jury.

[152] Section 122(2)(a) and (d) comprise a legislative recognition that hearsay evidence and evidence of prison informants may raise reliability issues.¹⁵¹ That the same issues arise in cases involving lengthy delay is likewise reflected in s 122(2)(e),¹⁵² which requires the judge to consider whether a reliability warning should be given in respect of evidence about the conduct of the defendant alleged to

¹⁵¹ *CT v R*, above n 105, at [45] per Elias CJ, McGrath and William Young JJ.

¹⁵² At [41] per Elias CJ, McGrath and William Young JJ.

have occurred more than 10 years previously. Any warning should also instruct the jury to take into account any forensic disadvantages resulting from the delay.¹⁵³

[153] Forensic disadvantages resulting from delay may include issues with the reliability or accuracy of witnesses' recollections so many years after the relevant events, difficulties sourcing evidence, and any age-related cognitive impairments or other health issues witnesses may now suffer from.¹⁵⁴ This Court has recognised that, in cases involving delay, the fair trial guarantees in s 25 of the New Zealand Bill of Rights Act 1990 will usually require "the judge to take particular measures to reduce, as far as possible, the risk of delay-related prejudice".¹⁵⁵ The Judge in this case did give reliability warnings relating to delay and incentivised witnesses.¹⁵⁶

Lies

[154] One of the strands of the Crown case was lies allegedly told by Mr Wilson and Mr Hoggart. Section 124 of the Evidence Act provides, in relevant part:

124 Judicial warnings about lies

- (1) This section applies if evidence offered in a criminal proceeding suggests that a defendant has lied either before or during the proceeding.
- (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.
- (3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—

¹⁵³ At [54]–[57] per Elias CJ, McGrath and William Young JJ, and see at [59] per Glazebrook and Arnold JJ.

¹⁵⁴ See at [13]–[14] per Elias CJ, McGrath and William Young JJ. Although *CT v R* concerned historical sexual offending, many of the examples given of forensic disadvantages are applicable more generally.

¹⁵⁵ At [16] per Elias CJ, McGrath and William Young JJ. Arnold J and I agreed with this point, noting that it will often be necessary to draw attention to the risk of possible loss of the opportunity to adduce evidence, to any other prejudice allegedly arising due to the delay and to the possible detrimental effects of time on memory: at [59]–[60]. We dissented on whether the requirement for directions to be given on delay-related prejudice arose from s 122(2)(e) of the Evidence Act. We considered that s 122(2)(e) covered only reliability and the need to give directions on delay-related prejudice was distinct, where such directions were necessary to ensure a fair trial: see at [61] and [75].

¹⁵⁶ See above at [117]–[118] and below at [262]–[263] and [435].

- (a) the jury must be satisfied before using the evidence that the defendant did lie; and
- (b) people lie for various reasons; and
- (c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

...

[155] Since the enactment of s 124, it is clear that evidence of lies may be relied on by the jury not just as relevant to the accused's credibility, as was the case under the old law, but also (taking into account any warning by the judge) as indicative of guilt, and is to be treated the same as any other piece of circumstantial evidence.¹⁵⁷

[156] Mr Wilson submits that, when relying on evidence of an alleged lie in a circumstantial case as evidence of guilt, the prosecution must prove:

- (a) the defendant's statement was false, by reference to objectively verifiable evidence;
- (b) the statement was deliberately false; and
- (c) the motive for the lie was a realisation of guilt and a fear of the truth.

[157] I reject Mr Wilson's submission. The proper approach, in line with s 124, is as follows. First, the jury must decide the statement was false. But, contrary to the first part of Mr Wilson's submission, this can be inferred in the context of all the evidence and does not have to be by reference to objectively verifiable evidence.¹⁵⁸

[158] Second, the jury may only consider a statement is a lie if they are satisfied the person knew it to be false. But, even if the jury finds the person believed the statement was true, they may still reject the evidence (for instance, if the person was mistaken or just plain wrong).

¹⁵⁷ See *Te Aka Matua o te Ture* | Law Commission *Evidence* (NZLC R55, 1999) vol 1 at [481]; and *R v Toia* [1982] 1 NZLR 555 (CA) at 559.

¹⁵⁸ See above at [137].

[159] Third, like all circumstantial evidence the prosecution is not normally required to prove to any particular standard that the lie was motivated by a consciousness of guilt.¹⁵⁹ Just as the jury may infer a statement was a lie, they may also infer it is consistent with guilt, provided any competing inferences can be displaced by reasoning, rather than speculation.¹⁶⁰

Reasonableness of the verdicts

[160] The first issue is whether the verdicts were unreasonable. If they were, the appeals must be allowed.¹⁶¹ I start by summarising the submissions of the parties on this issue.¹⁶² I then set out the approach I will take before reviewing the evidence against the appellants.

Mr Wilson's submissions

[161] Mr Stevenson KC, for Mr Wilson, notes that all witnesses who claimed Mr Wilson had made direct incriminating statements were excluded by the close of trial.¹⁶³ This meant, in Mr Stevenson's submission, all that was left was Mr Ross and Mr Dunbier's unreliable evidence of passing equivocal statements from the 1980s; the fact that Mr Wilson was within 100 km of where the crime was committed, despite hundreds of gang members passing through the area at the time; and the fact that Mr Wilson had previously committed an armed robbery and may have had a motive to commit another.

¹⁵⁹ See above at [135]. The Court of Appeal also rejected Mr Wilson's three proposed requirements: CA judgment, above n 58, at [233]–[241]. The submission before the Court of Appeal that these requirements had to be proved beyond reasonable doubt was not repeated before us and Mr Wilson did not clarify what standard of proof he said should apply. The Court of Appeal was correct to reject the submission as phrased before it. This was not one of those exceptional cases, referred to above at [135], where proof beyond reasonable doubt of the lies was required.

¹⁶⁰ See above at [137].

¹⁶¹ Criminal Procedure Act, ss 232(2)(a) and 240(2). Indeed, that was the result reached in *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [56]–[58]; *Longi*, above n 126, at [93] per Winkelmann CJ, Williams and Kós JJ; and *Kuru*, above n 126, at [67] per Winkelmann CJ, Ellen France and Williams JJ, [312] per Glazebrook J and [314] per Kós J. I comment that the Court of Appeal in this case set out the Crown and defence cases and analysed the submissions of the parties but, except where the admissibility of a piece of evidence was challenged, did not analyse the evidence: see above at [127]–[129]. Any such review must of course adhere to the *Munro* principles endorsed by this Court in *Owen*: see above at [133].

¹⁶² Where necessary, I include more detailed summaries of the parties' submissions on the particular evidential strands in my discussion of those strands below.

¹⁶³ These witnesses were the subject of this Court's decision in the SC admissibility judgment, above n 62.

[162] It is submitted that there was a glaring lack of evidence that actually connected the appellants to the crime. Stripped of its incentivised witnesses, the Crown case pivoted, focusing instead on Mr Wilson’s conduct and his alleged lies about his whereabouts. In Mr Stevenson’s submission, those lies were never proven and, moreover, it was impermissible for the Crown to advance alleged lies as the backbone of its case. Further, in Mr Stevenson’s submission, the evidence against Mr Hamilton was much greater than the evidence against Mr Wilson.

[163] Mr Stevenson submits that all other reasonable possibilities consistent with Mr Wilson’s innocence cannot be excluded, meaning the conviction was unreasonable and must be quashed.

*Mr Hoggart’s submissions*¹⁶⁴

[164] Mr Hoggart points out that, of the 10 strands of evidence relied on by the Crown, only four related to him: the appearance of the offenders, the association and movements of the appellants, his changed financial circumstances and the false alibi he allegedly tried to create. It is submitted that these strands were weak and not sufficient to prove the case against Mr Hoggart beyond reasonable doubt. In effect, he was found guilty only by virtue of his association with Mr Wilson, against whom there was significantly more evidence.

Crown submissions

[165] In the Crown’s submission, the appellants must identify an error in the Court of Appeal decision. The Crown refers to this Court’s instruction in *Sena v Police* that it is not the role of an appellate court to “consider the issues de novo as if there had been no hearing at first instance” but that it is “for the appellant to show that an error has been made”.¹⁶⁵

[166] The Crown submits that, putting aside the admissibility of the Hartshorne evidence, the appellants have not identified any error in the Court of Appeal’s

¹⁶⁴ Mr Hoggart adopts Mr Wilson’s submissions on this issue, except to the extent there are specific points relating to Mr Hoggart.

¹⁶⁵ *Sena*, above n 161, at [38]. I note that this is in line with principles (a) and (f) of *Munro and Owen* set out above at [133].

reasoning. In the Crown's submission, by contrast to *Munro*, in which the errors in key planks of the Crown evidence were obvious once explained,¹⁶⁶ Mr Wilson challenges the weight that could be afforded to the various strands of the Crown case, which is a quintessential issue for the jury.

[167] The Crown submits that it was open to the jury to conclude beyond reasonable doubt that the appellants were guilty. Mr Wilson's submission that each individual strand of the evidence against him was weak fails to recognise the nature of a circumstantial case; while individual strands may not be especially probative, it is their cumulative tendency that counts. Even evidence that would be speculative if relied upon alone may be strong enough to eliminate a jury's doubt when considered with the other evidence at trial. If the evidence had no probative value, it would be irrelevant and therefore inadmissible.¹⁶⁷ But that was not so in this case. Whether each strand of evidence put to the jury in fact proved anything was ultimately a question for the jury. In this case, the Crown submits that the cumulative strength of the evidential strands proved the case against Mr Wilson and Mr Hoggart beyond reasonable doubt.

My approach

[168] The appellants have, in line with principle (f) endorsed by this Court in *Owen* and set out above at [133], identified the shortcomings in the evidence that they say made the verdicts unreasonable. Their challenge is to almost all of the evidence and is backed up by clearly articulated reasons which cannot be dismissed without careful consideration.

[169] I therefore undertake a detailed review of the evidence. In the course of this review, I assess whether all of the evidence relied on by the Crown at trial was in fact admissible and the effect on the outcome of the appeal if it was not.¹⁶⁸ I then consider whether a reasonable jury could have found the charges proved based on the admissible evidence, while making due allowance for the matters in principles (a)–(e)

¹⁶⁶ *Munro*, above n 125, at [232] per Glazebrook, Chambers, Arnold and Wilson JJ.

¹⁶⁷ Evidence Act, s 7(2).

¹⁶⁸ It is of course the role of the judge at trial and of the court on appeal to decide questions of admissibility of evidence.

set out above at [133]. The detailed review of the evidence accords with the approach of this Court in *Iongi* and *Kuru v R*, and by the Court of Appeal in *Munro*.¹⁶⁹

[170] Before coming to a final conclusion on whether or not the verdicts were unreasonable, I consider the effects of delay and of there being cogent evidence of another possible perpetrator, Mr Hamilton.

Review of the evidence

[171] I deal with the strands of evidence relied on by the Crown at trial in the order that appears the most logical for understanding and evaluating the Crown case. I indicate when evidence relates to one of the appellants only. I discuss the evidence in the following order:

- (a) the descriptions of the offenders;¹⁷⁰
- (b) the appellants' known association;¹⁷¹
- (c) the appellants' movements around Labour Weekend;¹⁷²
- (d) the shotgun evidence;¹⁷³
- (e) lies (Mr Wilson);¹⁷⁴
- (f) the glove evidence;¹⁷⁵
- (g) the shoe print evidence;¹⁷⁶
- (h) the Birkenhead robbery propensity evidence;¹⁷⁷

¹⁶⁹ See *Iongi*, above n 126, at [63] per Winkelmann CJ, Williams and Kós JJ; and see generally *Kuru*, above n 126; and *Munro*, above n 125.

¹⁷⁰ See below at [172]–[192].

¹⁷¹ See below at [193]–[199].

¹⁷² See below at [200]–[280].

¹⁷³ See below at [281]–[303].

¹⁷⁴ See below at [304]–[335].

¹⁷⁵ See below at [336]–[346].

¹⁷⁶ See below at [347]–[373].

¹⁷⁷ See below at [374]–[380].

- (i) motive;¹⁷⁸
- (j) money (Mr Wilson);¹⁷⁹
- (k) money (Mr Hoggart);¹⁸⁰
- (l) lies (Mr Hoggart);¹⁸¹
- (m) statements (Mr Wilson);¹⁸² and
- (n) statements (Mr Hoggart).¹⁸³

(a) *Descriptions*

[172] The first strand of the Crown case was that the descriptions of the offenders were generally consistent with the appearance of the appellants.¹⁸⁴

Evidence at trial: physical descriptions

[173] Ms Prisk confirmed in evidence the descriptions she had given in her first statement:¹⁸⁵ that the gunman was male, “noticeably short”, about five feet and seven inches tall,¹⁸⁶ of medium build and wearing a “[b]lack woollen ribbed balaclava to bottom of neck” with “2 eye holes cut in a slash”, dark gloves, and possibly dark trousers and a dark jacket.¹⁸⁷

¹⁷⁸ See below at [381]–[385].

¹⁷⁹ See below at [386]–[398].

¹⁸⁰ See below at [399]–[404].

¹⁸¹ See below at [405]–[414].

¹⁸² See below at [415]–[449].

¹⁸³ See below at [450]–[454].

¹⁸⁴ See above at [103(a)].

¹⁸⁵ Ms Prisk gave three statements to the police: the first in the early morning of the Sunday of Labour Weekend (25 October 1987), starting around 3.25 am, the second on Monday 26 October 1987 at 10 am and the third on 5 October 2017.

¹⁸⁶ At trial Ms Prisk confirmed that, in her second statement, she had said that “his height was about five foot seven inches but he was crouched with the gun in a stance as if to fire”.

¹⁸⁷ In her second statement she confirmed that she had said that she was unsure of the gunman’s clothing but thought he had a black jacket or jumper, and possibly jeans. She said his shoes were “[b]lack baseball boots possibly with white laces”. In her first statement she had said that the gunman’s shoes were unknown.

[174] Ms Prisk said the second offender (with the bat) was male, about five feet and 11 inches tall and of “solid^[188] build — possibly slightly fat”,¹⁸⁹ wearing a black balaclava, running shoes and khaki overalls similar to a mechanic’s overalls with a zip in front but with no monograms.

[175] Ms Soppet confirmed that she had said to the police on 25 October 1987 that the gunman “did not seem very tall, he could’ve been anywhere between five foot five and five foot 11, medium build”. She thought he was wearing a “one-piece garment, possibly overalls” and “a dark colour”. She was fairly sure he was wearing gloves but said, “I can’t describe them, I did not see his or the other’s skin at any time”.

[176] As to the second offender, Ms Soppet said that he was about the same build and height as the gunman and wearing the same type of clothing as the gunman: a dark balaclava and possibly a one-piece garment like overalls. She was fairly sure he was wearing gloves but said: “I could not see his hands, I cannot describe what was covering his hands.”

[177] In his first statement, Mr Bill Wilson said that he only saw one of the robbers, the one that had grabbed him and tied him up.¹⁹⁰ He said that he had looked at the robber as he was getting on the floor. He said that the robber “seemed pretty tall to me. He wasn’t fat, I just had this thought that he was a big bugger.” Mr Bill Wilson thought the robber “would probably have been about 6 foot tall.”¹⁹¹ He was wearing “something like a grey balaclava”. Mr Bill Wilson “only got a real quick look at [the robber] then I was down on the floor, face down”. In his second statement, he said that the robber he was describing “was the one with the bit of wood” and that he only glanced at him for a second. The robber “wasn’t fat or anything just normal”. Mr Bill Wilson could not remember if the robber “had anything on his hands when he was holding the bit of wood over his head”.

¹⁸⁸ In evidence, she used the words “solid” and “round”.

¹⁸⁹ In her second statement she said that the overalls were “noticeably tight around middle - slightly fat stomach”.

¹⁹⁰ Mr Bill Wilson gave two statements to police, the first on the morning after the robbery and the second the Monday afterwards, both of which were read by consent at trial.

¹⁹¹ In his second statement Mr Bill Wilson said he was five feet and eight inches or five feet and nine inches tall and he remembered looking up to the robber.

[178] The agreed facts at trial recorded that Mr Wilson (the gunman on the Crown's case) was approximately five feet and eight inches tall in 1987 and Mr Hoggart (the second offender on the Crown's case) was between five feet and 10 inches and five feet and 11 inches tall with a medium-solid build.

Evidence at trial: voices

[179] Ms Prisk confirmed that she had said in her first statement that both offenders were Māori or Polynesian by voice. In evidence she said, "the voices were so muffled but that's what I thought". In her second statement she said the gunman was "race unknown" but that she "had a feeling that he was Māori because of his voice" and that the man with the bat was "Māori, definitely by voice".

[180] Ms Soppet in her first statement given in the early morning of 25 October 1987 said that gunman was male and "sounded like a person in his twenties, sounded aggressive" but did not "sound like a Māori or Polynesian". She confirmed she could understand everything he said when he said it, and that he spoke clearly. As to the second offender, Ms Soppet said that he was male and "sounded like a person in his twenties, race unknown but like the gunman he didn't sound like a Māori or Polynesian". Ms Soppet said he "did not sound as aggressive as the other".

[181] In his first statement, Mr Bill Wilson said: "I don't know if they were Maoris or pakehas from the way they spoke." In his second statement, Mr Bill Wilson said, from the "way [the one with the bit of wood] talked he definitely wasn't an Islander." Mr Bill Wilson said, from the robber's voice, "I would say he was probably a pākehā but I can't say for certain whether he was Māori."

[182] A forensic linguistics expert called by the Crown, Dr Innes, gave evidence that Māori-English is a subvariety of New Zealand English. It has features transferred from te reo Māori which are mostly also present in New Zealand English, but speakers of Māori-English will use those features more often. She said that it is a dialect very often spoken by Māori but also sometimes by people who are not Māori. She agreed in cross-examination that New Zealanders can hear a difference between the two but that they also make mistakes at times in that respect. She also gave evidence about issues with attempting to identify ethnicity by voice.

[183] Dr Innes identified several factors which in her opinion could affect the reliability of the evidence in this case, including the brevity of the incident, the small amount of speech, the fact the offenders talked over each other, the stress of the situation and the wearing of balaclavas that potentially muffled the offenders' voices. She also said that neither of the identifications of Ms Prisk nor Ms Soppet specified the details of what the accents or dialects were like. They made broad statements without any specifics. Dr Innes did, however, accept in cross-examination that a witness like Ms Prisk may intuitively hear the differences (such as the vowel differences, the rhythm and the intonation) but not be able to explain them.

Submissions on appeal

[184] Mr Wilson submits that there was little evidence about the descriptions of the offenders at trial as they were heavily disguised and two of the bar staff remained on the ground during the robbery. The evidence as to the height of the offenders was superficially probative but imprecise and generic. It is submitted that the rest of Ms Prisk's evidence was not consistent with Mr Wilson's appearance. At trial, Mr Ross described Mr Wilson as having a "wiry" build in 1987, rather than a "medium" build.

[185] Further, Ms Prisk, who had the most interaction with the two offenders, said that, from their voices, they were Māori. Both Mr Wilson and Mr Hoggart are Pākehā. Mr Wilson notes that the forensic expert called by the Crown confirmed that New Zealanders can tell the difference between Māori-English and New Zealand English. The jury were not entitled to reject that evidence, given it was unchallenged.¹⁹²

[186] Mr Hoggart points out that Ms Prisk was the one member of the bar staff who did not remain on the ground and that she had engaged in a one-on-one conversation with the second offender (on the Crown's case, Mr Hoggart). Mr Hoggart is not Māori, and there is no evidence that he spoke with a Māori-English vernacular.

¹⁹² In this respect, Mr Wilson cites *Regina v Brennan* [2014] EWCA Crim 2387, [2015] 1 WLR 2060 at [44].

[187] Mr Hoggart also says that the physical descriptions were generic, and notes the discrepancy between Ms Prisk's description of the second offender as solid and slightly fat and the agreed statement of facts as to him being of medium-solid build. The other two witnesses described the second offender as taller than as described by Ms Prisk or about the same height as the gunman.

[188] The Crown submits that the appearances of Mr Wilson and Mr Hoggart were generally consistent with the description of the robbers. The offenders were described as Māori by only one of the staff members and the expert evidence called by the Crown established that ethnicity cannot be reliably identified by voice alone.¹⁹³ It is submitted therefore that the voice evidence did not advance matters one way or another.

My assessment

[189] The jury would have been entitled to put more weight on the evidence of Ms Prisk than the other two witnesses, both as to the relative heights of the robbers and as to their ethnicity. She was the only member of the bar staff not on the floor for the whole of the robbery. She also, as Mr Hoggart submits, spent time one-on-one with the second offender.

[190] This means that the jury would have been entitled to accept Ms Prisk's estimate of the difference in the heights of the robbers, which matched the heights of and, more importantly, the height differential between, Mr Wilson and Mr Hoggart. This had evidential significance, particularly in light of the evidence that Mr Wilson and Mr Hoggart had been together and within feasible travelling distance of the Red Fox Tavern over Labour Weekend.

[191] On the other hand, Ms Prisk thought, from their voices, that the robbers were Māori. The jury would have been entitled to consider that this was evidence indicating

¹⁹³ The forensic expert's evidence did not in fact go this far. Rather, she said that New Zealanders could identify Māori-English vernacular but that mistakes could be made at times. She noted that in this case the incident lasted only about five minutes, involving not much speech for the witnesses to assess, and the balaclavas worn by the robbers caused — at least on the account of one witness — their voices to be muffled.

that Mr Wilson and Mr Hoggart were not the robbers, given they are Pākehā.¹⁹⁴ Equally, however, the jury would have been entitled to doubt Ms Prisk’s evidence for the reasons given by Dr Innes: that, although New Zealanders could identify Māori-English, mistakes could be made, and in this case numerous factors could have affected the reliability of that identification. These included stress, that the robbers were talking over one another and that their voices were muffled. The jury were also entitled to take into account the conflict of evidence between the witnesses on this point.

[192] This means that the jury were not obliged to consider Ms Prisk’s evidence as to ethnicity as necessarily exculpatory and the jury would have been entitled to, and by their verdict did, consider that the evidence did not raise a reasonable doubt as to the identity of the robbers.¹⁹⁵

(b) Association

[193] The second strand of the Crown case was that the appellants were known to be associates at the relevant time.¹⁹⁶

Evidence at trial

[194] According to the agreed statement of facts at trial, in 1983 Mr Wilson and Mr Ross went to prison for the Birkenhead robbery. In late February 1987, Mr Wilson was moved from Auckland Prison (Pāremoremo) to Whanganui Prison at Kaitoke. He was released on 7 October 1987 on parole just 17 days before the Red Fox Tavern robbery and murder. Mr Wilson’s parole address was to the home of one of his sisters (Ms A) at a winery near Napier.

[195] Mr Wilson was generally unforthcoming when interviewed by police in January 1988,¹⁹⁷ initially replying “[n]o one” to the question “[w]ho do you associate with ... here in Napier?” and “[n]a” to the question, “[i]s there anyone else you hang

¹⁹⁴ Although I note the evidence of the forensic expert that some Pākehā do speak in the Māori-English vernacular.

¹⁹⁵ As the forensic expert’s evidence was qualified, this would not have involved rejecting her evidence that New Zealanders can recognise the Māori-English vernacular, as Mr Wilson asserts.

¹⁹⁶ See above at [103(b)].

¹⁹⁷ But see my discussion below at [204]–[206] about how that interview was conducted.

around with? Anyone in Hamilton?” But, immediately afterwards, he named Mr Hoggart when asked whether he associated with “a guy you were with last year in Whanganui”. Mr Wilson said he only met up with Mr Hoggart “[a] few times”, whereas he saw Mr Ross “[e]very other day”. The Crown submitted in closing that he was not being totally transparent as to the extent of his interactions with Mr Hoggart.

[196] Mr Hoggart was at Whanganui Prison when Mr Wilson arrived there until Mr Hoggart’s release on 17 August 1987.¹⁹⁸ In his interview with police, when initially asked who he was with in Whanganui Prison, Mr Hoggart named three people (not including Mr Wilson) and said he could not remember anyone else. However, he volunteered his connection with Mr Wilson very soon afterwards. He said that Mr Wilson was “a bit of a loner”.

[197] After his release, in August to October 1987, Mr Hoggart generally spent the weekdays in Hamilton at the house of Ms Hargreaves and the weekends at Ms Rautangata’s home in Ngāruawāhia, the latter of whom he had an intermittent relationship with for some five years. In his interview with police on 22 January 1988, Mr Hoggart said that since he came out of prison he had been “[j]ust riding around enjoying being free”.

[198] Ms Hargreaves’ statement to police (read by consent at trial) said that the only “mate” Mr Hoggart had was “a guy named Willie” but she did not know his last name. She did “know that Willie [Mr Wilson] was in the Filthy Few with Mog [Mr Hoggart]”.

My assessment

[199] This evidence was relevant in that it showed that Mr Wilson and Mr Hoggart were known associates. If they did not know each other, then they could not have planned to commit a robbery together. However, without the evidence of their movements and association at and around the relevant time,¹⁹⁹ I accept the appellants’ submission that the mere fact that they knew and associated with one another was of little evidential significance. I also note that both Mr Wilson and Mr Hoggart readily

¹⁹⁸ Mr Wilson and Mr Hoggart had also overlapped at Auckland Prison (Pāremoremo) between April and September 1983.

¹⁹⁹ Discussed below at [200]–[280].

admitted in their police interviews that they knew each other. I therefore do not accept the Crown submission that each had tried to minimise the closeness of their relationship when questioned by police.

(c) *Movements*

[200] The third strand of the Crown case was that the appellants' known movements either side of Labour Weekend were consistent with them being the offenders.²⁰⁰ I discuss the evidence relating to the appellants' movements in the following order:

- (i) Mr H's evidence about driving Mr Wilson from Napier to Taupō;
- (ii) Mr Wilson's account of his movements in his statement to police;
- (iii) Mr Hoggart's account of his movements in his statement to police;
- (iv) the appellants' visit to Ms Northcott over Labour Weekend;
- (v) Mrs Pyle's evidence, relied on by the Crown to contend the appellants scoped out the Red Fox prior to the robbery and murder;
- (vi) Mr Hoggart's visit to Ms Hargreaves on Saturday 24 October;
- (vii) Ms Rautangata and Ms Harris' evidence; and
- (viii) the evidence of the appellants' movements on the Sunday morning and beyond.

(i) Evidence at trial: Napier to Taupō

[201] Mr H, Mr Wilson's brother-in-law (married to one of Mr Wilson's sisters), gave evidence that on Thursday 22 October 1987 he had given Mr Wilson a lift from Napier to Taupō,²⁰¹ arriving at the Napier-Taupō turnoff at around 11 pm. Mr Wilson was

²⁰⁰ See above at [103(c)].

²⁰¹ Mr H was a courier driver and often did the round trip from Napier to Tūrangi (near Taupō) and back.

then picked up by a person waiting in a vehicle in the car park, but Mr H did not see the person or know who they were. The vehicle was covered in dents on both sides. Mr H thought Mr Wilson was going to the Cambridge area to see his former girlfriend, Ms Northcott. He knew that Mr Wilson had not seen her for a long time and wanted them to get back together.

[202] Mr H said that on the Sunday of Labour Weekend the family had gone to Fantasyland (a theme park). The family, including Mr Wilson, had arrived at Mr H's place on the way to Fantasyland at around 10.30 am. Mr Wilson "appeared his normal self and he was relaxed".

[203] On the Thursday after Labour Weekend, Mr H again dropped Mr Wilson off in Taupō. Again, there was someone waiting to pick up Mr Wilson, but Mr H did not know who that was. Mr Wilson said he was going once more to see Ms Northcott. Mr H's evidence is not contested by any of the parties.

(ii) Mr Wilson on his movements over Labour Weekend

[204] The circumstances in which Mr Wilson's statements were taken are relevant to my assessment, and I therefore first briefly outline these. Mr Wilson was uplifted from a friend's house near Cambridge on Friday 22 January 1988 and taken to Hamilton for questioning about "a matter that the police needed to speak to him about". After they arrived at Hamilton Police Station at 4.20 pm, police then decided that he was to be interviewed in Napier. At 5.05 pm, Mr Wilson was driven to Napier, arriving there at 8 pm. The interview started at 9.19 pm and continued with breaks until 1 am the next morning. It was not until around 12.45 am that Mr Wilson was told that the questioning concerned the Red Fox robbery and murder, and it was not until the questioning recommenced at 11.42 am on the Saturday morning that he was cautioned. The interview ended at 4 pm on the Saturday and recommenced at 9.31 am on Monday 25 January. It was not until after the end of the interview on the Monday that Mr Wilson had legal advice. He and his lawyer read the notes of the interview. Mr Wilson declined to sign the notes, but his lawyer advised that Mr Wilson may wish to sign them at a later date.

[205] The record of the interview is in a question-and-answer form. The Detective Sergeant involved jotted down bullet points during the interview²⁰² and then later wrote them up in full. He stated in his evidence given pre-trial that these notes contained “pretty close” to a full record of the initial bullet points. Mr Wilson submits that there are large periods of time unaccounted for. This is set out in the following table, provided to us by Mr Wilson:²⁰³

Interview start	Interview finish	Interview length	Time taken to read transcript Q and A
Friday			
9.19 pm	10.10 pm	51 minutes	6 minutes, 5 seconds
11.41 pm	12.27 am	46 minutes	3 minutes, 34 seconds
Saturday			
3.18 pm	4.00 pm	42 minutes	2 minutes, 50 seconds
Monday			
9.31 am	11.30 am	2 hours	5 minutes, 38 seconds

[206] I accept Mr Wilson’s submission that the notes cannot have been a full record of what was said in Mr Wilson’s interview, given both the time gaps and the process of writing up notes later from bullet points. While the statement was held to be admissible and this Court declined leave to appeal on that point,²⁰⁴ I accept the submission that the way the interview was conducted and recorded must be taken into account when assessing the Crown submissions, especially those related to lies.

[207] Mr Wilson, in his interview starting on 22 January 1988, when first asked about his movements in the week of Labour Weekend, said that he had got a lift from Napier to Taupō with his brother-in-law, Mr H. Mr Hoggart had picked him up from Taupō and taken him through to Hamilton where he had stayed the night. He said that the day after he had hitchhiked to Tauranga, arriving on what he thought was the Friday. He stayed on the Friday night in a motel with “Peanuts”²⁰⁵ and “some dirty girls ‘Peanuts’ had jacked up”. On the Saturday he had gone to a Filthy Few reunion until about 2 pm, after which he had started hitchhiking back to Napier. He was dropped at the Taupō-Napier turnoff and, because he was not getting any rides, had

²⁰² I understand that these bullet points have never been disclosed to the defence.

²⁰³ This is not a complete record of the interview times, but rather a table provided by Mr Wilson indicating where he submits there are time gaps in the interview transcript.

²⁰⁴ SC leave judgment, above n 59, at [2], [5] and [7].

²⁰⁵ When asked for “Peanuts”’ real name Mr Wilson said his name was Fitzgerald but he did not know Mr Fitzgerald’s first name, “just that he is called ‘Peanuts’”.

gone off the road and slept under a tree. He got up at dawn and got a lift to the Napier-Wairoa turnoff in a Valiant. He then walked “about half way to Bayview and then this old guy picked me up [in a Triumph] and dropped me outside home”. He arrived home “first thing Sunday morning”. His parents were there and later that day the family went to Fantasyland.

[208] As soon as he was told that the questioning concerned the aggravated robbery of the Red Fox Tavern,²⁰⁶ Mr Wilson said that Labour Weekend was “a while ago” and he was not sure if he was in Tauranga that weekend. He could have been in Cambridge visiting an old girlfriend, Ms Northcott. When pressed he said he thought he was in Cambridge. He said that he had got Ms Northcott’s address from a Mr Jeffries and that Mr Hoggart had taken him there around midday in his Vauxhall on the Saturday and he stayed for about three hours as he “was trying to reconcile our relationship”.

[209] He said Mr Hoggart did not stay but came back to pick him up at around 3 pm (now driving a Mitsubishi) and dropped him on the main highway, where he walked for a bit until he got a ride. He then got a couple of rides to Taupō but could not remember in what type of car. When he got to Taupō, he got another ride along the Napier-Taupō road and got dropped off near a forestry village. There were a couple of hours of daylight left and he walked until it got dark. He then slept under a tree in a forest area about 100 yards from the road. He had a bag with clothes in it and was wearing jeans, a T-shirt and a black jersey. In response to the Detective Sergeant’s comment that “[i]t was pretty cold that night according to the Met Office”, between 5°C and 7.5°C, Mr Wilson said: “Yeah it was a real heavy dew I didn’t get much sleep.” He woke at dawn and then hitchhiked to Napier. He first “got picked up by these Māori fellas in a Valiant”. When asked about his second ride “from the old guy in the Triumph” he said he was dropped off at about 8.30 am or 9 am.

[210] In the last interview session of the Saturday, Mr Wilson was told that the police had been talking to Ms Northcott and she had said he had gone round and given her child a present. He said: “Na.” He confirmed that they had gone round in Mr Hoggart’s Vauxhall and that he, Mr Wilson, was driving. When told that

²⁰⁶ Which was not until over three hours into the interview: see above at [204].

Ms Northcott said he was there for an hour, he said he was there longer than that — “a couple of hours at least”. When told that Ms Northcott said it was the Thursday and not the Saturday, he said she was wrong. Mr Wilson was then told that Mr Jeffries was seen that day at the Post Office “no doubt picking up his dole” and that would be a Thursday.²⁰⁷ Mr Wilson said: “Ain’t Post Offices open on a Saturday?” When the answer was no, he said: “Well then it must have been Thursday.” When asked what he was doing on the Friday and Saturday, he said he did not know. This exchange then took place:²⁰⁸

- Q. Well there are a lot of strange occurrences. You have possession of a shotgun five days before the robbery. You were up in that area, you can’t account for the vital 24 hour period. So I have to start thinking whether you are involved.
- A. Na, I’m sure it was Saturday. I got home on Sunday and I told mum how I had seen [Ms Northcott] and how it looked pretty good, her and me. I’m sure that was Saturday.
- Q. But [Ms Northcott] and [Mr Jeffries] confirm it was in the week.
- A. Well I don’t know.
- Q. Did you do the Red Fox that night [Mr Wilson]?
- A. (Laughs — shakes head)
- Q. Do you want to tell me about it?
- A. [F...] off it wasn’t me. I told you what I did, I just can’t remember.
- Q. Think about what you have done on Saturday. It’s important that you can remember your movements.
- A. I don’t know.
- Q. I’ll give you time to think about it, okay.

[211] The interview recommenced on the Monday. Mr Wilson was told that Ms Northcott and Mr Jeffries said the visit was on the Thursday and Mr Hoggart said it was a weekday. Mr Wilson replied: “Well I just don’t know.” He said that he thought he was in Ngāruawāhia that weekend to visit a friend of his parents. He stayed with Ms Rautangata on the first night that he was in Ngāruawāhia. When asked if he was

²⁰⁷ It was subsequently found that it was a Friday that they saw Mr Jeffries at the Post Office: see below n 211.

²⁰⁸ As noted above at [206], the written notes of the interview are not necessarily an accurate record of the questions and answers.

still adamant that it was a weekend he saw Ms Northcott, he said: “The dude [Ms Northcott] lives with works during the week but he was there that day. He wouldn’t have been there if it had been a working day.” Mr Wilson then became upset over what he said was a personal matter he did not want to talk about, and the interview was terminated shortly afterwards.²⁰⁹

(iii) Mr Hoggart on his movements over Labour Weekend

[212] Mr Hoggart, when asked in his interview beginning on 22 January 1988 what he was doing at Labour Weekend, said: “I don’t rightly remember but I was living with [Ms Rautangata] then. I didn’t go away. I might have been down at the pub.” He and Ms Rautangata were “pretty close” at the time, and he thought he spent Labour Weekend with her.²¹⁰ When told it was important that he remembered what he did that weekend and who he was with, he said he would have to consult Ms Rautangata as “[e]very day is the same around here”. He asked what the problem was. He was then asked if he remembered the shooting at the Red Fox. He said that he did and said it was “somewhere up north — Whangārei or somewhere”.

[213] When asked if he had dropped Mr Wilson off to visit Ms Northcott, he said that he had done so a couple of times and that Mr Wilson had told him where to go. He did not know how Mr Wilson knew where she lived but later said that Mr Jeffries told Mr Wilson where she lived. He said he could not remember when he had dropped him off, but it was daylight. After being allowed to consult Ms Rautangata, Mr Hoggart said that he had picked Mr Wilson up in Taupō on the Thursday night at midnight and that he had taken him to Ms Northcott’s in Cambridge on the Friday. He said that Mr Wilson stayed at Ms Northcott’s, then left for Napier on the Saturday morning for a family reunion “or some sort of family do” and that he thought Mr Wilson hitchhiked there.

²⁰⁹ The Crown suggested in closing that Mr Wilson was upset because he was concerned that Ms Rautangata would inform on him to the police. In my view, this submission lacked any evidential foundation and should not have been made. Mr Wilson had been questioned for three days at this stage (four including the break on the Monday), including late at night (which does not seem to have been necessary). He could have been upset about any number of personal matters.

²¹⁰ He said, however, that he and Ms Rautangata had broken up about two weeks before the interview and that she was “pretty sour about it”.

(iv) Visit to Ms Northcott in Cambridge

Evidence at trial

[214] Ms Northcott gave evidence that Mr Wilson had come to see her at her home in Cambridge the week after her son's first birthday, which was on 17 October 1987. She thought the visit was on a Thursday: it would have been a weekday because her girlfriend had been to visit during her lunchbreak, and the girlfriend did not work weekends. Ms Northcott agreed in cross-examination that, when she said she thought it was a Thursday, she was "doing the best that [she] could to sort of piece together the days given that [she] was being asked about it three months later".

[215] She said that Mr Wilson was with a friend called "Mog" (Mr Hoggart). Mr Wilson had come because he wanted to "re-ignite our relationship, he wanted me to go away with him and move to Napier". She refused. They stayed for around an hour and had come in a green Vauxhall Viva which was in poor condition and "looked a bit shotty". They had to push-start it when they were leaving. Mr Wilson had said they were "going down the line" but did not say where or what for.

[216] On Friday 23 October, the day before the robbery and murder, Mr Hoggart and Mr Wilson were seen by "Beaver" Jeffries by the Post Office in Cambridge (just over one hour's drive from the Red Fox) between about 1 and 3 pm. Mr Jeffries said that he chatted with them "for a while" and they asked him if he knew "where a girl [said by the Crown to be Ms Northcott] lived".²¹¹

My assessment

[217] It seems likely that the visit to Ms Northcott took place on the Friday, despite Ms Northcott being sure it was the Thursday (with Mr Jeffries initially also thinking the Thursday), and Mr Wilson that it was the Saturday. Whether the visit lasted an hour or longer, and whether Mr Hoggart stayed or came back later to pick up Mr Wilson, is unclear. Even if the visit to Ms Northcott was on the Saturday and

²¹¹ Mr Jeffries in his statement to police was unsure what day he saw the appellants in town "but it was late in the week". He initially appears to have thought it was on the Thursday, the same day Ms Northcott said Mr Wilson had visited her: see above at [211] and [214]. It was subsequently proved from Post Office records, and agreed between the parties at trial, that the meeting outside the Post Office occurred on the Friday.

Mr Hoggart and Mr Wilson left Ms Northcott's house at 3 pm, this still left ample time for them to travel to Maramarua to commit the robbery.

[218] I discuss below the Crown submission that the visit to Ms Northcott was a manufactured excuse to cover up the real reason for the visit to the Waikato: to rob the Red Fox Tavern.²¹²

(v) Friday evening sighting of a car near the Red Fox Tavern

Evidence at trial

[219] Mrs Pyle's statement (taken on 26 October 1987) was that at around 8.45 pm on Friday 23 October she was standing in front of the petrol pumps outside the dairy where she worked. She saw a car go past and stop "on an angle beyond the pumps on the driveway". It was an agreed fact at trial that this was after dark (sunset was at 6.45 pm).²¹³ A diagram she drew was produced as an exhibit and is reproduced as Appendix A to this judgment.

[220] Mrs Pyle said that there were two people in the car. "The driver was looking over in the direction of the [Red Fox] really straining to see it." The car stayed there for about one minute with the motor running, then moved forward. The driver was still looking at the Red Fox, and Mrs Pyle said that it was "as if they moved to get a better view of the [Red Fox]". They stayed for about another minute and then drove off towards State Highway 1. She said their behaviour "was really odd. The driver didn't take his eyes off the [Red Fox]."

[221] The description of the car she saw was:

Big car. Looked as if it had patches of colour on it. No main colour. I can remember the colours brown and green. It was just a wreck. It idled very quietly. When it drove off it was quite noisy. I don't think that the tail lights were on –I really can't be sure I might recognise the car again.

²¹² Below at [319]–[322].

²¹³ This time was for the Saturday, but daylight saving did not start until the Sunday. It was not suggested at trial that the sunset time on the Friday was different from the Saturday.

[222] Mrs Pyle described the driver as European, in his early 20s, of average build (from what she could see from the shoulders up), with sandy-coloured, collar-length wavy hair. She said he was clean shaven, average looking and wearing an open-necked shirt (colour unknown). She said she did not see the passenger's face, "just his shape", but he was "[s]lightly bigger than the driver", of unknown race, wearing black clothing²¹⁴ and with dark hair. She did not take the car's registration number because she was in the middle of closing up.

[223] Three days later, on Monday 26 October, between 6.15 and 6.30 pm (before sunset), Mrs Pyle saw a car that she was "fairly sure" was the one she saw on Friday night. It had stopped on the highway side of the petrol pumps in front of another dairy.²¹⁵ She described the car as "[p]redominantly a greenish brown colour", with large brown patches measuring one foot by one foot on the bonnet and mudguards. She could not see any dents in the car. There were two men in the car but she could not see them very clearly, nor tell what race they were.²¹⁶ She saw the owner of the dairy go out to speak with them.²¹⁷ She said that Mr McCarty (the neighbour who she and Mr Pyle were visiting) said the car was a Vauxhall, "about a 1956 model". When shown a colour chart to compare to the colour of the car, she picked out sage green, number 27 on the chart. She said the patches were yellow brown, number 90 on the chart.²¹⁸

²¹⁴ The Crown in closing submitted that Mr Wilson (who was, on the Crown's theory, the passenger) often wore dark or black clothing, pointing to his sister Ms Wilson's description of the outfit he arrived home in on Sunday morning as being a black T-shirt, jeans and a brown or denim jacket, and to the outfits Mr Wilson was wearing in the two photographs of him which were before the jury.

²¹⁵ This second sighting relates to a different dairy further up the road, which was visible from the neighbours' house that Mr and Mrs Pyle were then visiting.

²¹⁶ She did, however, look at the car through binoculars to try to get the car's registration number, but it did not have a front number plate.

²¹⁷ Mrs Pyle went to speak to the dairy owner after the car had driven away. He said they wanted to buy petrol using a credit card but, as he did not accept credit cards, they left without buying petrol. Mrs Pyle thought they would have tried at the Maramarua garage, so went there to speak to the owner. He said he could not remember the car stopping because he was so busy.

²¹⁸ See a copy of the physical chart shown to Mrs Pyle attached as Appendix B to this judgment. I note that the jury were shown a physical copy of this chart as, when copied, the colours do not come out true.

[224] Mrs Pyle died on 25 May 2014. Her statement of 26 October 1987 and the job sheet of 27 October 1987 were read to the jury.²¹⁹

[225] The statement of Mrs Pyle's husband, made on 18 September 2017,²²⁰ was also read by consent at trial.²²¹ Mr Pyle said that he and his wife were visiting the McCardys on Ferndale Road (just off State Highway 2, near the Red Fox Tavern) on 26 October 1987. They had walked up to the McCardys' house between 6.15 pm and 6.30 pm.²²² As they were sitting with the McCardys at their table, Mrs Pyle saw a car arrive at the dairy from the Thames direction. She immediately "leapt up and said 'that's it'". She said that "it was a car exactly like the one she had seen at 8.45 pm on Friday night".

[226] Mr Pyle said that he initially thought the car was an old Holden, but Mr McCardy thought it was a Vauxhall and "when I think about it, I would have to agree". He thought it would have been "about a 1958 model". He would have described the colour as being between number 26 on the colour chart (olive green) and number 27 (sage green), and the brown patches as between number 90 (yellow brown) and number 84 (red brown). He said there were also some very light grey patches on the car, no broken lights and no dents. It was "[i]n stages of repair." There was an oval-shaped grill between the headlights and the chrome around the grill appeared to have been red. There was no front number plate.

[227] Mr Hoggart had acquired a Vauxhall car from an acquaintance, Mr Wallace, not long after he got out of prison. Mr Wallace did not see Mr Hoggart again after he had given him the car. Mr Wallace said that, at that time, he would buy "old rusted cars on people's properties".

²¹⁹ The Crown's application to admit Mrs Pyle's evidence as hearsay was granted before trial and upheld on appeal by the Court of Appeal: *R v Hoggart* (HC), above n 98; and *R v Hoggart* (CA), above n 98. The jury were also directed to an original and a copy of Mrs Pyle's diagram and shown the colour chart from which Mrs Pyle had identified the colour of the car: see below Appendices A and B. Photographs of the view from the McCardys' property were also produced as exhibits.

²²⁰ This Court has no information suggesting Mr Pyle or Mr McCardy were interviewed at the time.

²²¹ I am not aware of any statements of Mr McCardy or the owner of the dairy who spoke to the car's occupants. Mr Pyle is now deceased, although we were not told whether he died before or after trial.

²²² It was an agreed fact at trial that daylight saving had begun by the Monday.

[228] Mr Wallace recalled that he had two Vauxhall Victors at that time, one of which he ended up giving to Mr Hoggart “not long after he got out of jail ... only a matter of weeks”. One of the cars was a roughly 1978 model. He had painted it a dark green colour, and at night it looked “dark like black in colour”. The car was “all green ... [but] it may have had black cills”. The second Vauxhall Victor was a more faded green. Mr Wallace said that both of the cars “may have had small dings to the exterior but nothing extensive. They were old cars.” He said that both cars would have “sounded louder than today’s cars and other cars at the time”. He did not know which one he had given Mr Hoggart. He recalled that one needed to be crash started “because the starter motor was crap but [he] thought that [he] would have fixed it”. The faded green Vauxhall was possibly the one with the starter motor problems. He had not painted that one. He “just fixed up the motor and did little stuff to it”. He could not be sure where his cars were on Labour Weekend 1987 or who had them.

Crown closing

[229] The Crown submitted in closing that there were a number of reasons to think that the car described by Mrs Pyle that she had seen on Friday 23 October was Mr Hoggart’s green Vauxhall Victor that he had obtained from Mr Wallace. This included the colours of the car, the description of it being a “wreck”, Mrs Pyle’s comment that it was loud, and the fact that they kept the engine running, which was consistent with the vehicle having starter motor problems. The Crown offered a possible explanation for the brown colour described by Mrs Pyle, namely that it could have been rust, this being on the basis that Mr Wallace’s habit was to buy “old rusted cars”.

[230] Further, the Crown said Mrs Pyle’s description of the occupants was consistent with them being Mr Wilson and Mr Hoggart. The Crown referred in particular to the description of the driver as having “sandy coloured hair, collar length wavy hair” and drew the jury’s attention to the agreed fact that Mr Hoggart had at the time “long light brown hair”, also drawing attention to a photograph of him taken in the early-to-mid 1990s. In terms of the passenger being slightly larger than the driver, the Crown said that it appeared Mrs Pyle’s view was obscured and asked “what can you judge from the shoulders up and from where she was standing”? The Crown said that

the part of the description of the passenger which was most relevant (albeit a small point) was that the driver had dark hair, and it was an agreed fact that Mr Wilson had dark hair.

[231] The Crown said that, from where the car was parked, its occupants would have had a good view of the backdoor area of the Red Fox. There was no legitimate reason to park with the engine idling for two minutes looking back at the Red Fox, and without leaving the car to ask for directions, buy petrol, change a tyre or go into the dairy. In the Crown's submission, the occupants' actions were "consistent with the offenders' casing out the tavern for the robbery that happened the very next night". The Crown said Mr Wilson and Mr Hoggart would have had time to get to Maramarua after leaving Ms Northcott's house.

[232] The Crown acknowledged that the later sighting could not have been Mr Hoggart's car as, on the Crown case, that car had been left on Ms Hargreaves' lawn on Saturday 24 October.²²³ Nevertheless, the Crown argued that this evidence made it likely that the car which Mrs Pyle saw on Friday 23 October was also a Vauxhall Victor, even though she could not identify its make at the time.

Summing up

[233] With regard to Mrs Pyle's statement, the Judge said that the jury should exercise caution in deciding what weight to give to her evidence, given there was no opportunity to question her about it. The Judge noted that, as cross-examination was not possible, Mrs Pyle could not be asked about the light or the distance she was from the car. The Judge also highlighted inconsistencies between her various statements. He said:

[29] Caution is required before accepting Ms Pyle's descriptions. In particular, a witness's perception of a person's height or the colour of their skin, especially given the circumstances in which Ms Pyle was placed when seeing the two men for the first time, is not necessarily an accurate one. The vague terms in which Ms Pyle described the men (average build, average looking, slightly bigger) coupled with the circumstances in which Ms Pyle first observed the men, all require caution.

²²³ See below at [245]. Mr Hoggart said in his police interview that he had given the Vauxhall to Ms Rautangata's brother. I assume the police never saw this car as the police interview happened on 22 January 1988, the same day Ms Rautangata's house was searched by police.

Submissions on appeal

[234] Mr Wilson submits there is no evidential foundation for the Crown's submission that the appellants were seen scoping out the Red Fox the night before the robbery. In his submission, there were undeniable differences between the individuals Mrs Pyle saw and the appellants. Further, the patchy, green-and-brown car she saw did not match the car Mr Hoggart was using over Labour Weekend, which was a dark uniform green colour with no brown.

[235] Mr Hoggart likewise submits the vehicles he had access to did not match the description of the vehicles seen by Mrs Pyle. He says that inviting an inference that these vehicles were the same required the jury to speculate.

[236] The Crown submits that the car observed by Mrs Pyle on the Friday was idling because the driver did not want to risk turning it off and having to restart it. The Crown submits this was Mr Hoggart's Vauxhall Victor, which had startup motor issues. The Crown acknowledges the second car seen by Mrs Pyle cannot have been Mr Hoggart's, as by then it was sitting on Ms Hargreaves' front lawn. In the Crown's submission, Mrs Pyle's error in describing the passenger (on the Crown's theory, Mr Wilson) as "slightly bigger" is explainable: her view of the front seat passenger would have been obscured, it was 8.45 pm just before daylight saving had changed, and it is difficult to judge a person's size from the shoulders up.

My assessment

[237] I make five points about Mrs Pyle's evidence.

[238] First, Mrs Pyle died before trial. Had the charges been laid earlier, either after the investigation had concluded or after the review in 1999, then she would have been available for cross-examination. As it was, she could not be cross-examined on how she could see the car and the people in it when it was dark, nor on her angle of view. Notably, neither the lighting situation nor her particular field of view were explained in her statement. Mrs Pyle could not be cross-examined on the supposed second sighting on the Monday, her familiarity (if any) with makes and models of cars, her conversations about the car and its occupants with the garage owner and the dairy

owner, nor why she could not see the driver and passenger through the binoculars. Nor could her husband, who had also died before trial, be questioned on any of these matters. This created unfairness for the defence and, moreover, meant that the jury did not have the benefit of such cross-examination in order to assess Mr and Mrs Pyle's evidence.²²⁴ In addition, Mr McCarty, the friend who had identified the car as a 1956 Vauxhall, and the owner of the dairy who spoke to the car's occupants were not called at trial, although I do not know why. The loss of opportunity to examine these potential witnesses also created prejudice for the appellants.

[239] Second, as Mr Wilson submits, identification evidence is notoriously unreliable, and there are undeniable differences between the individuals Mrs Pyle saw and the appellants. This included that the passenger (alleged to be Mr Wilson) was "slightly bigger" than the driver (alleged to be Mr Hoggart), when Mr Hoggart is in fact significantly bigger than Mr Wilson. I accept that this was a factor the jury had to take into account, but I also accept that Mrs Pyle could only see a general shape of the passenger and that it is difficult to judge heights when people are sitting down (as height differential may depend on the relative length of legs).

[240] Third, I accept Mr Wilson and Mr Hoggart's submission placing significance on the fact that Mr Pyle and Mr McCarty both identified the car seen on Monday 26 October as a 1950s model Vauxhall. They say Mr Hoggart's Vauxhall Victor was a 1970s model, which they say is a "very, very different car". However, the evidence on this is not entirely clear. Mr Hoggart's car was one of two possible Vauxhall Victors once owned by Mr Wallace. Mr Wallace identified one of those Vauxhalls as a "roughly 1978" model but did not specify the year of the other. He could not remember which car he gave to Mr Hoggart. This means that, while it is possible Mr Hoggart was driving a 1978 Vauxhall, it is also possible he was driving the more faded Vauxhall of unknown year (and possibly more likely the latter, given the starter motor issues). I do, however, consider it unlikely that Mr Wallace, as a mechanic, would not have identified the faded Vauxhall as being some 20 years older than the other Vauxhall rather than just referring to both Vauxhalls as "old cars". Even if

²²⁴ See *Clasen v New Zealand Police* HC Auckland CRI-2011-404-108, 7 July 2011 at [17].

Mr Hoggart was driving the faded Vauxhall, therefore, it is very unlikely to have been the 1950s Vauxhall seen by the Pyles and Mr McCarty the day before the robbery.

[241] Fourth, there are discrepancies between Mrs Pyle's description of the car she saw on Friday 23 October and Mr Hoggart's car. His Vauxhall was consistently described by other witnesses as "green",²²⁵ whereas the car Mrs Pyle saw had "no main colour" but rather patches of colour. She "remember[ed] the colours brown and green". The Crown, as noted above, suggested that the brown patches could have been rust on the basis that Mr Wallace bought rusty cars. But this called for speculation on the part of the jury. There was no evidence that either of the possible Vauxhall cars Mr Hoggart could have acquired from Mr Wallace were rusty or, if this was the case, whether or not the rust was visible. Indeed, the description Mr Wallace gave of both cars as maybe having "small dings to the exterior but nothing extensive" might suggest that there were no such visible signs of rust. Ms Hargreaves' statement did not mention rust. Ms Northcott was called at trial and confirmed that the car was green. She said it "looked a bit shotty", but did not mention and was not asked about rust. Mr H said at trial that the car Mr Wilson was picked up in Taupō (likely Mr Hoggart's car) had lots of dents, but he did not mention rust. There would be no need for speculation had any of these witnesses been asked about rust.

[242] Fifth, there are a number of possibilities concerning Mrs Pyle's sighting of what she was fairly sure was the same car on the Monday. Mrs Pyle could have been right that the car she saw on the Monday was the same car she had seen on the Friday, in which case it was not Mr Hoggart's car on either day because on the Monday Mr Hoggart's Vauxhall was on Ms Hargreaves' front lawn.²²⁶ Mrs Pyle could have been mistaken, and the two cars were different cars. It is possible that the two different cars could have been similar models with similar colouring. However, it might be thought to be something of a coincidence that there were two such vehicles in town and both visiting Maramarua within days of each other.²²⁷ It might be that the cars were similar but not the same make of car. It is significant that Mr Pyle initially

²²⁵ See above at [215] and [228] and below at [245].

²²⁶ If it was the same car, it might well have been the robbers scoping out the Red Fox.

²²⁷ Although I reiterate that the 1978 model, which Mr Hoggart may have had, was not similar to the 1950s model, and I do not know the year of the other car as this information was not in Mr Wallace's statement.

thought the car he saw on the Monday was a Holden. It could be that the only similarity was that both cars were green with brown patches. Mrs Pyle did not identify the vehicle she saw on the Friday as a Vauxhall (indeed she said she could not be sure she could identify the car if she saw it again). The identification of the model and make of car they saw on the Monday was made by Mr McCarty and Mr Pyle and not by her (which may in itself suggest she was not very familiar with cars and may throw doubt on the accuracy of her memory of the Friday car compared to the Monday car).²²⁸

[243] In light of these points, I do not consider that a reasonable jury could have put any reliance at all on Mrs Pyle's evidence, and it therefore should not have been admitted.²²⁹ Certainly the jury were not entitled to speculate and choose to accept the aspects of her evidence that favoured the Crown case. This means that the jury were not entitled to infer from this evidence that Mr Wilson and Mr Hoggart had travelled to Maramarua to scope out the Red Fox Tavern on the Friday of Labour Weekend.

[244] Even if Mrs Pyle's evidence had some nominal probative value, in my view it should have been excluded under s 8 because of the unfair prejudicial effect arising from the inability to cross-examine Mrs Pyle on the various issues with her statement.

(vi) Saturday visit to Ms Hargreaves

Evidence at trial

[245] Ms Hargreaves' statement²³⁰ recorded that, on Saturday 24 October 1987, she went to her sister's for lunch and, when she returned home, Mr Hoggart and Ms Rautangata were at her Hamilton home. Ms Hargreaves said that, at the time, Mr Hoggart had a green Vauxhall Victor and "the starter motor was stuffed, you always had to push start it". He left the Vauxhall parked on Ms Hargreaves' front lawn, took Ms Hargreaves' Mitsubishi and left with Ms Rautangata. The Crown

²²⁸ Counsel for Mr Wilson argued in closing that the fact the occupants of the car seen on Monday tried to use a credit card pointed against them being Mr Wilson and Mr Hoggart. But in any event, on the Crown's theory, the Monday Vauxhall was not Mr Hoggart's, as by then it was parked on Ms Hargreaves' lawn.

²²⁹ See above at [144].

²³⁰ Ms Hargreaves' statement was read by consent at trial.

submitted in closing that Mr Hoggart swapped the cars so that he and Mr Wilson could use the more reliable one as transport to and from the robbery the next night.²³¹

[246] Ms Hargreaves said that Mr Wilson was not there when Mr Hoggart visited on the Saturday. Ms Hargreaves thought he was staying in Ngāruawāhia with Ms Rautangata. She said she knew “[Mr Hoggart] was taking [Mr Wilson] back to Napier but that’s all I know, I don’t know where [Mr Hoggart] was after that.”

[247] On 30 October 1987, Mr Hoggart had arrived at Ms Hargreaves’ home with Ms Rautangata and some other women in a green Hillman Hunter. He had some bad news. He said that “the Mitsubishi was written off and that he was in the right”.²³² Mr Hoggart said that he had “got done for no drivers’ licence”. He said he had been in hospital with a broken arm and, when Ms Hargreaves asked if he had been with anyone at the time of the accident, he said no one was with him.

[248] Ms Hargreaves remembers that around that time Mr Hoggart got a black coloured Triumph Tiger 650 motorbike: “It was the first set of wheels he had. I don’t know where he got the wheels from.” The parties do not contest Ms Hargreaves’ evidence on appeal.

My assessment

[249] Apart from the evidence of the whereabouts of the Vauxhall and the substitution of the Mitsubishi, and Mr Hoggart’s possession of a Triumph Tiger motorbike, the significant point is that there is no evidence of the whereabouts of Mr Hoggart from the time of leaving Ms Hargreaves’ until the next alleged sighting by Ms Rautangata between 1 am and 2 am on the Sunday morning (even assuming her evidence was admissible).²³³ With regard to Mr Wilson, there is only his statement about visiting Ms Northcott on the Saturday afternoon — although, as noted above at [217], this visit was most likely on the Friday — and then setting out to hitchhike to Napier and sleeping on the side of the road in Taupō. There is no other evidence of

²³¹ The Crown also submitted in closing that another reason for the substitution was so that the car used for reconnaissance was different to that used in the robbery.

²³² They said they were going to Rotorua or Tokoroa to see the Mitsubishi and to take photos of it.

²³³ See below at [274]–[276].

his whereabouts at the relevant time. I accept that the jury would also have been entitled to take into account the Crown's submission about substituting the Vauxhall for the more reliable Mitsubishi.

(vii) Visit to Ms Rautangata

Evidence at trial

[250] Ms Rautangata said in evidence that Mr Hoggart was a former partner of hers. In October 1987, she was living in Ngāruawāhia with Ms Harris. Mr Hoggart came to stay with her, alternating between her place and Ms Hargreaves' place. Ms Rautangata confirmed that Mr Wilson was a "friend, kind of, Mog's [Mr Hoggart's] friend" and that he came with Mr Hoggart when he visited her. She agreed that on Labour Weekend in 1987 she had wanted to go to a Black Power convention in Auckland but that she did not end up going.

[251] Ms Rautangata confirmed in evidence that she had given a number of statements to police. When asked whether Mr Wilson had stayed with her on the Friday of Labour Weekend 1987, and whether she also saw Mr Hoggart that weekend, she said she did not remember making any of these statements but that, if she signed them, they must be right. When asked if she had gone with Mr Hoggart on the Saturday to pick up a brown Mitsubishi Mirage from Ms Hargreaves, she said she did not remember that at all.

[252] Once it became evident Ms Rautangata had no recollection of the events that occurred in October 1987,²³⁴ Crown counsel sought and obtained the Court's leave for her to refer to her statements to the police from January and March 1988 to refresh her memory. Those statements did not help her recollection. Counsel then conferred and

²³⁴ In evidence-in-chief, Ms Rautangata said that she was waiting surgery for back problems (she was giving evidence by video link from Kāwhia Police Station as that was the nearest place to where she lived from which she could appear via video link). In cross-examination, she said that she had a broken back and neck and was on "some pretty heavy medication". She accepted that this affected her cognition and memory.

agreed that six statements and job sheets would be admitted in evidence under s 90(7) of the Evidence Act and read aloud, after which counsel would question her further.²³⁵

[253] In her first statement (22 January 1988), Ms Rautangata said she could not remember whether Mr Hoggart had been with her that weekend: “He probably was but I can’t remember for sure.” In her second interview (24 January 1988), she said she did not recall Mr Wilson staying with her. In her third interview (29 January 1988), she said Mr Wilson had in fact stayed with her on the Friday before Labour Weekend, but that Mr Hoggart had driven him back to Napier on the Saturday. In her fourth statement (3 March 1988, more than 120 days after the robbery and murder), she said both Mr Wilson and Mr Hoggart had turned up at her house on Saturday night or early Sunday morning.

[254] In that fourth statement, Ms Rautangata said that, around Labour Weekend 1987, she was “starting to finish with Mog”. She said that Mr Wilson had been there for a couple of days that weekend and he and Mr Hoggart were getting around in Ms Hargreaves’ car, a brownish Mitsubishi. She said that she would have gone to the pub on the Saturday around 3 pm with Ms Harris who was staying with her. They stayed until the pub shut at 10 pm, and a few friends came back with them. She had been “home long enough to hear about the Red Fox murder on the TV”. Mr Hoggart and Mr Wilson came home sometime after that but before she went to bed, which would have been between 1 am and 2 am. They did not stay long. She did not know where Mr Hoggart went.

[255] Ms Rautangata said that Mr Hoggart had come round after she had been spoken to by the police in January “to thank me for keeping him out of trouble”. She asked if he had done the robbery and he said no. She said that she had never seen Mr Hoggart with overalls or a baseball bat.

²³⁵ *R v W* HC Auckland CRI-2017-092-10119, 24 February 2021 (Bench Note No 6 of Woolford J). Counsel for Mr Wilson asked the Court to note his reservation that Ms Rautangata had at that time given sufficient evidence such that the statements and job sheets read to her could be said to be consistent with her evidence. He stated he felt constrained by this Court’s decision in *Hannigan v R* and its interpretation of “consistent with the witness’s evidence” as meaning “not inconsistent”: *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [88], n 38 per McGrath, William Young, Chambers and Glazebrook JJ, and see *Body v R* [2019] NZCA 378 at [22].

[256] In her fifth statement (6 April 1988), Ms Rautangata said that she had heard of the murder on the television or the radio and that, if she had not heard it over the TV news, it would have been one of the Auckland FM stations — that is, 89 or 91 FM.

[257] The police made inquiries with all radio stations in the Auckland and Hamilton areas to determine whether any of them had broadcast news of the Red Fox murder during the early hours of Sunday 25 October. The result of that inquiry was that “[t]here were no records of any broadcast about the Bush homicide prior to 7 am”, and the inquiring officer “could not find any confirmation that such a broadcast had in fact taken place”. There was said to be “some acknowledgement in the course of [his] enquiries that some of the night-time announcers would sometimes make unauthorised news releases”, although the night-time announcers spoken to denied doing so that night.

[258] Another witness, Mr Rikiriki, gave evidence that he heard news of the shooting over the radio “a few hours” after passing the Red Fox on his way to a Black Power convention in Auckland that same night. He said he arrived at the convention at about 1.30 am, left at about 3 am, and heard news of the robbery sometime *after* leaving (but admitted he had consumed both speed (amphetamine) and cannabis at that time).

[259] Ms Rautangata was regularly drinking and taking drugs (weed, speed and LSD) in 1987; her drug habit was “daily” and “constant”. She accepted in cross-examination that the effect of those drugs could be quite dislocating and that she could “quite easily” lose track of time. She also admitted during cross-examination that she would have been “wasted” when she was making statements to the police.

[260] Ms Harris, who was staying with Ms Rautangata at the time, made the following statement (which was read into evidence). It refers to Ms Rautangata returning from the pub on the Saturday of Labour Weekend and continues:

[Ms Rautangata] said to me she heard this thing on the news about the Red Fox Tavern and tried to give me a picture of where it was –that I had seen it before and it was red and looked like a barn.

Then Mog [Mr Hoggart] her exboyfriend and Willie [Mr Wilson] (? not too sure) were there. They had arrived at some time in the night, after [Ms Rautangata] arrived back from the pub.

[Ms Rautangata] was joking to Mog about the Red Fox and he says to her she shouldn't joke about things like that.

[261] Ms Harris also had no recollection of the events of the time. She read her police statement from the time out at trial. She confirmed in examination-in-chief that she was at the time of her statement heavily drinking and taking drugs. She was not cross-examined, although it seems the defence were given the opportunity to do so.

Summing up

[262] Regarding prior statements, Woolford J explained that most witnesses at the trial were asked about statements they had made on earlier occasions. The jury were told not to "accept their earlier statements uncritically". They were directed to take into account any inconsistencies with their earlier statements or other witnesses' statements and to remember that many witnesses could not be cross-examined effectively because they had no independent recollection of the events of 30 years prior. Relatedly, the Judge pointed out the delay of over 30 years between the robbery and the charges being brought to trial. That meant there was "a particular need for caution in assessing the evidence".

[263] The Judge likewise explained that the delay would have affected the accuracy of witnesses' memories, for instance causing details to be lost or errors in the sequencing of events. He said that the jury's assessment of the reliability of a witness' memory should take into account the nature and quality of any inconsistencies between a witness' testimony and other reliable evidence. Woolford J noted that there were "particularly acute" memory problems with the evidence of Ms Rautangata, who had no memory at all of the events of Labour Weekend, nor of making the statements taken from her in 1988.

Submissions on appeal

[264] Mr Wilson submits that it was only in her fourth statement, made over 120 days after the events of Labour Weekend, that Ms Rautangata mentioned seeing the appellants at her home in the early hours of Sunday morning. It is submitted that the visit cannot have been on the Sunday morning as there was no television or radio broadcast relating to the offending for her to have heard prior to the appellants' arrival.

Mr Wilson says the prosecution could not explain the inconsistencies in her statements, and it is deeply unsatisfactory to cherry-pick one statement made months after the offending, especially after multiple prior consistent statements. It is further submitted that both Ms Rautangata's and Ms Harris' statements were unreliable due to their alcohol and drug use at the time.

[265] Mr Hoggart submits that Ms Rautangata's evidence had significant reliability and credibility issues. The combination of Ms Rautangata's substance and alcohol abuse at the time of the statements, her delay in providing a detailed account and the implausibility of the timing (referring to her hearing a television or radio report before the appellants allegedly arrived at her home) meant very little, if any, weight should have been placed on her evidence.

[266] The Crown submits that there was no "cherry picking" of Ms Rautangata's statements: all of them were before the jury. It points out that, while there is no record of the news playing on the radio early that morning, another witness, Mr Rikiriki, recalled hearing about the robbery on the radio between 1.30 and 3.30 am that Sunday morning.²³⁶

My assessment

[267] If the evidence from Ms Rautangata and Ms Harris that Mr Wilson and Mr Hoggart came to the house in Ngāruawāhia late Saturday night or early Sunday morning (between 1 and 2 am on Ms Rautangata's account) is accepted, this would place Mr Wilson and Mr Hoggart approximately an hour away from the Red Fox Tavern on the night of the robbery at a time when, on Mr Wilson's account, he was sleeping under a tree just outside of Taupō. This was also approximately one to two hours after the robbers left the Red Fox.²³⁷ I accept that this evidence is probative on its face insofar as it could tend to prove the appellants' whereabouts on the relevant night in a manner consistent with the Crown case. However, Ms Rautangata made four different statements, and there are major differences between them.

²³⁶ Mr Rikiriki's evidence was actually that he heard the broadcast after 3 am: see above at [258].

²³⁷ The offenders arrived at the scene at approximately 11.30 pm. Police were first directed to the scene at 12.21 am, after the victims had been lying on the floor for a while and also possibly after Ms Soppet's husband and the neighbour were called: see above at [81] and [85].

[268] The Crown, in its closing, offered an explanation for the discrepancies in Ms Rautangata's statements and a reason why the jury could accept the fourth statement. The Crown said that, in her earlier statements, she was covering for Mr Hoggart, from whom she had only recently separated, not by giving him a full alibi but by failing to mention his turning up at her house that night.²³⁸ This submission was said to be supported by Ms Rautangata's evidence of Mr Hoggart coming round to thank her for keeping him out of trouble.

[269] The Crown also said in closing that this was supported by Mr Dunbier's evidence that Mr Hoggart had told him an ex-girlfriend had "alibi'd him and he was a bit surprised by it 'cos he thought she'd take the opportunity to hack at him". This evidence should not have been said to be supportive of Ms Rautangata's fourth statement. Mr Dunbier's formal written statement recorded that Mr Hoggart had said he was "with [his girlfriend] on the Saturday night of Labour [W]eekend" (and at trial Mr Dunbier did not clarify what he meant by "alibi'd him"). This was not what Ms Rautangata said in any of her four statements. In the fourth statement she only said that he came to her home between 1 and 2 am, which is hardly an alibi as this was after the robbery had occurred. Mr Hoggart would have known this by February 1988 when the conversation with Mr Dunbier allegedly occurred.

[270] I do not consider therefore that Mr Dunbier's evidence provided support for Ms Rautangata's evidence about Mr Hoggart coming round to thank her. Nor is there an evidential foundation for the Crown submission purportedly explaining the discrepancies between the statements in circumstances where Ms Rautangata was not able to be asked what she meant by keeping Mr Hoggart out of trouble. Nor was she able to explain for herself the discrepancy between the statements. Further, Mr Dunbier was not asked to clarify his statement in his examination-in-chief and was not cross-examined on this point.

[271] In addition, apart from the differences between the statements, there are other reliability issues with the evidence of Ms Rautangata and Ms Harris, given their drug

²³⁸ The Crown again submitted that it was the mention of Ms Rautangata that "sent Mr Wilson ... into a tailspin" because he did not know what she had said to the police. This submission should not have been made: see above n 209.

and alcohol use at the time. Ms Rautangata freely admitted she was “wasted” when making statements to the police and that she frequently lost track of time due to the effects of the drugs she was taking. Ms Harris also accepted she was drinking heavily and taking drugs at the time.

[272] Further, the fact that it does not seem possible that Ms Rautangata had heard about the Red Fox Tavern murder and robbery from the commercial radio stations she mentioned, nor from the television, also throws doubt on her evidence, at least as to the timing of any visit.

[273] Ms Harris said the appellants had arrived at the house “some time in the night, after [Ms Rautangata] arrived back from the pub”. She did not know what the time was, and it is unclear from her statement whether she was awake when the appellants arrived or whether her assessment of the timing of their arrival was based entirely on Ms Rautangata’s account.

[274] Given these issues with reliability, I conclude that Ms Harris’ statement and the fourth and fifth statements of Ms Rautangata (the only statements the Crown relied on) were not admissible. This is for two reasons. First, because there is a real issue as to whether “the circumstances relating to the statement provide reasonable assurance that the statement is reliable”, as required by s 90(7)(a) of the Evidence Act.²³⁹ I do accept that, if Ms Rautangata’s last two statements were admissible, then the earlier statements would also have been admissible because they were relevant to the assessment by the jury of the credibility and reliability of Ms Rautangata and Ms Harris in light of all the evidence.

[275] Second, even if the statements had been admissible in terms of s 90(7)(a), I consider that they should have been excluded under s 8 of the Evidence Act. Because of the reliability issues discussed above, their probative value was low, but their prejudicial effect was high. Ms Rautangata could not be cross-examined at trial on the differences between her statements, nor on her assertion that Mr Hoggart had thanked her for keeping him out of trouble, nor indeed any possible issues with timing and memory (except in relation to her drug use). The same applies to Ms Harris.

²³⁹ See above at [150].

This is because they could no longer recall the events of 1987 or, in Ms Rautangata’s case, any of the inconsistencies between her various statements. This created fairness issues for the defence (which would likely have been avoided had the trial not taken place so long after the robbery and murder). It also means the jury were deprived of that cross-examination and thus one of the most important means of conducting their assessment of Ms Rautangata’s and Ms Harris’ credibility and reliability, particularly in respect of their decision as to which of Ms Rautangata’s five statements to accept (if any).²⁴⁰

[276] I accept that the jury was given a strong warning by the trial Judge in respect of issues with witnesses’ memories of the events of the time, given the 30-year delay, and in particular Ms Rautangata’s “acute” memory issues.²⁴¹ Despite that warning there is a risk that the jury did give some weight to her evidence (and that of Ms Harris).

(viii) Sunday morning and beyond

Evidence at trial

[277] Mr A (at the time married to another of Mr Wilson’s sisters) said that Mr Wilson was not at the winery on the Saturday night of Labour Weekend but that he had arrived on the Sunday morning at about 8 am, looking like he had not slept. Mr A remembered hearing on the radio that morning about the Red Fox shooting. He also remembered one of the family members asking Mr Wilson whether that was anything to do with him and Mr Wilson replying something like: “No. That’s bloody lovely”. Mr Wilson then went to Fantasyland with the rest of the family, but Mr A stayed home. Mr A recalled that the trip to Fantasyland took the family away from the winery for most of the day.

²⁴⁰ A previous statement of a witness is not a hearsay statement, but in these circumstances, the total failure of Ms Rautangata to recall the contents of the previous statements gives rise to the same concerns as arise in the hearsay context of the inability to cross-examine the maker of the statement (as to which, see Scott Optican and Elisabeth McDonald (eds) *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [EV16.03.04]). And, as noted above at [150], the words used in the test under s 90(7) for previous statements are the same as those in the hearsay test.

²⁴¹ See above at [262]–[263].

[278] Both Mr Wilson’s mother and one of his sisters (Ms A) said Mr Wilson had told them the same story about having hitchhiked and slept on the side of the road in Taupō when he arrived home on the Sunday morning. His mother said he was looking “a bit tired”. Ms A said he “did not look tired and was just like his usual self. He did not look like he had spent the night sleeping on the side of the road.” She added, however, that he “may have ... changed or freshened up before I saw him”. Indeed, Ms Wilson (Mr Wilson’s other sister) said Mr Wilson “went into his room to change, wash and unpack” shortly after he got home and had brought a change of clothes with him. She said he was wearing jeans when he arrived home (which is consistent with Mr Wilson’s own account), but Ms A said he was wearing grey cords when she saw him, suggesting he may have freshened up and changed by then. Mr Wilson’s mother, and his sisters Ms Wilson and Ms A, all said Mr Wilson went with the family to Fantasyland and stayed at home that evening too.²⁴²

[279] On Thursday 29 October, Mr H gave Mr Wilson a lift from Napier to Taupō.²⁴³ Mr Hoggart met him in the Mitsubishi, which was later written off in a crash in Tokoroa just after 11 pm. Mr Hoggart said he had been driving alone, but the woman in the other vehicle said two men had checked on her and the police found two or three hamburgers in the car. Mr Wilson arrived in Tauranga that Sunday and stayed in a motel with Mr Fitzgerald, the President of the Filthy Few. As discussed further below, Mr Wilson made a down payment on a motorbike while he was there.²⁴⁴

My assessment

[280] The evidence as to Mr Wilson’s appearance on the Sunday morning of Labour Weekend was part of the evidence the jury could use to assess whether or not to accept there was a reasonable possibility that Mr Wilson was on his way to Napier on the Saturday evening (and thus not robbing the Red Fox Tavern). The evidence about the following Thursday and Sunday is more relevant to other planks of the Crown case discussed below.

²⁴² The evidence as to Mr Wilson’s appearance at home on Sunday morning is not contested. The only objection is to the Crown’s theory that Mr Wilson was lying about his alibi, as discussed below at [323]–[329].

²⁴³ See above at [203]. Mr H accepted at trial this was what he had said in his statement signed in January 1988 but could not remember the trip at the time of trial.

²⁴⁴ See below at [308]–[311].

(d) *Shotgun (Mr Wilson)*

[281] A further strand of the Crown case was that, shortly before the robbery, Mr Wilson had acquired a shotgun matching the description of the one used by the gunman and he had disposed of it shortly afterwards. It was also asserted that he lied about the reasons for its acquisition and disposal.²⁴⁵

Evidence at trial: Mr Wilson

[282] Mr Wilson, in his interview commencing 22 January 1988, agreed that he had acquired a sawn-off shotgun from Mr Ross on 19 or 20 October 1987. Mr Ross thought Mr Wilson and Mr A might like it to kill birds. Mr Wilson at first said that he had got rid of the shotgun a few days later because it was no good: it was “a real rough saw job.” He said it had not been filed down and “the barrels were cut on an angle”. He had thrown it in the sea midway between the winery and the airport.

[283] Once Mr Wilson had been told that the investigation concerned the Red Fox Tavern, he said that, when he arrived home in Napier on the Sunday morning, his father and brother-in-law were listening to the radio about the robbery at the Red Fox. He said:

I thought that their armo was the same M.O. as the Birkenhead Tavern job. I just freaked out. I went and got the gun, this bag with some plates and paper in it that [Mr Ross] had given me. I borrowed [Mr A's] car and went over to [Mr Ross'] place. I threw the gun into the sea and went over to [Mr Ross'] place. I told him I had dumped the sawn-off and I told him to get rid of the stuff in the bag. I told him the cops would be probably turning us over because the Red Fox was like the Birkenhead job.

[284] He said there were also some bolt cutters in the bag which he had returned to Mr Ross, because Mr Ross owned them, but Mr Ross had since returned them to Mr A. The papers and plates were for a van. Mr Wilson “was just going to use these for an earn.^[246] Just to get up on my feet after coming out.” He went to Mr Ross' house

²⁴⁵ See above at [103(h)].

²⁴⁶ Meaning a “job”, or an illegal way to make money.

around 9.15 am, about half an hour after coming home. After giving that evidence, this exchange took place:

- Q. If you are not involved in the Red Fox Tavern why rush around as soon as you get home and dispose of the gun and get rid of the bag of plates / papers and bolt cutters to [Mr Ross]?
- A. [F...] man, I [had] just come out for doing an armo. I am a prohibited person. I knew you guys would be turning me and [Mr Ross] out.
- Q. Can you pinpoint where you threw the sawn off?
- A. Yeah, I drove up this access-way. I walked about 100 yards up the beach and threw it.

Evidence at trial: Mr Ross

[285] Mr Ross said that he had stolen a shotgun while he was in Auckland after being released from prison so he could sell it to someone. He described the shotgun as “a sawn-off side-by-side, hammer lock shotgun” and said the barrels “had been cut with a hacksaw by the look of it and they were sort of cut on a slant”. He still had the shotgun with him when he moved down to Hastings. Mr Ross said that after Mr Wilson got out of prison and was staying at the winery the two of them would sometimes catch up. He recounted a discussion with Mr Wilson one day when Mr Wilson had asked if Mr Ross could acquire a firearm or shotgun for his bike that he was intending to bring down. Mr Ross said that he wanted it as “security for the motorcycle, as most bikers have got them”. Mr Ross said that “[m]ost guys that ride bikes they’ve got a sawn-off somewhere” to protect the bike. Mr Ross did not tell Mr Wilson at that stage about the shotgun he had.

[286] Around 19 October 1987, Mr Ross talked to Mr Wilson about going up to Auckland to pick up Mr Ross’ bike (a 1975 T 1 60 Trident). That same day Mr Wilson asked him to bring the shotgun Mr Ross had to the winery, which he and Mr Wilson later did. Mr Wilson, Mr A and Mr Ross then test-fired it (around four rounds) to see if it worked, and Mr Wilson said he would take it for the motorbike he was bringing down. Mr Ross gave it to him because both his wife and the person they were staying

with wanted it out of the house.²⁴⁷ He did not see the gun again. Mr Ross did not know whether Mr Wilson had a motorbike at the time.

[287] After the test-firing, Mr Ross and Mr Wilson stole a car (a Cortina) to go to Hamilton to pick up a ute. Mr Ross got arrested for being in possession of the stolen car and spent the night in police custody, being released on bail the next morning but returning to face charges later. Mr Wilson had managed to make his way home. I interpolate that, in his 22 January 1988 interview, Mr Wilson agreed (after being reassured that there was no intention to charge him over the matter) that he had driven Mr Ross to steal the Cortina and that they were going to Auckland to get some parts for Mr Ross' bike. When asked why Mr Ross had on the same day brought round the sawn-off shotgun, Mr Wilson reiterated that they were just going to use it as a "bird gun, it's got a wide spread. You can get bigger flocks. Those scarers and kites are no good."

[288] Mr Ross said that, when he heard about the Red Fox Tavern murder, his first thought was that it was a "split image of Birkenhead Trust" in that "[t]here were two armed robbers with shotguns, shot-fired." He said: "I thought it was only a matter of time before [the police] were kicking down my door." Mr Ross said that Mr Wilson had come over after Labour Weekend, and told him that someone had been shot at the Red Fox Tavern and that "we'll be getting some heat". Mr Wilson had told him that he had to get rid of the plates and papers for stolen vehicles²⁴⁸ because they were going to be raided and that he had "already gotten rid of the shotgun in the bay."

Evidence at trial: Mr and Ms A

[289] Mr A said that he, Mr Ross and Mr Wilson test-fired the shotgun at the winery. Mr A had "some shot that was in the shed". Mr A supplied the cartridges, which were probably five-shot. They shot into a stump and a steel drawer. When asked if he thought it would be good to have for scaring birds off, he replied: "Yeah, if you're shooting blackbirds you need a quick spread so I thought it might be quite handy."

²⁴⁷ Mr Ross acknowledged that he had initially just said to police that he had seen a shotgun in Mr Wilson's possession but then, when asked, admitted that he had stolen the shotgun and given it to Mr Wilson.

²⁴⁸ Mr Ross told Mr Wilson that he said he had nothing to get rid of as there was nothing stolen there.

He was “pretty sure” that he said to Mr Ross that he would not mind having the gun. Mr Ross did not say he could have it and he did not see the gun again. Nor did he know where it went after that.

[290] In cross-examination, Mr A confirmed that in 1987–1988 he was using reloaded shotgun cartridges and that the wadding (explained as a bit of plastic that separates a primer and shot) was white and clear.²⁴⁹

[291] Mr A said that at the time he had another double-barrelled shotgun on the farm he had used for shooting birds over the years but that one was not a sawn-off. It was kept in the shed where Mr Wilson slept (in the loft). The agreed facts at trial record that, in the search of the winery in January 1988, the police located in a shed adjacent to the main house a double-barrelled shotgun. It was seized but later returned to Mr A.

[292] Mr A recalled Mr Wilson saying on the Sunday of Labour Weekend before he and the family went to Fantasyland that “I’d better go and get rid of [Mr Ross’s] gun.” He said that Mr Wilson sometimes borrowed a car from him or Ms A but could not remember him asking to borrow the car that morning.

[293] Ms A said Mr Wilson had commented, after news of the robbery broke: “I suppose they’ll come check me out”. Ms A assumed Mr Wilson meant the police. When she asked him why, he said it was because of his past record.

Description of shotgun used in the robbery

[294] Ms Prisk described the gun used in the robbery as being a “short stubby sort of gun, blunted at the barrels, two barrels” and about one and a half feet long.

[295] Ms Soppet described the gun as “short barrelled, colour unknown, side by side barrels possibly”. She had heard shotguns fired before, and it sounded like a shotgun.

²⁴⁹ Mr Wilson submits that the wadding found on the floor of the Red Fox was pink, not white and clear like the wadding described by Mr A. This was noted by Mr Wilson’s counsel in closing at trial. The Crown submits that the wadding has nothing to do with the gun and is connected with the cartridge that is used.

Evidence at trial: ESR testing

[296] The results of ESR²⁵⁰ testing indicated that the pellets used at the Red Fox Tavern were not inconsistent with the shotgun pellets Mr Wilson had test-fired at the winery (although, as the ESR witness accepted, this revealed nothing about the shotgun itself). No meaningful comparison could be made between the gunshot wound and the pellet pattern on the steel drawer taken from the winery. The pellets recovered from the Red Fox scene were between sizes four and five (but more likely four). From the impression left on the steel drawer, the pellets test-fired at the winery were likely between sizes three and six.

Submissions on appeal

[297] Mr Wilson submits that the Crown, in its submissions before the Court of Appeal, misrepresented the conversations with Mr Ross about the shotgun and that this led the Court to make a fundamental error. The Court of Appeal said: “Mr Wilson told Mr Ross that he had an ‘earn up north’ and he asked Mr Ross to find him a shotgun.”²⁵¹ The conversations about the earn and the shotgun were separate, and Mr Ross’ evidence was that Mr Wilson had asked him for a shotgun to safeguard his motorbike. It is also submitted that the evidence showed that Mr Wilson had got rid of the shotgun because he was worried that suspicion would wrongly fall on him.

[298] The Crown submits that the evidence shows that, at the relevant time, Mr Wilson had a side-by-side, sawn-off shotgun given to him by Mr Ross. This shotgun matched the description of the gun used at the Red Fox Tavern. The shotgun pellets that killed Mr Bush were not inconsistent with the shotgun pellets that had been test-fired at the winery.

[299] The Crown acknowledges that Mr Wilson told Mr Ross that he wanted the shotgun to protect his motorbike, but the Crown points out that Mr Ross had not seen Mr Wilson with a bike and did not know if he had one. The Crown submits that, although Mr Wilson’s alleged conversation with Mr Ross about planning “an earn up

²⁵⁰ ESR refers to the Institute of Environmental Science and Research, a Crown Research Institute which provided, amongst other services, independent forensic testing and advice. ESR is now known as the New Zealand Institute for Public Health and Forensic Science.

²⁵¹ CA judgment, above n 58, at [22]; and see below at [429].

north” was separate from the conversation about acquiring a shotgun, it was an available inference that the true purpose of Mr Wilson’s request for the shotgun was for his planned earn up north.

[300] It is also submitted by the Crown that Mr Wilson’s disposal of the shotgun is significant. He initially told police he disposed of it because it was “no good”, but later he said it was because he was concerned that he would come under suspicion. The Crown says the fact of this disposal, along with the changing stories, points to guilt.

My assessment

[301] Mr Wilson’s possession of the shotgun is an important strand of evidence against him. The gun was consistent with the description of and forensic evidence about the weapon used at the Red Fox. Mr Wilson had acquired it just five days before the robbery and admitted that he had disposed of it shortly after the robbery took place. I accept the Crown’s submission that the jury would have been entitled to draw the inference that the shotgun was wanted for the “earn up north”,²⁵² especially in light of the agreed fact at trial that Mr Wilson had used a sawn-off shotgun in the Birkenhead robbery.²⁵³

[302] The jury were entitled to reject the alternative explanations for Mr Wilson wanting the gun. It is significant that Mr Wilson, at the time of the conversation with Mr Ross, did not appear to have a motorbike (although, on the Crown case, he was planning to get one with the Red Fox robbery proceeds). Mr Wilson’s explanation that he had wanted the shotgun to scare birds at the winery was not consistent with Mr Ross’ evidence about the reason Mr Wilson gave him (protecting his motorbike). Although Mr A had expressed interest in the gun for shooting birds, he did not see the

²⁵² See below at [429].

²⁵³ The defence submitted in closing that armed robberies were prevalent at the time and referred to evidence to this effect, including that of Mr Dunbier that in the late 1980s sawn-off shotguns were “the tools of the day” and it was “the fashion” to saw off the end of the barrel. Mr Ross likewise said that “[m]ost guys that ride bikes” had one. A newspaper article produced as an exhibit at trial recorded that armed hold-ups involving guns of various kinds (“from sawn-off shotguns to pistols”) averaged more than three per month in Auckland. The jury would have had to take this into account, but this does not reduce the significance of the timing of the acquisition and disposal of the gun. It could even strengthen the inference the shotgun was acquired for the purpose of conducting a similar robbery.

gun again after it was test-fired and he already had another gun he used for that purpose. The jury were entitled to conclude in all the circumstances that Mr Wilson lied about the reasons for the acquisition of the shotgun and, in the context of all the evidence, also to conclude that these lies were to try to conceal his guilt.

[303] The jury were also entitled to take into account the changing explanations for the disposal of the shotgun. I conclude below that it was up to the jury to decide which of the two explanations given for the disposal was correct and whether the disposal of the gun indicated guilt.²⁵⁴

(e) *Lies (Mr Wilson)*

[304] The Crown submits that Mr Wilson told a number of lies which the jury were able to take into account in assessing guilt:²⁵⁵

- (i) that he was in Tauranga over Labour Weekend;
- (ii) the reason for his trip to Cambridge and certain details relating to it;
- (iii) hitchhiking to Napier; and
- (iv) disposal of the shotgun.

Summing up

[305] In his summing up, with regard to the defendants' alleged lies, Woolford J said that, if the jury were satisfied the defendants had lied, this was something the jury could take into account, like all the other evidence. He continued:²⁵⁶

²⁵⁴ See below at [332]–[333].

²⁵⁵ See above at [103(d)].

²⁵⁶ The Judge's directions regarding the alleged lies accorded with s 124 of the Evidence Act: see above at [154]–[159].

But it is important not to think that just because they lied about where they were, they are necessarily guilty. People in such circumstances can lie for reasons other than because they are guilty. It can be to protect someone else, or to cover up something else they were doing, or just because they panicked and said something stupid. It is over to you what weight you place on any proven lies, but consider them carefully before placing weight on them and remember it is just one piece of evidence to consider in deciding if the prosecution has proved its case.

(i) Alleged lie: Tauranga

[306] The first alleged lie is Mr Wilson’s initial account of his movements over Labour Weekend (that he was in Tauranga).²⁵⁷ The Crown says Mr Wilson had also told his mother, and possibly his sister Ms A, that he would be in Tauranga on Labour Weekend, suggesting his police interview was not the first time he had thought to use Tauranga as an alibi. The Crown concedes that it was “not the most clearcut lie” Mr Wilson told in his interview but submits that the Crown was still justified at trial in suggesting that the initial story was a deliberate lie.

[307] Mr Wilson points out that he was leading an unstructured and itinerant lifestyle, and it was unsurprising that, at the time of his police interview, he had problems recalling events so far in the past (almost three months earlier). In addition, Mr Wilson had not been told about the purpose of the inquiries. Once he was told that the questions related to the Red Fox, he said that he may have been either in Tauranga or Cambridge and after further reflection opted for Cambridge. It is submitted that, were Mr Wilson the offender, he would not have falsely claimed to be in Tauranga in a motel, as that could easily be disproved. The overwhelming inference is that initially Mr Wilson had his weekends confused, as he had gone to Tauranga the following weekend.

[308] Mr Wilson’s visit to Tauranga the weekend after Labour Weekend is confirmed by the evidence of Mr Fitzgerald, who was the President of the Tauranga chapter of the Filthy Few. Mr Fitzgerald’s statement, given on 28 January 1988, was read aloud at trial.²⁵⁸ Regarding this statement, the jury were directed to “exercise some caution in deciding what weight to give to [his] evidence”, given there was no opportunity to

²⁵⁷ See above at [207]–[208].

²⁵⁸ See above at [117].

question him about it.²⁵⁹ As noted above, the Judge also gave specific directions about prior statements and delay.²⁶⁰

[309] In his statement, Mr Fitzgerald said that he had known Mr Wilson for about eight years and that he was “a good mate of mine”. He had seen Mr Wilson only about four times since Mr Wilson was released from prison. He initially said one of these times was over Labour Weekend. Mr Wilson had come up to Tauranga because they were having a party. He arrived on, he thought, the Thursday or Friday of Labour Weekend and stayed the night in a motel booked by Mr Fitzgerald. Mr Fitzgerald was with “a girl from Auckland” and he arranged for a “call girl” to come over to the motel. She came in a taxi and spent about an hour with them. “[Mr Wilson] paid for the taxi and the girl.” They went back to “the pad” in the morning and the earliest Mr Wilson left would have been around 11 am the next day. He thought Mr Wilson was in a Holden, but he was not sure.

[310] The next time Mr Fitzgerald saw Mr Wilson was about a week later when Mr Wilson bought a Triumph motorbike from him. He paid \$1,500 for the bike in \$10 and \$20 notes. Mr Fitzgerald did not know where Mr Wilson got the money from and did not ask. Mr Wilson still owed about \$3,000 for the bike.

[311] The police checked the motel register and told Mr Fitzgerald that he was recorded as being booked into the hotel on 1 November 1987. He then said that he had only been to the motel once and that must have been the time he was there with Mr Wilson. That also must have been the time Mr Wilson bought the motorbike from him. He said he was not sure if he saw Mr Wilson over Labour Weekend.

My assessment

[312] I accept Mr Wilson’s submission that a reasonable jury could not have been satisfied that the Tauranga account was a deliberate attempt to construct an alibi for Labour Weekend. I accept that it was most likely to have been a mix up in weekends

²⁵⁹ The same direction was given in respect of Mr Watene’s statement, which was largely only relied on as evidence that ownership of a British or American motorbike was necessary to become a full member of the Filthy Few.

²⁶⁰ See above at [118] and [262]–[263].

and therefore that it could not even be considered a lie. Mr Wilson's account of the Tauranga trip is broadly consistent with what happened the weekend after Labour Weekend, as confirmed by the evidence of Mr H²⁶¹ and Mr Fitzgerald. Indeed, Mr Fitzgerald at first thought that Mr Wilson had come to Tauranga on Labour Weekend. I also accept Mr Wilson's submission that it is unlikely his initial account of going to Tauranga was a deliberate attempt to construct an alibi as this could be easily checked through motel records, as was done for Mr Fitzgerald.

[313] Further, it is significant that, when he gave the Tauranga account, Mr Wilson had not been told that the questioning was in relation to the Red Fox Tavern robbery and murder. Once he was told that, Mr Wilson reconsidered and said first that it might have been Tauranga or Cambridge, finally saying he thought he had been in Cambridge visiting his ex-girlfriend, and that he had hitchhiked back home on Saturday 24 October.²⁶² It was unfair to categorise the Tauranga account as a deliberate attempt to construct an alibi when the police had not disclosed to Mr Wilson at that stage why he was being questioned.

[314] The suggestion that Mr Wilson had tried to construct an alibi relating to Tauranga before Labour Weekend cannot stand in light of the likelihood of him just being mistaken in his first account to the police. In any event, I note that the mother's statement is hazy on this point. She said:²⁶³

[Mr Wilson] had said then that he wouldn't be here when we got there [on Labour Weekend] but he would be home no later than the Sunday morning. He said he was going to see [Ms Northcott] in Cambridge and then I'm pretty sure that he was going to Tauranga or somewhere with [Mr] Ross to pick up a car or a bike or whatever. *I could be wrong about that and mixed it up with another time I was speaking to him.*

[315] Other witnesses were similarly uncertain about Mr Wilson's whereabouts over Labour Weekend. Mr Ross said that he remembered ringing Mr Wilson's sister, Ms A, on the Friday of Labour Weekend and that she had said Mr Wilson was in Whangārei. When asked whether it could have been somewhere else, he said "it was either Whangārei or Tauranga. I'm not too sure." Ms Wilson (Mr Wilson's other sister) said

²⁶¹ That he drove Mr Wilson as far as Taupō the Thursday after Labour Weekend: see above at [203].

²⁶² See above at [208]–[209].

²⁶³ Emphasis added.

Ms A had told her on the Saturday that Mr Wilson “had gone up to see [Ms Northcott]” — that is, to Cambridge. In her statement of 22 January 1988, which she read aloud at trial, Ms A said that, when she spoke to Mr Wilson, “he told me that on the Saturday he had been to see [Ms Northcott] ... She lives in Cambridge I think.”

(ii) Alleged lie: Cambridge

[316] Mr Wilson said that he visited Ms Northcott in order to reconcile their relationship. The Crown submitted at trial that this was a lie and that it was a ruse to conceal the true purpose of his trip: to meet up with Mr Hoggart in order to rob the Red Fox Tavern. The Crown pointed out that Ms Northcott had not heard from Mr Wilson in years, that she had not told him where she lived and that he arrived uninvited.

[317] The Crown submits also that Mr Wilson lied about two important details: the day of the visit (Mr Wilson said it took place on Saturday, when, as noted above, it was likely to have been on the Friday) and the length of the visit. Mr Wilson said it was around three hours or at least a couple of hours. Ms Northcott said it was only about an hour.

[318] Mr Wilson submits that the evidence of the Cambridge visit proved nothing directly linking him to the Red Fox offending. It was not alleged it disproved an alibi, nor that it linked Mr Wilson to the crime scene. It was simply relied upon to suggest Mr Wilson was being untruthful about his movements on the Saturday afternoon of Labour Weekend. He points out that others were confused over the date of the visit. Ms Northcott, for example, thought it was the Thursday. It is submitted that this divergence shows no more than the inherent and inevitable difficulty in recalling one’s precise location on a single afternoon some 90 days earlier. More importantly, it is submitted that the visit was not a claimed alibi and could not therefore be evidence of guilt.

My assessment

[319] In assessing the Crown submission that the visit to Ms Northcott was a ruse, the jury would have needed to take into account that Mr Wilson had only been released

from prison a couple of weeks earlier and that they had been together when he went in. Nevertheless, the jury would have been entitled to consider it odd that he would turn up after such a long period without any prior communication. They would therefore have been entitled to accept the Crown submission that Mr Wilson's stated purpose for the visit to the Waikato was not true.

[320] Before coming to that conclusion, the jury would have had to take into account that Ms Northcott gave a very similar account of his visit ("he wanted to re-ignite our relationship, he wanted me to go away with him and move to Napier with him") and reported Mr Wilson making similar comments on a subsequent visit. Others also gave similar evidence.²⁶⁴ The jury would have been entitled, however, to conclude that, in the circumstances, telling Ms Northcott and others about wanting to reconcile was part of the ruse to conceal the true purpose of being in the Waikato over Labour Weekend, or at the least that the desire for reconciliation was not the sole reason for Mr Wilson travelling to the Waikato, and he had thus lied by omission.

[321] With regard to the day and length of the visit, the jury would have had to have considered the possibility that Mr Wilson may just have been mistaken, particularly as other witnesses were confused about the day of the visit. However, it was up to the jury to decide whether these were lies told in a deliberate attempt to back up the ruse related to Ms Northcott. The assertion that the visit was on the Saturday provided a reason, other than the Red Fox robbery, for Mr Wilson to be in the vicinity of the Red Fox on the afternoon of the robbery. A longer visit also was more consistent with a true attempt at reconciliation than a short one.

[322] I accept that, even if these were lies, they did not provide an alibi when considered alone. However, they did do so when combined with the hitchhiking account. Mr Wilson said that, after his unsuccessful attempt at reconciliation, he had hitchhiked back to Napier. Cumulatively, these statements did constitute the assertion of an alibi.

²⁶⁴ Mr H similarly said that when he drove Mr Wilson to Taupō he knew Mr Wilson was going to see Ms Northcott, whom he had not seen for a long time and with whom he wanted to get back together. Mr Wilson's mother and two of his sisters (Ms Wilson and Ms A) also said he had gone to visit Ms Northcott, although they did not elaborate on why.

(iii) Alleged lie: hitchhiking

[323] The Crown says Mr Wilson’s story about hitchhiking home on the Saturday and spending a night in the bush was a lie. The Crown points to the implausibility of Mr Wilson trying to find another ride in the dark on a steep road, then sleeping in the forest on a chilly spring night without any bush gear or pack and still arriving home before some members of his family had breakfast.

[324] Mr Wilson submits that there is no evidence that his account of sleeping on the side of the road was untrue. Mr Wilson does not accept that the story was implausible, pointing out that he “was a rough and ready character back then”.²⁶⁵ He further submits that the delay in bringing the charges means the opportunity to track down the person who picked up Mr Wilson hitchhiking to Napier had been lost.

My assessment

[325] If Mr Wilson was sleeping beside the road on the way back to Napier at the time, as he says he was, then he could not have been one of the Red Fox offenders. The jury, by their verdict, must have rejected the hitchhiking account and been satisfied that there was no reasonable possibility Mr Wilson was sleeping in a forest near Taupō at the time of the Red Fox robbery.

[326] It is clear that Mr Wilson led an unstructured and itinerant lifestyle.²⁶⁶ This means that his account of hitchhiking is not necessarily implausible. I also note that the accounts of his appearance on the Sunday are mixed in terms of support for his account.²⁶⁷ A reasonable jury should have taken these matters into account and also the forensic disadvantage to Mr Wilson of the loss of opportunity to find the people who had allegedly picked him up.²⁶⁸ The Judge had said in summing up the defence case that no efforts had been made by police to trace these potential witnesses and said that by the time of trial, “the task is impossible”.

²⁶⁵ Defence counsel in closing argued that, if Mr Wilson was guilty, he would have come up with a better story than sleeping on the side of the road.

²⁶⁶ See *W (CA226/2019) v R*, above n 110, at [86] per Moore J: “[Mr Wilson’s] answers to [police] questions conveyed the impression he had been living an itinerant, almost nomadic, existence where the memory of particular events and specific movements might be expected to merge.”

²⁶⁷ See above at [277]–[278].

²⁶⁸ See above at [151]–[153].

[327] I note too that Mr Wilson told the same story in his first account of having gone to Tauranga that weekend and also in his second account of having visited Ms Northcott on the Saturday.²⁶⁹ The hitchhiking could only have happened in the way and with the lifts he described on Labour Weekend or the following weekend but not both. This raises the possibility that Mr Wilson was mistaken about the weekend he hitchhiked and slept by the side of the road.

[328] Even taking into account the above points, I consider that a reasonable jury could in all the circumstances have decided that the hitchhiking story was not true and therefore that Mr Wilson's whereabouts at the time of the robbery were unknown.

[329] The Crown went further, however, and asked the jury to decide not only that the hitchhiking story was untrue but that it was a lie to cover up guilt. In this case, the inference that Mr Wilson told the lie because, although he was not one of the offenders, he knew he would be suspected to have been involved in the offending and wished to distance himself from it might be thought to be equally available. Choosing between these inferences may have involved speculation if considered just in isolation, but the jury needed to consider the Crown's submission in the context of the whole case and would have been entitled to consider that, in light of all the evidence, the lie was told to cover up guilt.²⁷⁰

(iv) Alleged lie: gun disposal

[330] Finally, the Crown says Mr Wilson lied about the timing and the manner of his disposal of his sawn-off shotgun. He initially said that he had disposed of the shotgun a few days after obtaining it because it was no good. He then said that he had thrown it in the ocean the Sunday of Labour Weekend after hearing about the Red Fox Tavern robbery. However, no one in the family noticed Mr Wilson borrowing a car, and he had gone with the family to Fantasyland for the day. It was in any event implausible that he would have disposed of a shotgun on a holiday weekend just off the "well-trodden State Highway 2". Mr Ross was sure that the conversation regarding disposal of the gun happened some days after Labour Weekend. And if Mr Wilson

²⁶⁹ It was later confirmed by motel records that the Tauranga trip occurred the weekend after Labour Weekend: see above at [311].

²⁷⁰ See above at [136]–[137].

was innocent, he had no means of knowing at that time that the murder weapon matched the description of his gun. It is submitted that it is more likely that he threw it away because he was the murderer and was concerned that the description of the gun used in the Red Fox murder could include the unusual detail that it was sawn off at an angle.

[331] Mr Wilson says that the totality of the evidence showed that he had got rid of the gun after Labour Weekend when he had heard that a shotgun had been used in the Red Fox robbery and he was concerned that he would come under suspicion (as he had told a number of people).

My assessment

[332] The first story Mr Wilson told about the time and reason for his disposal of the gun — that it was no good — was not true. But at that time he had not been told he was being questioned in relation to the Red Fox offending and so it may be unsurprising that he did not bring it up when explaining why he disposed of the gun.²⁷¹ After he was informed of the purpose of the interview, Mr Wilson consistently said he disposed of the gun because he thought he would be suspected.²⁷² This explanation was confirmed by the evidence of Mr Ross and Mr and Ms A.²⁷³

[333] There were therefore two equally plausible reasons for Mr Wilson to have disposed of the gun — guilt, and fear that he would be targeted as a suspect because of the similarities between the Red Fox offending and the Birkenhead robbery. The jury would not have been entitled therefore to choose between these inferences unless they considered, in the whole context of the case, that the inference that he had disposed of the gun because of fear that he would be suspected for the offending was capable of displacement by reasoning (rather than mere guesswork).²⁷⁴

[334] The jury could legitimately have concluded that Mr Wilson's explanation for the gun disposal was a lie to conceal guilt, particularly in light of the fact that the gun

²⁷¹ See above at [282]–[283].

²⁷² See above at [283]–[284].

²⁷³ See above at [288] and [292]–[293].

²⁷⁴ See above at [136]–[137].

had been acquired just five days before the Red Fox robbery, that Mr Wilson had lied about the reasons for its acquisition and the inference that was available to the jury that the acquisition was for the “earn up north”. They could reasonably have concluded, therefore, that the disposal also related to that “earn” and, for the reasons discussed below, that this “earn” was the robbery of the Red Fox Tavern.

[335] With regard to the alleged lies about the time of disposal, it is possible that Mr Wilson could have disposed of the gun on the Sunday morning, as he said. There was time before the family went to Fantasyland, and it was possible that he borrowed Mr A’s car.²⁷⁵ A round trip from Napier to Mr Ross’ house would have taken between about 40 minutes and an hour non-stop, with an additional five miles each way (approximately) between the winery and Napier. The Crown claims Mr Ross was certain the conversation about having just disposed of the gun happened some days after Labour Weekend, not on the Sunday. This was not the case: Mr Ross merely agreed the conversation happened “around about” the Monday of Labour Weekend or shortly after. He was by no means certain. Further, Mr Wilson was consistent as to the method of disposal (dumping the gun in the sea), and it is of no moment whether the disposal occurred on the Sunday of Labour Weekend or a bit later as either way it was still after the robbery. Therefore, even if Mr Wilson did lie in this respect, this would not be hugely significant.

(f) Gloves (Mr Wilson)

[336] Another strand of evidence in the Crown case was that Mr Wilson had access to gloves similar in appearance to the gloves worn by the second offender which could have made the handprint impression found on the Red Fox Tavern safe.²⁷⁶

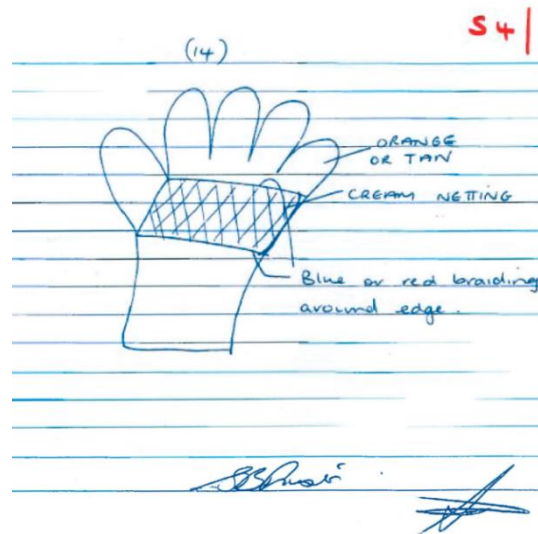
Evidence at trial

[337] In her statement to police in the early hours of Sunday 25 October, Ms Prisk said that the man holding the bat (on the Crown’s case Mr Hoggart) was wearing “orange gloves with fishnet vinyl pads across the knuckles, pads were blue on edges, some red and white fishnet cover”. In a second statement, made on Monday

²⁷⁵ See above at [292].

²⁷⁶ See above at [103(i)].

26 October, she gave another description of the gloves, namely that they were “orange or tan with cream netting, blue or red braiding around the edge”. This second description was accompanied by a drawing:



[338] In 2017, Mr A provided a single used Lynn River “de-budding” glove to police:



[339] Mr A’s evidence was that de-budding gloves would have been used at the winery in 1987 and that to his knowledge the type of glove used, and the pattern on it, had not changed since 1987. He also gave evidence that he would have had “[p]airs and pairs and pairs, piles of them” in the September/October period, and that the gloves would have been stored in the tool shed adjoining where Mr Wilson was staying at the time: “There wasn’t even a door ... you can walk straight through”. Mr A agreed that these gloves featured “cream netting on the outside”. It was an agreed fact at trial that an extensive search of the winery in January 1988 did not uncover any orange gloves.

[340] A witness who worked for the company that supplied de-budding gloves to the winery gave evidence that in fact a different brand of gloves — Prevent — was in use when he began working for the company in 1988, although it was “essentially the same” as the Lynn River glove and any differences were “[v]ery minor”. Police obtained two new pairs of Prevent gloves in 2017, which the witness said looked “pretty much exactly the same” as the Prevent glove he remembered being supplied:



[341] Inquiries with the Slovenian manufacturer of the Prevent gloves indicated that the moulding on the palm had not changed since 1986. The forensic expert concluded, following ESR testing of these gloves, that the possibility could not be excluded that a glove of that style made the impression on the safe handle. But the possibility could not be excluded that other gloves with textured components of the same general appearance could also have made the impression in question.

[342] The Crown in its closing address suggested this was just “another small strand in the Crown’s circumstantial case against Mr Wilson”, accepting that the weight the jury placed on it had to reflect the possibility that other gloves or items could also have left the impression. The Crown also accepted in closing that Ms Prisk’s two descriptions of the gloves were not easy to reconcile, but suggested the discrepancies between the two descriptions could be explained by Ms Prisk’s “hysterical” state immediately following the robbery. The Crown encouraged the jury to focus on the consistent features between her two descriptions, most importantly the orange colour of the gloves.

Submissions on appeal

[343] Mr Wilson submits there is no proven link between the winery gloves and the appellants, and further that it is impossible to know how many gloves with this pattern were in circulation in 1987. More fundamentally, Mr Wilson says that the winery gloves do not match Ms Prisk's descriptions and in particular they do not have "fishnet vinyl pads across the knuckles" as per her first description. In Mr Wilson's submission, the gloves issue was a "significant red herring".

[344] The Crown submits that Ms Prisk's two descriptions are "broadly consistent" with the Prevent de-budding gloves used at the winery in the 1980s and highlights that Mr Wilson slept in a loft with easy access to the shed where those gloves were stored.

My assessment

[345] I accept Mr Wilson's submission that the glove evidence is not probative. There are clear discrepancies between Ms Prisk's two descriptions, and vitally, neither matches the winery gloves, except for the colour orange which does not suffice in itself to suggest the gloves were ones to which Mr Wilson had access. Further, there is no evidence of Mr Wilson actually accessing any such gloves, and the extensive search of the winery undertaken in 1988 did not reveal any gloves of interest. The results of the ESR testing on the Prevent glove acquired in 2017 are equivocal. This evidence therefore was not admissible as it was not probative.²⁷⁷

[346] Even assuming the glove evidence had some minimal probative value, given the circumstantial nature of the case and the lack of direct evidence tying the appellants directly to the Red Fox, there is a risk the jury would have overweighed the glove evidence. It therefore was likely to have unfair prejudicial effect exceeding any probative value it had and should have been excluded under s 8.

²⁷⁷ See above at [142].

(g) *Shoe print (Mr Wilson)*

[347] A further piece of evidence that the Crown said supported its case but was not a key plank was the discovery of a grassy shoe print found inside the Red Fox Tavern near the backdoor through which the offenders entered.²⁷⁸

Evidence at trial

[348] Detective Inspector (DI) Lendrum²⁷⁹ was called to attend the Red Fox Tavern at 12.45 am on Sunday 25 October 1987. At 1.05 am, he and three other police officers travelled to the Red Fox. DI Lendrum was appointed officer in charge of the scene. He began his scene examination at 3.45 am.²⁸⁰ DI Lendrum noted when commencing his initial examination of the lounge bar that “the area within the lounge bar had been disturbed by various persons subsequent to the shooting ... includ[ing] the persons from a nearby party, ambulance personnel and a doctor”. He recorded that “[t]he extent of contamination was not known”.

[349] When he recommenced his examination the next morning at 11 am, DI Lendrum prepared a sketch diagram of the floorplan of the lounge bar, which is appended to this judgment.²⁸¹ He noticed shoe print impressions on the carpet leading from the doorway between areas one and two (the services corridor area and the area immediately before the bar, respectively), through which the robbers had entered. He measured one impression and noted it was approximately 0.3 m long, recording that it was “(size eight and a half shoe approx) same size as mine”.

[350] Pieces of small cut grass could be seen inside the impressions. The lawn surrounding the Red Fox had been recently mowed with the clippings not caught.

²⁷⁸ See above at [104].

²⁷⁹ DI Lendrum had died before trial. Evidence was given at trial by another police officer on the basis of DI Lendrum’s formal written statement, signed on 12 December 2017, and his notebooks and job sheets from 1987.

²⁸⁰ The scene was also examined by Ms Lawton, a scientist from the Department of Scientific and Industrial Research, on Monday 26 October 1987. A police fingerprint officer also dusted the scene for footprints and fingerprints.

²⁸¹ See below Appendix C. The police officer who gave evidence at trial in place of DI Lendrum also prepared diagrams of the Red Fox Tavern interior based on the initial sketches: see below Appendix D. I also include a photograph of the lounge bar (area 2): see below Appendix E.

The shoe print impressions “gave the appearance of someone having walked across the lawn, prior to coming into the tavern”.

[351] A pair of Mr Wilson’s running shoes were subsequently seized in 2017 and the sizing eight and a half was taken from the label inside the tongue.²⁸² There was no suggestion that these were the shoes he was wearing at the time of the Red Fox offending and thus no suggestion that the shoe print came from these particular shoes.

[352] It was clear from the evidence at trial that the bar staff had undertaken some cleaning of the Red Fox before the robbery. By approximately 9.45 pm, the lounge bar was cleared of patrons, and from 10 pm, both Ms Prisk and Ms Soppet were in the public bar helping with the cleaning as they had finished cleaning the lounge bar. The cleaning of the public bar involved cleaning up glasses and putting rubbish out the back. Mr Bill Wilson had also mopped the floors in the public bar. It is, however, unclear whether anybody vacuumed the carpet by the backdoor where the shoe print impressions were found.²⁸³

[353] Ms Prisk’s evidence was that the backdoor was only used by staff, but it had been unlocked all evening, and staff, including kitchen staff, would use it to enter and exit the Red Fox. There were kitchen staff working that night, but they had left by about 9.30 pm.

[354] After the robbery but before the police arrived, ambulance personnel, Ms Soppet’s husband, Mr Poa (the neighbour) and people from a nearby party arrived at the Red Fox. The evidence at trial indicated that they all entered through the main entrance and not by the backdoor.

²⁸² Mr Wilson’s pre-trial objection to the admission of the evidence relating to the seizure of his shoes in 2017 was declined: *R v W* HC Auckland CRI-2017-092-10119, 11 March 2021 (Ruling No 7 of Woolford J).

²⁸³ See below Appendix E for a photograph of the area immediately in front of the door where the shoe prints were allegedly found.

Crown closing

[355] Just over four pages of the Crown closing (out of what was admittedly a very long closing address)²⁸⁴ were taken up with analysing the shoe print evidence and why it could be relied upon. The Crown accepted in closing that the shoe print evidence, on its own, “doesn’t take you very far” but said that it was “another small strand of evidence that is legitimately part of the larger pool of circumstantial evidence against Mr Wilson”.

[356] The Crown said that DI Lendrum’s job sheet showed that he had made a careful and thorough examination of the scene. He had measured one of the shoe prints and said it was approximately 0.3 m long. The Crown noted that elsewhere DI Lendrum had used centimetres as his unit of measurement showing that his use of metres indicated “a little less precision”. It noted the presence of the grass clipping and said that those who drove up and parked at the front or back of the Red Fox would not have walked over recently mown grass to enter. The Crown suggested that it “seems elementary” that the robbers would not have parked in a reasonably well-lit car park in view of State Highway 2. The Crown said that a “thinking or discerning offender” would have approached the Red Fox and made their eventual getaway over the grass out the back of the Red Fox and then to a waiting vehicle.²⁸⁵

[357] The Crown stressed that there is no evidence of anyone other than the offenders coming in using the backdoor entrance. The evidence showed that those who arrived after the robbery came in the front entrance. The Red Fox had been well cleaned by Ms Prisk and Mrs Soppet before their shift had ended and the backdoor of the bar was not one the public used.

[358] The shoes seized from Mr Wilson in 2017 were size eight and a half and 0.28 m or 0.285 m which the Crown said aligns with DI Lendrum’s measurement of the grassy shoe print impression as being approximately 0.3 m.

²⁸⁴ Approximately 167 pages.

²⁸⁵ I interpolate here that the bar staff did not hear a car drive away after the robbery: see above at [85].

Closing for Mr Wilson²⁸⁶

[359] In his closing, counsel for Mr Wilson argued that the shoe print evidence was irrelevant because “it was bypassed by the scientist of the day, analysing the scene”. He said that the problem was that the Red Fox had been full and, in a rural setting, customers may have had some grass on the bottom of their shoes. He noted that no one had suggested that Mr Bill Wilson vacuumed the Red Fox before the armed robbery happened and that a number of other people had come through after the robbery.

[360] Counsel stressed the uncertainty of the measurement. He suggested it was unclear whether it was 30 cm or 33 cm. In assessing the shoe size as eight and a half, DI Lendrum “must have been looking at his shoes and saying approximately an eight and a half. That’s not good science, that’s not high quality evidence.”

[361] Counsel also pointed out that Mr Bill Wilson also said that, after closing the bar but before the robbery, he went out of that backdoor to throw some water out and then came back in that door, meaning he could have been the depositor of that impression as well.

Court of Appeal decision

[362] The Court of Appeal noted Mr Wilson’s submission that the evidence of the shoe print was inadmissible as it was too ambiguous and, in any event, the print could have been made by a number of people who arrived at the Red Fox after the robbery.²⁸⁷

[363] The Court said that the Crown did not place significant weight on the shoe print evidence: “It was just another strand in the case against Mr Wilson.”²⁸⁸ The Court said that counsel could emphasise any ambiguity regarding the shoe print in closing submissions, but it was ultimately for the jury to determine what if any weight they placed upon that evidence.²⁸⁹ The Court noted that the grassy shoe print was made by a person entering through the backdoor, as the offenders did. The person

²⁸⁶ Counsel for Mr Hoggart did not address the shoe print impression in closing.

²⁸⁷ CA judgment, above n 58, at [76].

²⁸⁸ At [213].

²⁸⁹ At [213].

who made the print would have walked across the freshly cut lawn at the back of the Red Fox, across a gravel area and through the backdoor. The Court said: “When looked at in that context, the grassy footprint was a strand of evidence that the jury were entitled to consider.”²⁹⁰

Submissions on appeal

[364] Mr Wilson submits that the probative value of the shoe print evidence was slight. He points out that no photograph was taken of the prints and that people had come in and out of the bar. He submits that DI Lendrum’s assessment of the apparent shoe print impression was unqualified, non-peer reviewed and not preserved. Mr Wilson also submits that the shoe print evidence caught the defence by surprise at trial, as the allegation Mr Wilson left a shoe print at the scene was not identified in the Crown’s summary of its case in 2018, nor in its opening at trial.

[365] Mr Hoggart submits that the shoe print evidence should not have been admitted, given the extent of contamination at the scene was not known.

[366] The Crown submits that the shoe print evidence was supportive of the Crown case but was not a key plank of it. In the Crown’s submission, the effect of this evidence was not overstated at trial and the jury were entitled to consider it.

My assessment

[367] I do not consider that a reasonable jury could have put any weight at all on this evidence, and it therefore should not have been admitted. There are a number of reasons for this.

[368] First, there is no evidence that there were two sets of grassy shoe prints found matching the two robbers.²⁹¹ If the robbers had both walked over newly mown grass

²⁹⁰ At [214].

²⁹¹ Another shoe print matching a Bata shoe was found on the door going out of the bar and into the foyer and then into the manager’s office. This was said to be the print of the taller offender with the bat who had kicked in the door, although this evidence was not relied on by the Crown. This print was initially thought to match a shoe print from another unresolved homicide, but this was found not to be the case.

before entering the Red Fox (as the Crown suggested), it could perhaps be expected that two sets of prints would be found.

[369] Second, while the evidence was that the backdoor was not used by the public, it had been left unlocked and staff members had entered and exited through it that evening, including Mr Bill Wilson after the bar had been closed. Although it was a “fairly quiet” night, most customers were locals, and it cannot be ruled out that someone came in through the backdoor across the grass or who otherwise happened to have grass on their shoe (which would not be unlikely given the rural setting). While the staff members said they had finished their cleaning for the evening before the robbery occurred, including wiping the tables, mopping the floors and cleaning the glasses, there is no evidence as to whether that involved vacuuming the carpet of the lounge bar immediately in front of the door leading from the services corridor where the shoe print impressions were found.

[370] Third, while there was some evidence that Mr Soppet, Mr Poa, the first responders and people from the nearby party entered through the front door, it cannot be ruled out that one of them may have entered through the backdoor.

[371] Fourth, and most importantly, DI Lendrum’s measurement was approximate. There was no evidence as to how the shoe print was measured, including as to whether best practice was followed.²⁹² Nor is there any evidence that DI Lendrum had specialist training in this area. Another police officer dusted for footprints and fingerprints, and a forensic scientist also analysed the scene, but there is no suggestion that either of them noted the shoe print impressions or suggested they were significant. No photographs were taken of the impressions.

[372] With rounding, the measurement could include anything from 0.25 m to 0.34 m and it could have meant one third of a metre (as submitted by Mr Wilson). DI Lendrum was no longer available to clarify what he meant. While the measured shoe seized from Mr Wilson (at 0.285 m) came within the possible range, the

²⁹² As to the appropriate methods of measuring and photographing two-dimensional footwear impressions, see Michael J Cassidy *Footwear Identification* (Canadian Government Publishing Centre, Quebec, 1980) at 41–65; and *A Simplified Guide to Footwear & Tire Track Examination* (National Forensic Science Technology Center, 2013).

difference between sizes is very small — the difference between a United Kingdom men’s size 8.5 and 9 is less than half a centimetre.²⁹³ Sizes are in any event measured by the length of the foot, rather than the sole of the shoe. I cannot rule out the possibility that the length of shoe prints might differ depending on the brand or type of shoe, even if the size is the same.

[373] Finally, there was a risk the jury would have given more weight to the shoe print evidence than it rightly deserved (even had it did have some probative value), as it was one of the few pieces of evidence that was directly related to the Red Fox. The evidence therefore also carried a real risk of unfair prejudice that would have outweighed any possible probative value, and it should have been excluded under s 8.

(h) *Propensity evidence (Mr Wilson)*

[374] An additional strand of the Crown’s case was the propensity evidence of Mr Wilson’s aggravated robbery of the Birkenhead Tavern.²⁹⁴

[375] Regarding the Birkenhead robbery, the Judge gave suitable directions on propensity evidence. No issue has been raised before us with the content of these directions. Importantly, Woolford J made it clear that the evidence related only to Mr Wilson, not Mr Hoggart.

[376] The Crown submits before us that the Red Fox robbery was strikingly similar to the Birkenhead robbery.²⁹⁵ Eleven similarities are identified in the Crown submissions.²⁹⁶

- (a) Mr Wilson was in [straitened] financial circumstances before each robbery;
- (b) Mr Wilson obtained sawn-down, double-barrelled shotguns for both robberies;
- (c) Mr Wilson took the lead in planning both robberies;

²⁹³ In respect of both United Kingdom and United States shoe sizing, the difference between full sizes is a third of an inch (0.847 cm): The Brannock Device Co Inc *Size Comparison of the Standard Model Brannock Device Foot Measurers*.

²⁹⁴ See above at [103(g)].

²⁹⁵ The facts related to the Birkenhead robbery were agreed between the parties and presented to the jury as a written document.

²⁹⁶ The same 11 similarities were identified in the Crown closing at trial.

- (d) the robbers wore similar disguises obscuring their hands and faces, using clothing Mr Wilson had available to him at the time;
- (e) Mr Wilson scoped out the locations by car beforehand;
- (f) both were large premises robbed after closing on Saturday night when the staff were still on-site to help open the safe;
- (g) an armed co-offender for each robbery helped subdue the staff;
- (h) the staff were kept on the floor at gunpoint while one offender escorted a staff member to open the safe;
- (i) victims were kicked while on the floor (the bartender at Birkenhead and Mr Bush as he lay dying at [the] Red Fox);
- (j) over \$30,000 in cash and substantial numbers of cheques were taken in both robberies, along with very heavy sacks of coins which the offenders were prepared to shift;
- (k) items used in both robberies were immediately disposed of (Mr Wilson threw items from the Birkenhead robbery into Auckland harbour and nothing taken from the Red Fox robbery was ever found).

[377] Mr Wilson submits that most of these alleged similarities are extremely generic. This single instance of moderately similar offending was of moderate probative value, and propensity cannot be the central plank of a prosecution case.

My assessment

[378] As Mrs Pyle's evidence was inadmissible,²⁹⁷ point (e) was not a relevant point of similarity. The remaining points have some cumulative probative value. However, the following observations may limit the significance of certain points of similarity raised by the Crown:²⁹⁸

- (a) Point (b), the use of a sawn-off shotgun, seems not to have been particularly unusual for the time. A newspaper article produced in evidence referred to a string of armed robberies using shotguns in late 1987. Mr Dunbier described shotguns as "the tools of the day" and said it was "the fashion" to saw off the end of the barrel.

²⁹⁷ See above at [243].

²⁹⁸ See Evidence Act, s 43(3)(c).

- (b) Point (d), the wearing of face coverings and gloves, is unremarkable.²⁹⁹
- (c) Point (g), the involvement of an armed co-offender, might have less significance in light of the fact the Birkenhead robbery involved three offenders rather than two.
- (d) Point (j), the fact that a similar amount of money was stolen, says little about the offenders' conduct; rather it is about what they happened to find at the locations targeted. The willingness to transport heavy sacks of coins may however be significant.

[379] These factors may limit the usefulness of this strand of evidence more generally:

- (a) the propensity evidence refers to only one previous incident rather than a pattern of events;³⁰⁰
- (b) the relevant similarities lack any significant degree of unusualness;³⁰¹ and
- (c) there was evidence at trial that armed robberies were prevalent at the time.

[380] Despite these points and as noted above, the propensity evidence was admissible, and the jury were entitled to consider that it supported the Crown case.

²⁹⁹ The Court of Appeal acknowledged in its propensity evidence decision that “this is not an unusual feature of aggravated robberies”: *R v Hoggart* (CA), above n 98, at [27(g)], n 9. It is also worth noting that motorbike helmets were worn at the Birkenhead robbery but not at the Red Fox robbery, contrary to what the Court of Appeal said: at [27(g)], n 9.

³⁰⁰ See *O (CA736/2017) v R* [2018] NZCA 434 at [15] per Kós P; and Evidence Act, s 43(3)(a).

³⁰¹ See Evidence Act, s 43(3)(f).

(i) *Motive*

[381] One strand of the Crown’s case at trial was that the appellants wanted money to acquire motorbikes in order to become full members of the Filthy Few.³⁰² The Crown relied on evidence from various witnesses,³⁰³ including the appellants themselves,³⁰⁴ about the association of Mr Hoggart and Mr Wilson with that motorcycle club. The evidence at trial was that to become a full patched member, you had to have a British or American motorbike.

[382] It seems to be common ground that neither Mr Wilson nor Mr Hoggart owned such a motorbike prior to Labour Weekend 1987. The evidence was that both purchased motorbikes after Labour Weekend 1987. On 9 November, Mr Hoggart paid the full price in cash for a second-hand Triumph Tiger motorbike from an Auckland dealership. Mr Wilson, in the weeks after Labour Weekend, purchased a “Triumph motor bike on a chopper frame” from Mr Fitzgerald, the President of the Filthy Few, for a down payment of \$1500 in \$10 and \$20 notes. Approximately \$3,000 was still to be paid.³⁰⁵ He later acquired a second motorbike, another Triumph Bonneville, which Mr A described as being in better condition than the first.³⁰⁶ Later in November, Mr Wilson did work on this motorbike at further expense.

Submissions on appeal

[383] Mr Wilson submits that the Crown’s allegation the appellants were in need of money to purchase motorbikes to gain entry into the Filthy Few was classic conjecture.

³⁰² See above at [103(e)]. The Crown submission was therefore not that the appellants had a specific motive to rob the Red Fox Tavern, but rather that they had reason to engage in criminal behaviour, including in the case of Mr Wilson relating to stolen vehicles.

³⁰³ Including Ms Hargreaves and Mr Fitzgerald: see above at [198] and [308]–[309]. Mr Dunbier also described going to the Filthy Few “pad” with Mr Wilson sometime after the robbery and Mr Hoggart being there too. Mr A likewise said Mr Wilson had a connection with the Filthy Few. Mr Ross thought Mr Wilson was an associate of the Filthy Few in 1987 “because of the people he hung around with”.

³⁰⁴ Mr Wilson himself said he had attended a Filthy Few reunion: see above at [207]. The Crown in closing referred to Mr Hoggart’s police interview where he was recorded as saying he “used to be in [a bike gang] years ago ... the [F]ew a bit”.

³⁰⁵ See above at [310].

³⁰⁶ Mr A initially said this was the bike that had been purchased from Mr Fitzgerald but in cross-examination clarified that the first bike was purchased from Mr Fitzgerald and the second, better bike came after.

Both appellants submit the evidence revealed they had already acquired sufficient funds to purchase the motorbikes on their own account.

[384] The Crown continues to maintain that the appellants wanted money and motorbikes as a way into the Filthy Few.

My assessment

[385] Mr Wilson does not dispute the evidence as to his involvement with the Filthy Few, and both appellants accept that, after the robbery, they did acquire motorbikes. The jury were entitled to take into account the evidence as to their interest in the Filthy Few and what was required to become a member. The appellants' challenge is rather to the Crown's assessment of their financial position and how they acquired the motorbikes, which I discuss below.

(j) Money (Mr Wilson)

[386] The Crown case was that both appellants inexplicably came into money shortly after the robbery.³⁰⁷ Tracking their acquisitions and spending following Labour Weekend, the Crown submitted in closing at trial that there was no plausible alternative to them being the Red Fox Tavern offenders that accounts for this spending.

[387] Counsel for Mr Wilson at trial challenged this, submitting that Mr Wilson had not bought the second bike because, if it was bought, there would be evidence similar to that of Mr Hoggart's purchase (in other words, a receipt). Rather, the evidence was that Mr Wilson was low on cash: he got the "chopper" from the Filthy Few and "couldn't even pay for it all". The natural inference, in counsel's submission, was "that it's [assumedly meaning the second, better motorbike] been pinched". Counsel then noted that, in any event, Mr Wilson was the prison tattooist "and was making a lot of money. So this idea they're completely broke and rob a hotel is simply absurd."

³⁰⁷ See above at [103(j)].

Evidence at trial

[388] As to Mr Wilson's pre-Labour Weekend financial circumstances, the parties were agreed that:

- (a) Mr Wilson had a prison account of \$300 when he left Whanganui Prison on 7 October 1987.
- (b) His sister, Ms A, had also set up an account for him at the post office, which had \$581.78 in it on 9 September 1987. There was \$185.39 in the account by 16 October 1987, and \$135.39 by 4 November 1987.
- (c) Mr Wilson also had a Bank of New Zealand account at the Napier branch, which had a balance of \$468.20 on 19 October 1987 and received weekly social welfare payments of \$129.26 in October and November. The balance was \$268.20 on 22 October 1987 and \$121.32 by 27 November 1987.

[389] According to Ms A, Mr Wilson was not paying board at the time but "did the odd bit of work to cover his food and board". Apart from welfare payments, Ms A was not aware of any other source of income.

[390] Mr Wilson's own estimate of his funds was larger. He said in his initial police interview that he had "[a]bout \$2,000–\$3,000" when he left prison, comprising money he made as the prison tattooist and from his sister's post office account (which he correctly estimated to have "about \$500 in it at the most"). Mr Ross confirmed in his evidence that Mr Wilson was "doing a lot of tattooing" while in prison; that he was "one of the more popular tattooists" in that part of the prison; and that "he would make quite a bit of money" from that "reasonably lucrative business".³⁰⁸

[391] Mr Wilson also claimed to have made some additional money since then through "earnings". Mr Wilson referred in his interview to his plans to use some papers and plates "for an earn ... to get up on my feet after coming out".

³⁰⁸ Mr Ross said that he himself made about \$8,000 through bone carvings in prison and was able to smuggle the money out through visits.

[392] The Crown says that in the weeks following Labour Weekend Mr Wilson made several acquisitions, including a Ford Falcon, a Triumph Bonneville motorbike and motorbike parts, which point to a sudden influx of cash:

- (a) As to the Ford Falcon, on Mr Ross' account this was a newer-looking car ("sort of late 80s") which "wouldn't have come cheap". There is no other indication of how much it would have cost, nor how or from whom Mr Wilson acquired it.
- (b) As to the motorbikes, Mr Wilson acquired a Triumph Bonneville on a "chopper" frame from Mr Fitzgerald after Labour Weekend. Mr Fitzgerald said that the balance — \$3,000 — was still owing at the time he made his statement to police in January 1988.³⁰⁹
- (c) As to the motorbike parts, Mr Ross gave evidence that they would have cost "probably ... another four grand or something", while a motorbike dealer, Mr Pratt, provided a much lower estimate of \$580 to \$1,350. Again, there is no indication in the evidence of how or from whom Mr Wilson acquired them.

[393] At trial (although counsel makes no reference to it on appeal), the Crown pointed to other evidence of spending, including various other vehicles and bikes. There are no receipts or ownership papers in evidence for these other vehicles or bikes. The defence pointed out in closing that there was other evidence of Mr Wilson being involved in car stealing or "ringing" and submitted that the natural inference was that the second Triumph motorbike was stolen.

Court of Appeal decision

[394] The Court of Appeal considered the Crown had been wrong to refer in closing to Mr Wilson's acquisition of four vehicles in closing as evidence of Mr Wilson's "inexplicable" acquisitions, knowing that he was in the business of stealing cars.³¹⁰ The Court nevertheless held that this did not occasion a miscarriage of justice because,

³⁰⁹ See above at [310] and [382].

³¹⁰ CA judgment, above n 58, at [158]–[159].

although Mr Wilson had admitted to stealing two vehicles, there was no explanation as to how he acquired the other two vehicles referred to. This was “more than sufficient to support the Crown’s submission that Mr Wilson used the proceeds from the robbery of the Red Fox Tavern to acquire vehicles”.³¹¹

My assessment

[395] It is clear that Mr Wilson had some savings which may have been sufficient to pay the deposit on the motorbike he purchased from Mr Fitzgerald, at least without any major robbery. I note also that his debt to Mr Fitzgerald relating to the motorbike, nearly three months after his purchase, could be seen as inconsistent with Mr Wilson having committed a large, highly lucrative robbery, as opposed to petty crimes. Over \$30,000 in cash and coins and over \$4,000 in cheques were taken from the Red Fox.

[396] Mr Dunbier’s evidence tends to suggest Mr Wilson would not have gone into debt to the Filthy Few if he could afford to buy the bike outright:

- Q. The question is, were you aware whether Mr Wilson owed money to anyone?
- A. Yeah, he owed, I was under the impression he was in debt to the club, hence the plants and the armos and all that. ‘Cos when you’re in debt to the club ya gotta get out pretty quick. Clear the debt before it all turns to custard.

[397] On the other hand, Mr Wilson’s “earn up north” comment to Mr Ross and the comment to the police about doing an earn to get on his feet after prison do point to impecuniosity and an associated willingness to derive income from crime. While the jury would have had to consider the other possible explanations for the source of the funds he had after the robbery, the jury could still legitimately have inferred from the evidence that Mr Wilson was in need of funds and was prepared to earn them from illegal activity, including the “earn up north” which the Crown said was the Red Fox robbery, and that he had at least some unexplained funds after that robbery.

³¹¹ At [160].

[398] As to the other vehicles allegedly acquired by Mr Wilson after the Red Fox robbery, I agree with the Court of Appeal that the Crown should not have submitted in closing that Mr Wilson inexplicably acquired those vehicles as the police knew Mr Wilson was in the business of stealing vehicles, and there was evidence that at least some of those vehicles had been stolen. I agree, however, that this did not occasion a miscarriage of justice as, in respect of other vehicles referred to, there was no explanation of how Mr Wilson acquired them.³¹² I agree with the Court of Appeal that this was quite sufficient to support the Crown’s submission that Mr Wilson had used the Red Fox funds to acquire vehicles, a submission that the jury were entitled to accept.

(k) *Money (Mr Hoggart)*

Evidence at trial

[399] Prison records indicated that Mr Hoggart had no money in his possession when he was released from Whanganui Prison on 17 August 1987. Ms Hargreaves and Ms Rautangata gave evidence he was receiving social welfare payments; neither was aware of another source of income. Nevertheless, on 9 November 1987 Mr Hoggart paid full price — \$4,395 — for a second-hand (not “brand-new” as the Crown suggests) Triumph Tiger,³¹³ using cash in a brown paper bag and a fake name.

[400] Mr Hoggart gave a number of inconsistent statements about the money he had used to purchase the motorbike in his police interview on 22 January 1988. He said (fairly consistently) that part of the purchase price came from money he had before he went to prison, \$1,200–\$1,800, which he had stored in the ceiling. As to the remainder, he initially said that it had been lent to him. However, after a confidential conversation with the interviewing detective he eventually confessed to making a significant amount of money by selling drugs and other contraband in prison. He at first said this was “about 4 grand”, but clarified later in the interview it was only “[a]bout 2 grand” (his savings in the ceiling comprising the balance). He said that he had smuggled this out from prison in a stereo.

³¹² See at [158]–[160].

³¹³ The vehicle offer and sale agreement clearly indicates the motorbike was second-hand, having had six previous owners. The bike was 15 years old.

[401] Mr Scarlett, the police detective who interviewed Mr Hoggart, inspected the stereo he claimed to have used to smuggle the cash out of prison. He said at trial:

I observed that there was plenty of space in the speakers to store cash and the screws in the back were easily undone as if the back was regularly taken off.

Submissions on appeal

[402] Mr Hoggart submits that the Crown's submission that he inexplicably came into money after the robbery was an unsubstantiated assertion that did not reflect the evidence at trial. Mr Hoggart had provided an explanation for the money used to purchase the motorbike — selling drugs whilst in prison and smuggling the revenue from that enterprise out of the prison in the speakers of a portable stereo.

[403] The Crown continues to maintain that Mr Hoggart inexplicably came into money shortly after the robbery, pointing out that, although his prison account was empty when he left, he purchased the Triumph Tiger at the full price, using cash and under a fake name.

My assessment

[404] It would have been up to the jury to consider the Crown's submission in light of the evidence of possible earnings while in prison. I note in this respect that the explanation about the source of earnings in prison was not necessarily implausible, although there nevertheless seems to be a shortfall.³¹⁴ The jury would have been entitled to reach the view that Mr Hoggart's explanation for the source of the funds was untrue.

(l) Lies (Mr Hoggart)

[405] The Crown alleges that Mr Hoggart lied about his whereabouts on Labour Weekend, where he got his money from (in particular how he financed his motorbike purchase) and the timing of this purchase.³¹⁵ The Crown says that these lies provide a further strand of evidence against him.

³¹⁴ Even if Mr Hoggart had \$1,200–\$1,800 in the ceiling, and had made around \$2,000 in prison, there remains a shortfall of \$595–\$1195, the motorbike having been purchased for \$4,395.

³¹⁵ See above at [103(d)].

Evidence at trial

[406] When Mr Hoggart was first asked where he was at Labour Weekend 1987, he suggested he “might have been down at the pub”. He said he did not remember but he was living with Ms Rautangata then; he would “have to go and ask [Ms Rautangata] what we were doing”.

[407] Mr Hoggart also gave the wrong dates when asked when he had purchased the motorbike. He said in his January interview that he had purchased it “5–6 months ago” (in July or August) — or “about 3 weeks” after he was released from prison on 17 August 1987 (meaning he purchased it in early September). The motorbike was actually purchased on 9 November 1987 — after the Red Fox Tavern robbery. Mr Hoggart contemporaneously told the police the name of the shop he had bought the bike from and the address where they would find the papers, which he confirmed included dates. This was right after he had been told by the interviewing officer that “we go into these sort of things pretty thoroughly so any bullshit now is only going to waste time”.

Submissions on appeal

[408] Mr Hoggart submits that the singular comment “I might have been down at the pub” cannot be categorised as a false alibi. When given an opportunity to comment on the accuracy of his recollection, Mr Hoggart had noted that “it’s hard when you don’t work to remember each day”.

[409] As noted above, Mr Hoggart submits that the Crown’s theory he lied about how he funded his motorbike purchase is unsubstantiated.³¹⁶

[410] The Crown’s submission is that the comment about possibly being down at the pub was a lie. At trial, the Crown submitted that Mr Hoggart “hides behind [Ms] Rautangata as knowing what he did on Saturday”.

[411] The Crown further submits that Mr Hoggart’s changing explanations with regard to the funds for the motorbike purchase showed he was lying about the source

³¹⁶ Above at [402].

of those funds.³¹⁷ In closing at trial, the Crown also submitted that Mr Hoggart lied about the timing of the motorbike purchase.

My assessment

[412] With regard to the alleged whereabouts lie, Mr Hoggart’s explanation for his lack of memory — that “[e]very day is the same around here” and “it’s hard when you don’t work to remember each day” — rings true. In any event, a casual and vague comment about a possibility of being “down the pub” could in no way be construed as a false alibi. And that comment was made before Mr Hoggart was told what the interview was for. As with Mr Wilson’s initial explanation of his whereabouts on Labour Weekend,³¹⁸ it was unfair to characterise Mr Hoggart’s comments as deliberate attempts to construct an alibi.

[413] As for the motorbike purchase, while Mr Hoggart clearly did lie (initially) about the source of the funds used for the purchase, the explanation that he was afraid to admit to the police that he sold contraband while in prison is plausible. Whether it was a lie and then whether it was a lie told in consciousness of guilt was for the jury to assess in light of the whole of the evidence. If the jury concluded Mr Hoggart’s explanation for the source of the funds was untrue, as I have said they were entitled to do,³¹⁹ they could have considered this was a lie told to conceal the true source of the funds — the proceeds of the Red Fox robbery.

[414] The dates given for the purchase of the motorbike are undeniably inconsistent. It was certainly open to the jury to consider not only that this was a deliberate lie but also one to try and cover up guilt, given that he falsely claimed the purchase was before the robbery. The jury would have had to assess this submission in light of the fact that Mr Hoggart would have known the date of purchase could be checked. But that was a matter for the jury, who could still have considered it was a lie told to conceal guilt.

³¹⁷ See above at [400].

³¹⁸ See above at [313].

³¹⁹ See above at [404].

(m) Statements (Mr Wilson)

[415] The Crown also relied on various statements made by Mr Wilson to Mr Dunbier and Mr Ross discussing possible robberies³²⁰ and allegedly hinting at his involvement in the Red Fox robbery and murder.³²¹

Evidence at trial: Mr Dunbier

[416] Mr Dunbier first gave a statement on Christmas Eve 1987 and then five more statements in January and February 1988. He was not facing any active police charges at that time. He signed a consolidated statement taking into account the earlier evidence in August 2017.

[417] Mr Dunbier had been released from Whanganui Prison on 25 November 1987 after serving a sentence of 18 months for burglary.³²² He met both Mr Wilson and Mr Hoggart in prison. He said that he and Mr Wilson “just kinda clicked”. They had discussed robbery in prison because they were both keen on robbery at the time. Mr Wilson told him that he “had another job lined up outside of Auckland somewhere”. Mr Dunbier said it was: “[p]robably a pub. ‘Cos pubs were popular then, big – big cashflow. And they were a bit easier than banks.” He also thought Mr Wilson had mentioned that he had a shotgun “lined up or he was getting one off a mate”.

[418] Mr Dunbier also said in evidence that he had gone to Napier to see Mr Wilson on about 18 January 1988, at the instigation of the police. He also visited Mr Wilson again shortly afterwards, once more at the instigation of the police. On that occasion, the police put him up in a motel with a recording device and gave him money (“Fish and Chip money mate”, in the words of Mr Dunbier) to cover expenses.³²³ Any conversations were mainly outside as Mr Wilson was “very paranoid about being

³²⁰ See above at [103(f)].

³²¹ The alleged hinted admissions were identified in opening as standing “separately to all the circumstantial evidence”: see above n 84.

³²² He was incarcerated on 16 March 1987. Mr Dunbier overlapped at Whanganui Prison with Mr Hoggart from 27 February to 17 August 1987, and with Mr Wilson from 16 March to 7 October 1987.

³²³ The only benefit given to Mr Dunbier “for his assistance was receipt of his expenses, which were minimal”: SC admissibility judgment, above n 62, at [151] per Glazebrook, O’Regan and Ellen France JJ.

recorded and stuff like that”. The police also could not hear the conversations in the motel because the TV was up too loud.

[419] Mr Dunbier said that, during the first visit, while they were walking on the beach, he had asked Mr Wilson whether he had done the Red Fox robbery. Mr Wilson replied something like, “[n]o of course I didn’t mate” but “with a bit of a sort of a wink and a nod”. When asked whether the subject had come up again, Mr Dunbier said that he had asked again and said that Mr Wilson had said, “[y]eah, ‘course I did,’ or something along those lines, I’d have to look at the statement to know the exact phrase”. After being referred to his 2017 consolidated statement, Mr Dunbier clarified Mr Wilson had in fact said, “[i]t’s hard to say”, with a “bit of a cheeky look on his face ... Like I said, wink and a nod.” Later in cross-examination, Mr Dunbier denied that he had said Mr Wilson admitted involvement, reverting to his initial statement that Mr Wilson had denied the offending, saying, “[w]ell of course I didn’t, mate,’ with a bit of a cheeky grin.” Mr Dunbier said that, during that conversation, Mr Wilson had commented that “one [shotgun] and a bat was enough” in response to Mr Dunbier’s suggesting “[t]wo shotties would’ve been better.” Mr Wilson had also said that the Red Fox was “a good [robbery]” because “they’d got away with it”. The Crown argued in closing that, in saying this, Mr Wilson “went beyond ... hints ... and towards expressly admitting the offending”.

[420] Mr Dunbier said further that Mr Wilson was not happy with Mr Ross for telling the police about the shotgun Mr Wilson had got from Mr Ross. Mr Wilson told Mr Dunbier that he had dumped the shotgun in the ocean. When asked whether it was a sawn-off shotgun or not, he replied that Mr Wilson had just said it was a “shottie”: “Anyone tells me that I just automatically assume it’s sawn-off, ‘cos that was the fashion.”

[421] Mr Dunbier also said that he remembered going for a drive up to Hamilton after Labour Weekend with Mr Wilson to see Mr Hoggart. When asked how the conversation in the car between him and Mr Wilson went, Mr Dunbier said: “It was

just the usual thing, ya know, talking about crime, talking about lifestyle.” When asked if there were any more chats about jobs or not, he said:

Ah yeah, like we saw a few places on the way up: “Oh, ya know, we could knock that off. We could knock this off.” Just talking about the opportunities on the way, he was definitely, at the time, keen to do a bit of, do some work.

[422] When asked about one place in particular that they drove past and the conversation about it, the following exchange occurred:

Q. Now tell me about one place in particular that you drove past, I think through Taupō, on the way, do you remember –

A. Was that the one by one of the trees?

Q. Yes.

A. Yeah, ‘cos it was a good location, good exits.

Q. And what sort of place was it?

A. It was a pub.

Q. How did the conversation go about that pub then?

A. Oh, we just noticed it and, you know: “Wow, look at that. Easy one to do.” We got into a bit of technical detail, you know, how would you leave, how would you come, how would you go and how would you do it.

Q. And as far as you remember what did [Mr Wilson] say about that sort of stuff – how would you come and go, what would you use?

A. Oh he was keen on using bikes to gap it and then switch.

Q. Switch to what?

A. Car.

Q. What about what would you use?

A. Oh, a coupla shotties. It was the tools of the day.

[423] In cross-examination, Mr Dunbier agreed that he had gone to the police in Auckland and told them he might be helpful to them. He further agreed that “this wiring up and sending you to Napier was the plan” and that he knew exactly the type of thing the police wanted him to report back.³²⁴ He also accepted that he “had an

³²⁴ See also below at [439].

issue” with Mr Wilson and Mr Hoggart, although counsel did not ask for any detail about this.

Evidence at trial: Mr Ross

[424] Mr Ross had also been taken to the police station in Napier for questioning on 22 January 1988 and made a statement around that time. He made another statement in July 2017, which was largely a reflection of what he had said in the original statement. He made a further statement in 2018 covering some matters that he had not mentioned before, as I discuss below.³²⁵

[425] In evidence Mr Ross confirmed that he had taken part in the aggravated robbery of the Birkenhead Licensing Trust in 1983 with Mr Wilson and a Mr McCullough. He had been sentenced to five and a half years in prison. For a large part of that he had been in Auckland Prison (Pāremoremo) with Mr Wilson.

[426] Mr Ross said that, soon after he and Mr Wilson had started their sentences for the Birkenhead robbery, Mr Wilson had said that he was “looking at doing another [armed robbery] when he got out”. He made these comments on a few occasions but “it was more like bravo sort of talking in jail”.

[427] When asked if the topic of the Red Fox Tavern came up while he was in prison, Mr Ross said:

There were several occasions where [the Red Fox] was spoken about in prison, not only by Mr Wilson but by most of the other inmates that was talking about their careers as crime. But [Mr Wilson] always used to seem to be there when it was spoken about ...

[428] When asked what sorts of things Mr Wilson would say about the Red Fox Tavern, Mr Ross said that Mr Wilson would say that it would be a “good one to look at”. When asked what Mr Wilson meant by that, Mr Ross said: “Probably because of its set-up, where it was situated and the access roads in and out of it.” Mr Wilson’s alleged interest in robbing the Red Fox Tavern whilst in prison was first mentioned in Mr Ross’ 2018 statement.

³²⁵ The new 2018 matters are discussed below at [427]–[428], [430] and [433].

[429] Soon after leaving prison on 7 October 1987, Mr Wilson visited Mr Ross in Hastings. He said that he was going to live in Napier at the winery with Mr and Ms A. Mr Ross caught up with Mr Wilson from time to time. He remembered a discussion about how he (Mr Ross) was getting by for money. When asked if Mr Wilson said what he was doing for money he said: “He didn’t really say what he was doing, he just said he had some stuff planned, he had a earn up north”. Mr Ross explained that an “earn” is “a job. It’s something illegal.” He did not ask Mr Wilson what that earn was.

[430] Sometime after the visit where Mr Wilson told Mr Ross that he had to get rid of papers and plates,³²⁶ Mr Wilson asked Mr Ross and Mr Ross’ wife’s father-in-law or stepfather to give him an alibi for Labour Weekend, but Mr Ross refused. Mr Wilson was not happy about his refusal. Mr Ross’ wife, who Mr Ross said was “in the vicinity”, could not recall such a conversation taking place. Again, Mr Wilson allegedly asking for an alibi was first mentioned in 2018.

[431] On another occasion around the same time, when both Mr Ross and Mr Wilson were visiting Mr Ross’ wife in hospital, Mr Wilson “said that a guy from the Red Fox got his guts blown out”. When asked about the way he said it or his tone, Mr Ross answered: “It was sort of one that, I don’t know, just like he didn’t, there was no caring factor in it.” When pressed, Mr Ross said that he sounded “[j]ust factual” and then “[w]ell it was more sarcastic really. He just –how would I put it, yeah, he just came out.” And then, when asked if Mr Wilson was troubled by it, he answered: “No, he wasn’t troubled by it, no.”

[432] I note here that this exchange was first mentioned in Mr Ross’ second police statement (24 July 1988). In that statement he said Mr Wilson had said: “That was a bummer, that guy getting his guts blown out.” Mr Ross said, without prevaricating as he had in evidence, that Mr Wilson “made these comments in what I considered to be a sarcastic manner”.

³²⁶ See above at [288].

[433] Mr Ross acknowledged that there were some things, including the discussion about the Red Fox Tavern in prison and Mr Wilson asking for an alibi, that he had not told the police in 1988. When asked why, he said:

At that time I was, as I said before, I was trying to distance myself from the whole thing, both me and my friends and family. It's always been in the back of my mind, it wasn't, it didn't come out until our last statement [in 2018] I think it was that I told them about the alibi, um, and our discussions of what happened in prison.

[434] As discussed above, Mr Ross also described giving Mr Wilson a sawn-off shotgun and Mr Wilson later telling him he had disposed of it after the robbery.³²⁷

Summing up

[435] The trial Judge gave the jury directions regarding incentivised witnesses, who he described as “witnesses who make a statement to Police or give evidence in Court in the hope or expectation of some benefit”. This includes prisoners, he said, although they need not be in prison at the time. The Judge highlighted that the defence had characterised Mr Ross and Mr Dunbier as incentivised witnesses and advised the jury to “treat their evidence with caution”. Woolford J directed the jury to consider the following factors:

- (a) Did the witnesses think they would obtain any advantages if they gave evidence against Mr Wilson?
- (b) Was there any animosity between the witnesses and Mr Wilson such that the evidence given by the witnesses could be seen as payback? In respect of Mr Dunbier, it seemed there was some animosity relating to his girlfriend.
- (c) Were the statements made by Mr Wilson genuine admissions and not just “big noting”?
- (d) The conversations were not recorded in writing and were not disclosed until some time after they were said to have been made. This was to be

³²⁷ See above at [285]–[288].

taken into account when assessing the accuracy and reliability of the evidence.

[436] As noted above, in his directions on delay, the Judge told the jury to exercise caution when considering whether to accept and, if so, what weight to give to, Mr Ross' additional evidence in his 2018 statement.³²⁸

Court of Appeal decision

[437] Mr Wilson on appeal challenged the admissibility of Mr Dunbier's evidence on the basis that he was an incentivised witness who lacked credibility and that he should not have been allowed to say that Mr Wilson's denials were made with a "wink and a nod".³²⁹ The Court of Appeal rejected that challenge on the basis that it was bound by this Court's pre-trial decision.³³⁰

[438] With regard to the additional material in Mr Ross' 2018 statement, the Court noted that Mr Ross had said for the first time in that statement that Mr Wilson had said in prison that the Red Fox "might be a good one to look at". The Court said the 30-year delay in giving that evidence "provided fertile material" for the defence to submit he was an unreliable witness and had lied. The evidence itself, however, could not be said to have been affected by the passage of time.³³¹

Submissions on appeal: Mr Dunbier

[439] It is submitted by Mr Wilson that the probative value of Mr Dunbier's evidence was very low, given the "deeply concerning" evidence relating to Mr Dunbier's credibility that had come to light after this Court's decision as a result of subpoenas issued to non-parties to obtain past information. Mr Wilson highlights the following

³²⁸ Above at [118].

³²⁹ CA judgment, above n 58, at [210].

³³⁰ At [211]. The Court of Appeal was correct that it was bound by this Court's prior decision, but not if new evidence had emerged or the decision was otherwise shown to be incorrect in the context of the trial as it played out. The majority of this Court explicitly recognised that admissibility could be revisited in the High Court if further information arose in respect of Mr Goodall and Mr Richardson, and the position must be the same in respect of all the witnesses discussed: see SC admissibility judgment, above n 62, at [119] and [174] per Glazebrook, O'Regan and Ellen France JJ.

³³¹ CA judgment, above n 58, at [117].

information which — except where I indicate otherwise — Mr Dunbier accepted in cross-examination at trial:³³²

- (a) when he was aged 15, he was an inpatient at Oakley hospital on account of a severe personality disorder;
- (b) in 1983, the probation service described him as “irresponsible, selfish and manipulative”;
- (c) around February 1985, he was “rampantly” committing burglaries, including stealing a car from the Presbyterian Church in 1986 and burgling the YMCA to “get back at them” after he was removed;
- (d) he was a member of Black Power from 1985 to 1992;³³³
- (e) in March 1987, while he was in prison, he was described as “pleasant and cooperative” but someone who fabricates and embellishes — the information he gave being “often inconsistent with known facts”;
- (f) at the end of his 1987 prison sentence, he told a probation officer he needed to see a psychologist because of his personality problems, yet he failed to see the psychologist he was meant to see;
- (g) he was treated with antipsychotic medication whilst in prison;
- (h) characteristics of his personality disorder included manipulation, deceit and lies, meaning lying was “second nature” to him;³³⁴

³³² See also above at [423].

³³³ Mr Dunbier said he was actually involved with Mangu Kaha during that period, which he described as being “similar” to Black Power, “like they’re affiliated but it’s not the same thing”.

³³⁴ Although Mr Dunbier agreed he had the characteristics of a personality disorder, he later said: “every time I’d see a probation officer or get a new medication, they give me a new disease ... the thing was, I wasn’t really any of those, I was just angry”.

- (i) he went to Auckland in December 1987 looking unsuccessfully for work,³³⁵ was staying at the YMCA and decided to go to the police on Christmas Eve 1987 about the appellants because “they’d shat on me”;
- (j) a 1988 report observed he was a “game player and will act out convincingly any role”;³³⁶
- (k) in 1996, he told a medical assessor that he had been knocked out over 50 times;
- (l) he said the alleged conversation with Mr Wilson in prison occurred whilst cannabis was being smoked,³³⁷ and
- (m) he continued to prey on people, including those who attempted to help him, stealing from a friend in 1991 (something described by the sentencing judge as “particularly nasty”), and stealing from a woman in 2003 who gave him a roof over his head.

[440] The Crown submits that this Court had previously held that Mr Dunbier’s evidence was admissible.³³⁸ The Crown accepts that Mr Wilson’s hinted admissions (both to Mr Dunbier and to Mr Ross) were not sufficiently probative to be a strand on their own (unlike the statements showing Mr Wilson’s interest in robbery in general and the Red Fox in particular, which were sufficiently probative). It is submitted nevertheless that these were relevant as being supportive of the Crown case but not a key plank of it.

³³⁵ Mr Dunbier said he was not looking for work: “I was a gang member, that was my job.”

³³⁶ Mr Dunbier did not entirely agree with the description in cross-examination, saying it was “a bit limited”.

³³⁷ These admissions actually related to the conversation on the beach: see above at [419].

³³⁸ The Crown does not address the evidence set out above at [439] in its submissions but this is unsurprising given the Court refused to grant leave on this point and, in any event, the proposed ground of appeal related to the Crown’s failure to call Ms Green and Mr Richardson, not the reliability of Mr Dunbier’s evidence: SC leave judgment, above n 59, at [2], [5] and [8]; and see above at [96]–[98].

My assessment: Mr Dunbier

[441] The new evidence casts Mr Dunbier's credibility in a much poorer light, particularly the evidence of Mr Dunbier's disordered personality characteristics and his accepted penchant for lying. Most of the evidence referred to by Mr Wilson in his submissions on appeal and set out above at [439] was not before this Court in the pre-trial admissibility appeal, and it was therefore not raised nor considered in reaching the conclusion that Mr Dunbier's evidence was not unfairly prejudicial.

[442] This Court refused to grant leave on the ground that its pre-trial decision regarding incentivised witnesses was based upon erroneous facts, and I see no reason to revisit this refusal.³³⁹ The new evidence related to credibility was before the jury, who were given extensive directions about incentivised witnesses, including that Mr Dunbier seemed to harbour animosity towards Mr Wilson.³⁴⁰

[443] The jury were required to exercise caution in relying on Mr Dunbier's evidence in light of the direction and the evidence of animosity. The new evidence outlined above at [439] clearly strengthened this need for caution, especially in relation to anything amenable to embellishment or interpretation by Mr Dunbier, such as any look or facial expression Mr Wilson might have had. Although Mr Dunbier was only paid his expenses, he would still have had an incentive to provide the police with useful evidence.³⁴¹ The weight the jury put on Mr Dunbier's evidence and what parts of his evidence they accepted or rejected was, however, for them. In making this assessment, they would have had to take into account the similarities between some aspects of Mr Dunbier's evidence with that of Mr Ross.³⁴²

³³⁹ SC leave judgment, above n 59, at [2], [5] and [8]. See also above n 330.

³⁴⁰ See above at [435]. The jury were aware that Mr Wilson and Mr Hoggart were not considered suspects until Mr Dunbier went to the police about them: see above at [86]. In the SC admissibility judgment, above n 62, this Court noted that the appellants and Mr Dunbier had fallen out in late 1987 and outlined the reason and that Mr Dunbier had approached the police only after that falling out: at [141] per Glazebrook, O'Regan and Ellen France JJ. This Court said this aspect of the evidence was not so problematic as to warrant its exclusion. "It can be addressed by judicial direction and consideration of such a motive is within the realm of decisions that juries regularly make": at [151] per Glazebrook, O'Regan and Ellen France JJ.

³⁴¹ See above at [423].

³⁴² See below at [448].

Submissions on appeal: Mr Ross

[444] Mr Wilson submits that Mr Ross was a deeply unreliable witness. Mr Ross first mentioned Mr Wilson making comments about the Red Fox in group settings whilst in prison in his 2018 statement. The prosecution's attempt to explain the delay by saying that, at the time of his 1988 statements, Mr Ross was being treated as a suspect and was careful about what he said so as not to attract too much attention to himself, was not true. In 1988, Mr Ross blamed Mr Wilson at every opportunity and described a number of incriminating things he allegedly said or did. Most notably, he told the police Mr Wilson had sourced the shotgun (which Mr Wilson submits was a lie). Mr Ross' claim that, after Labour Weekend, Mr Wilson visited him and asked for an alibi was also first mentioned in his 2018 statement. Despite Mr Ross claiming his then-wife was present during the conversation, she heard no such thing.³⁴³

[445] In Mr Wilson's submission, Mr Ross' evidence about Mr Wilson saying to him "shame about that guy getting his guts blown out" in a sarcastic tone amounted to nothing more than Mr Wilson commenting about the widely publicised shooting. Mr Ross' assessment of Mr Wilson's tone was subjective.

[446] The Crown highlights that this Court in its pre-trial admissibility decision held Mr Ross' statement to be admissible. The Crown further stresses that the comment made about the Red Fox offending being a "shame" was not prompted by Mr Ross.

My assessment: Mr Ross

[447] Nothing has come to light since this Court's pre-trial admissibility decision that casts doubt upon the conclusion that Mr Ross' evidence was admissible. As the Court of Appeal noted, the differences between Mr Ross' 2018 statement and his earlier statements provided grounds for the defence to submit that he was an unreliable witness and had fabricated his evidence.³⁴⁴

[448] It was up to the jury to assess whether or not to accept Mr Ross' evidence taking into account the Judge's directions on potentially incentivised witnesses,

³⁴³ He in fact only claimed that she was "in the vicinity".

³⁴⁴ See above at [438].

including Mr Ross.³⁴⁵ This includes the matters first disclosed in 2018. The jury were entitled to accept Mr Ross' explanation for the delayed disclosure. I note that the evidence about Mr Wilson's interest in an "earn up north" and Mr Ross' statements regarding Mr Wilson disposing of the shotgun were corroborated by Mr Dunbier's evidence of Mr Wilson saying in prison that he "had another job lined up outside of Auckland somewhere" and of Mr Wilson telling him about disposing of the shotgun. The comments on the shotgun were also confirmed by Mr A's evidence.³⁴⁶

[449] I do note that there was a particular need for the jury to exercise caution in relying on the supposed hinted admissions to Mr Ross by Mr Wilson, given that Mr Ross struggled to describe in evidence how Mr Wilson sounded or his tone of voice when discussing the Red Fox murder, and given Mr Wilson was referring to matters in the public domain. It was only when pressed that Mr Ross said Mr Wilson sounded sarcastic, and he immediately followed this comment by saying Mr Wilson "just came out" with the statement. As noted above, Mr Ross did not prevaricate in this manner in his 1988 police statement when describing Mr Wilson's tone when making these comments.³⁴⁷ The jury were nevertheless entitled to accept the Crown's submission that this was a hinted admission.

(n) Statements (Mr Hoggart)

[450] Another piece of evidence relied on by the Crown in its case against Mr Hoggart — although not as one of its 10 key evidential strands — was a conversation between Mr Hoggart and an associate of his, Mr Talbett-Lovelace, in 2017. The intercepted audio of that conversation was played at trial, and the transcript was distributed to the jury.

[451] The conversation occurred while the two men were in a vehicle driving past the Red Fox. The key statement referred to by the Crown was Mr Hoggart's statement, in response to Mr Talbett-Lovelace saying he had never been into the Red Fox: "[n]either have I, neither have I, neither have I, well that's what I tell you anyway (laughs)".

³⁴⁵ See above at [118] and [435].

³⁴⁶ See above at [292].

³⁴⁷ Above at [432].

[452] The Crown highlighted Mr Talbett-Lovelace's evidence in closing. And, in opening, the Crown had said both appellants had "at least hinted at their involvement to close associates".

[453] Mr Hoggart's counsel in closing said the Crown's submission that this was a hint of involvement was simply not true. Mr Hoggart had consistently denied involvement in the offending for over 30 years.

My assessment

[454] The Talbett-Lovelace conversation is not mentioned in any of the parties' submissions before this Court. Nor does it appear it was raised in the Court of Appeal because it is not mentioned in that Court's judgment. This is perhaps because the statement was equivocal, and the meaning to be attributed to it was a question for the jury in light of the whole context of the case. It could not be, and was not, relied on as standalone evidence of guilt. It nevertheless could have legitimately been taken into account by the jury as part of the evidence against Mr Hoggart.

Impact of the inadmissible evidence

[455] I have concluded that the following evidence was inadmissible:

- (a) Mrs Pyle's evidence of a car scoping out the Red Fox on the Friday of Labour Weekend;³⁴⁸
- (b) Ms Rautangata and Ms Harris' evidence of the appellants' arrival at their home in the early hours of Sunday morning;³⁴⁹
- (c) the glove evidence;³⁵⁰ and
- (d) the grassy shoe print evidence.³⁵¹

³⁴⁸ See above at [243]–[244].

³⁴⁹ See above at [274]–[276].

³⁵⁰ See above at [345]–[346].

³⁵¹ See above at [367]–[373].

[456] I have also concluded that the Crown was not entitled to allege that the appellants were lying about their whereabouts over Labour Weekend in the following respects: Mr Wilson in respect of his trip to Tauranga; and Mr Hoggart in respect of his statement that he was at the pub on the night of the robbery.³⁵² These “lies” relied on by the Crown at trial were therefore not legitimately part of the Crown case, and the jury should not have been asked to consider them as lies to conceal guilt.

[457] It is true that the issues with the evidence set out above at [455] and discussed in detail above could have led the jury to disregard it or to give it minimal weight.³⁵³ The jury may also not have relied on the lies set out at [456].³⁵⁴ There nevertheless remains a risk that the jury did rely on the inadmissible evidence and on the lies, and this means there is a “real risk that the outcome of the trial was affected”.³⁵⁵ There were relatively few strands of evidence directly related to the Red Fox even with the inadmissible evidence. Without the inadmissible evidence, there is a risk that the jury considered the evidence directly linking the appellants to the Red Fox was indispensable to its conclusion and, without it, they would not have reached guilty verdicts.³⁵⁶

[458] This constitutes a miscarriage of justice in terms of s 232(2)(c) of the Criminal Procedure Act. This would mean the appeals should be allowed and a retrial ordered, assuming that, on the remainder of the admissible evidence against the appellants, a reasonable jury could have found the appellants guilty beyond reasonable doubt.³⁵⁷ I discuss this next, first considering Mr Wilson and then Mr Hoggart.

³⁵² See above at [312]–[315] and [412].

³⁵³ See above at [237]–[244], [267]–[276], [345]–[346] and [367]–[373].

³⁵⁴ For the reasons set out above at [312]–[315] and [412].

³⁵⁵ Criminal Procedure Act, s 232(4)(a).

³⁵⁶ I do not agree with the majority that questions of admissibility “fall away” as irrelevant to the overarching unreasonable verdicts issue: see above at [17]. Had this evidence been admissible, the jury could have considered it as part of the total evidence suggesting the appellants’ guilt, with the weight able to be afforded to it being a matter for them.

³⁵⁷ This is likewise subject to my conclusion on whether the Crown had excluded the reasonable possibility of Mr Hamilton being one of the Red Fox offenders.

Would guilty verdicts be unreasonable on the remaining evidence?

Case against Mr Wilson

[459] The remaining evidence against Mr Wilson, once the inadmissible evidence is excluded, consists of:

- (a) Mr Wilson talking about an “earn up north” and a planned robbery outside of Auckland;³⁵⁸
- (b) evidence he had manifested an interest in the Red Fox Tavern in prison, for instance by saying to Mr Ross it would be a “good one to look at”;³⁵⁹
- (c) Mr Wilson acquiring a shotgun consistent with the one used in the robbery five days before it occurred and disposing of it afterwards;³⁶⁰
- (d) that the appellants were known associates;³⁶¹
- (e) that both Mr Wilson and Mr Hoggart were in the Waikato region over Labour Weekend 1987 within a reasonable driving distance of the Red Fox and were together at various points over that weekend;³⁶²
- (f) assuming a jury considered that his account of hitchhiking and sleeping by the side of the road was untrue,³⁶³ the whereabouts of Mr Wilson at the time of the robbery are unknown;³⁶⁴

³⁵⁸ See above at [441]–[443] and [447]–[448].

³⁵⁹ See above at [427]–[428].

³⁶⁰ The jury would have been entitled to conclude that Mr Wilson’s purported reasons for the acquisition (to shoot birds or to protect his motorbike) were not credible: see above at [301]–[302].

³⁶¹ See above at [199].

³⁶² Mr Hoggart picked Mr Wilson up from Taupō on the Thursday. The two of them then stayed with Ms Rautangata on the Thursday and perhaps also the Friday, and they visited Ms Northcott in Cambridge on (likely) the Friday: see above at [201], [207], [211], [213] and [217].

³⁶³ See above at [325]–[328].

³⁶⁴ See above at [249]. The evidence as to Mr Wilson’s appearance on the Sunday morning in Napier is relevant to this assessment: see above at [280].

- (g) the description of the offenders and in particular that the height differential between the offenders matched Mr Wilson and Mr Hoggart's respective heights;³⁶⁵
- (h) the evidence that Mr Wilson was in need of funds to purchase a motorbike to become a full member of the Filthy Few and that he had funds after the robbery;³⁶⁶
- (i) Mr Ross' statement that Mr Wilson asked for an alibi for Labour Weekend;³⁶⁷
- (j) the alleged hinted confessions by Mr Wilson to Mr Dunbier and Mr Ross;³⁶⁸
- (k) the alleged lies about the reason for the trip to the Waikato and about the timing and length of the visit Ms Northcott in Cambridge, the hitchhiking account and the reasons for the acquisition and disposal of the shotgun;³⁶⁹ and
- (l) the Birkenhead armed robbery propensity evidence.³⁷⁰

[460] In assessing whether a verdict of guilty would be reasonable, it is important to bear in mind that the constitutional role of the jury is to decide what evidence they will accept, the weight to give to each strand of evidence they do accept and the inferences they draw from that evidence. In a circumstantial case, this must necessarily involve determining, in light of the comparative weight given to each strand of evidence, whether the totality of the evidence proves the case against the accused beyond reasonable doubt.

³⁶⁵ See above at [189]–[190].

³⁶⁶ See above at [385] and [395]–[397].

³⁶⁷ See above at [430], [433] and [447]–[448].

³⁶⁸ See above at [441]–[443] and [449].

³⁶⁹ See above at [303], [319]–[322], [329] and [332]–[335].

³⁷⁰ See above at [378]–[380].

[461] The majority, in describing their approach to the appellate review function in unreasonable verdict cases, say that an appellate court must not circumvent its obligation to assess the whole of the evidence by resorting to the proposition that the weight to be given to individual pieces of evidence is a matter for the jury. The majority say it is for the appellate court to assess the whole of the evidence to the standard of beyond reasonable doubt.³⁷¹

[462] I agree that an appellate court must, where necessary, review the whole of the evidence to assess the reasonableness of any verdict.³⁷² But the aim is not for the court to decide for itself whether the case has been proved beyond reasonable doubt. The question is whether, paying due regard to the constitutional role of the jury, the jury ought to have had a reasonable doubt.³⁷³ If there is any legitimate path to a finding of guilt beyond reasonable doubt based on evidence the jury were entitled to accept and inferences they were entitled to draw, then a verdict of guilty would not be unreasonable.³⁷⁴ Contrary to the view of the majority, I consider there was such a path, as I now explain.³⁷⁵

[463] A reasonable jury would have been entitled to accept the evidence of Mr Ross that Mr Wilson was planning an “earn up north” after his release from prison and that this was the same as the “job lined up outside of Auckland” he had described to Mr Dunbier.³⁷⁶ They could have accepted the evidence of his need for funds and that his motive for the “earn” was to acquire a motorbike to become a full Filthy Few member.³⁷⁷ They could have legitimately drawn the inference that he acquired a shotgun to use in that “earn” and thus that the earn was an armed robbery, especially in light of the propensity evidence.³⁷⁸ In this regard, the jury could have placed weight

³⁷¹ See above at [19]–[20].

³⁷² On the condition that the appellant has outlined in detail in what respect or respects the verdict is alleged to be unreasonable.

³⁷³ As the majority recognise: see above at [19].

³⁷⁴ I note in this regard that, as the Court of Appeal said in *Munro* and this Court approved in *Owen*, reasonable minds can differ as to matters of fact and that an appellate court should not lightly interfere with the constitutional role of the jury as the finder of fact: see principles (d) and (e) above at [133]. The issue is whether the verdict was unreasonable, and assessments based on other possible tests, such as the English “lurking doubt” test, should not be undertaken: see above n 126.

³⁷⁵ A reasonable jury would not *necessarily* have reached a guilty verdict. But that is not the question on appeal. Rather, the task is whether a reasonable jury *could* have reached a guilty verdict.

³⁷⁶ See above at [417], [429] and [448].

³⁷⁷ See above at [385] and [395]–[397].

³⁷⁸ See above at [301] and [378]–[380].

on Mr Dunbier’s comment that Mr Wilson mentioned he had a shotgun “lined up” for the robbery, “or he was getting one off a mate”.³⁷⁹

[464] In my view, a reasonable jury would also have been entitled to conclude that the “earn” was the robbery of the Red Fox Tavern and that Mr Wilson was the gunman involved. The evidence that a reasonable jury would have been entitled to consider contributed to that conclusion includes:

- (a) That Mr Wilson had shown an interest in the Red Fox while in prison, for instance by commenting to Mr Ross that the Red Fox would be a “good one to look at”.³⁸⁰
- (b) That the Red Fox was north of Whanganui Prison where Mr Wilson had been incarcerated and thus was consistent with being the target of the “earn up north”.
- (c) Mr Dunbier’s comment that the job outside of Auckland was “[p]robably a pub” because pubs were “easier than banks” and had “big cashflow”.³⁸¹
- (d) That Mr Wilson travelled to the Waikato and was in the company of his associate, Mr Hoggart, in the vicinity of the Red Fox over the weekend of the robbery.³⁸²
- (e) Mr Wilson’s acquisition of a shotgun some five days before the robbery.³⁸³

³⁷⁹ See above at [417].

³⁸⁰ See above at [427]–[428].

³⁸¹ See above at [417]. The jury in this regard could have placed some weight on the evidence of Mr Wilson’s general interest in robbing public houses, as demonstrated by the conversation with Mr Dunbier while driving past a particular public house after Labour Weekend: see above at [421]–[422].

³⁸² See above n 362.

³⁸³ See above n 360.

- (f) That the shotgun he acquired and subsequently disposed of was consistent with the shotgun used in the robbery,³⁸⁴ and that the pellets that killed Mr Bush were not inconsistent with the shotgun pellets that had been test-fired at the winery.³⁸⁵
- (g) That the jury would have been entitled to conclude that his alternative explanation for his presence in the Waikato (to reconcile with Ms Northcott) was a ruse or that it was not the sole reason for the trip (the primary reason being to rob the Red Fox).³⁸⁶
- (h) That the height and build of the gunman matched Mr Wilson's height and build, and in particular the height differential of the two offenders matched the height differential of the appellants.³⁸⁷
- (i) That Mr Wilson's whereabouts at the time of the robbery are unknown,³⁸⁸ assuming the jury concluded the hitchhiking story was untrue, as they would have been entitled to do.³⁸⁹
- (j) That shortly after the Red Fox robbery, Mr Wilson requested an alibi from Mr Ross.³⁹⁰

³⁸⁴ Although the fact the shotgun had been a sawn-off was not in and of itself unique: see above at [420].

³⁸⁵ See above at [296]. The fact the pellets used for test-firing were not inconsistent with the pellets recovered from the crime scene is not probative on its own but nevertheless is relevant when viewed in combination with the other circumstantial evidence.

³⁸⁶ See above at [319]–[322].

³⁸⁷ The jury would have been entitled to accept Ms Prisk's evidence of this: see above at [189].

³⁸⁸ See above at [249]. Of course, it was not for Mr Wilson and Mr Hoggart to prove where they were at the relevant time: it was for the Crown to prove beyond reasonable doubt that, during the period in which their whereabouts are unaccounted for, they committed the Red Fox aggravated robbery and murder.

³⁸⁹ See above at [325]–[329]. Before the jury would have been entitled to conclude that Mr Wilson's hitchhiking alibi was not true, the jury would have had to consider Mr Wilson's unstructured and itinerant lifestyle at the time, as well as the forensic disadvantage of the loss of opportunity given the lengthy delay to find and question the people who allegedly gave him lifts: see above at [326]. When considering Mr Wilson's various explanations given in his police interview, the jury also would have had to bear in mind the issues with that interview — both as to not being told the purpose of the interview, and the incomplete record given the process of writing up notes later from bullet points and the time gaps left unaccounted for in the written record: see above at [206].

³⁹⁰ Regarding the alleged alibi request, the jury would have had to take into account that this evidence was given for the first time in 2018 and Mr Ross' explanation for the delay, but would have been entitled to accept it: see above at [447]–[448].

- (k) That the jury would have been entitled to infer that Mr Wilson had some unexplained funds after the robbery and to reject his alternative explanations for the source of those funds.³⁹¹

- (l) That the jury would also have been entitled to accept that the hinted admissions to Mr Dunbier and Mr Ross were consistent with the evidence of guilt set out above.³⁹² In this respect, they could legitimately have accepted that the statement to Mr Dunbier that the Red Fox was “a good [robbery]” because “they’d got away with it” was a hinted admission.³⁹³

[465] In my view, a reasonable jury could legitimately have put particular weight on the evidence as to the height differential between the two offenders being the same as the height differential between Mr Wilson and Mr Hoggart. They would have been entitled to consider it an extraordinary and unbelievable coincidence that there were two different and unknown offenders with the same height differential as the appellants at a time when the appellants just happened to have the bad luck to be together and in the vicinity of the Red Fox over Labour Weekend (with a dubious excuse for Mr Wilson’s presence in the Waikato and where their actual whereabouts at the time of the robbery are unknown). The jury would have been entitled to consider that the fact that Mr Wilson (and indeed Mr Hoggart) unexpectedly came into funds after the robbery, and that Mr Wilson had acquired a shotgun the week before (presumably for a different “earn up north” despite the interest he had shown in the Red Fox while in prison), likewise contributed to the implausibility of this coincidence.

[466] In light of the above, and taking into account the lies told and the hinted admissions, a reasonable jury would also have been entitled to consider that the evidence of the timing of the shotgun acquisition and disposal, the consistency of Mr Wilson’s gun and the gun used in the Red Fox robbery, and the lies about its

³⁹¹ See above at [397]. The jury could also have accepted the Crown’s submission that Mr Wilson had used the Red Fox funds to acquire vehicles: above at [398].

³⁹² See above at [441]–[443] and [449].

³⁹³ See above at [419].

disposal and acquisition constituted the proverbial “smoking gun” linking Mr Wilson directly to the Red Fox robbery.³⁹⁴

[467] Differing from the majority, I consider that a reasonable jury could have concluded not only that the appellants had the classic trinity of opportunity, means and motive to commit the Red Fox robbery but that, taken in combination, there was sufficient evidence tying them to the Red Fox.³⁹⁵ In agreement with the Court of Appeal, the case against Mr Wilson was not weak,³⁹⁶ and a reasonable jury would have been entitled to consider the case against him on the remaining evidence proved beyond reasonable doubt, subject to the issue of delay and the evidence against Mr Hamilton.

Case against Mr Hoggart

[468] The remaining evidence against Mr Hoggart was:

- (a) That he was a known associate of Mr Wilson.³⁹⁷
- (b) That Mr Wilson and Mr Hoggart were together at various points over Labour Weekend and within around an hour’s drive of the Red Fox.³⁹⁸
- (c) That the description of the height and build of the offenders, and in particular the height differential, matches Mr Wilson and Mr Hoggart.³⁹⁹
- (d) That Mr Hoggart’s whereabouts are unknown at the time of the robbery.⁴⁰⁰

³⁹⁴ See above at [301]–[303] and [333]–[334]. A “smoking gun” refers to “a piece of incontrovertible incriminating evidence”: JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (2nd ed, Oxford University Press, Oxford, 1989) vol 15 at 805.

³⁹⁵ See above at [56]–[57].

³⁹⁶ CA judgment, above n 58, at [121(b)].

³⁹⁷ See above at [199].

³⁹⁸ See above n 362.

³⁹⁹ See above at [189]–[190].

⁴⁰⁰ See above at [249].

- (e) Mr Hoggart's substitution of the faulty Vauxhall for the more reliable Mitsubishi.⁴⁰¹
- (f) That Mr Hoggart had a similar motive for wanting money as Mr Wilson (to acquire a motorbike and become a full member of the Filthy Few).⁴⁰²
- (g) That Mr Hoggart had money after the robbery.⁴⁰³
- (h) The alleged lie about the timing of the motorbike purchase and about the source of funds for that purchase.⁴⁰⁴
- (i) The possible hinted admission recorded in the conversation with Mr Talbett-Lovelace.⁴⁰⁵

[469] I accept Mr Hoggart's submission that there was much less evidence tying Mr Hoggart to the Red Fox than there was for Mr Wilson. Nevertheless, if the jury came to the view that the case against Mr Wilson was proved beyond reasonable doubt, they would then only be required to be satisfied beyond reasonable doubt that Mr Hoggart was the second offender. A reasonable jury could have come to that conclusion. His height and build matched that of the second offender, and importantly, the height differential between the offenders matched that between Mr Wilson and Mr Hoggart.⁴⁰⁶ They were known associates who had spent time together over Labour Weekend, and the whereabouts of Mr Hoggart were unknown at the time of the robbery.⁴⁰⁷ Mr Hoggart had substituted his faulty Vauxhall for the more reliable Mitsubishi on the day of the robbery.⁴⁰⁸ The jury would have been entitled to conclude that Mr Hoggart had a similar motive to Mr Wilson and that the money he had after the robbery was explained by his participation in that robbery.⁴⁰⁹

⁴⁰¹ See above at [249].

⁴⁰² See above at [385].

⁴⁰³ See above at [404].

⁴⁰⁴ See above at [413]–[414].

⁴⁰⁵ See above at [454].

⁴⁰⁶ See above at [189]–[190].

⁴⁰⁷ See above at [199] and [249].

⁴⁰⁸ See above at [249].

⁴⁰⁹ See above at [385], [404] and [413].

[470] The jury could therefore legitimately have concluded that Mr Hoggart lied about how he funded his motorbike purchase subsequent to Labour Weekend.⁴¹⁰ They could also have concluded that he lied (as against being mistaken) about the timing of that purchase. These are, in my view, very significant lies and the jury could well have concluded that they showed a clear consciousness of guilt.⁴¹¹ They could also have considered that his conversation with Mr Talbett-Lovelace was an admission.⁴¹²

[471] Overall, on the remaining evidence, a reasonable jury could have considered Mr Hoggart was also guilty beyond reasonable doubt, subject to the issue of delay and the evidence against Mr Hamilton.

Delay

[472] As I noted above, the initial investigation and a review in 1999 had both concluded there was insufficient evidence against Mr Wilson and Mr Hoggart for charges to be laid. It was only after a further review that, in 2017, charges were brought.⁴¹³ DSS Hayward explained that the decision to charge the appellants was made “following further investigation *and some new evidence being obtained*”.⁴¹⁴

[473] DSS Hayward did not specify what this new evidence was. It seems likely it is a reference to several of the witnesses who were the subject of this Court’s pre-trial admissibility decision but who did not end up giving evidence. As this Court explained in that judgment, following media publicity about the Red Fox murder in July 2017, several people contacted the police with information about the robbery.⁴¹⁵ This included Mr Goodall, Mr Moran and Mr Richardson.⁴¹⁶ They were to give evidence, respectively, that Mr Wilson had hinted to involvement in the offending, that he had before 1987 suggested doing an armed robbery of the Red Fox, and that he had

⁴¹⁰ See above at [404] and [413].

⁴¹¹ See above at [414].

⁴¹² See above at [450]–[454].

⁴¹³ See above at [86]–[89].

⁴¹⁴ Emphasis added. As Mr Ross’s additional statement was made in 2018 after the decision to charge the appellants, this cannot be a reference to his evidence.

⁴¹⁵ SC admissibility judgment, above n 62, at [5] per Glazebrook, O’Regan and Ellen France JJ.

⁴¹⁶ At [105], [154] and [168] per Glazebrook, O’Regan and Ellen France JJ.

outright confessed to his involvement.⁴¹⁷ As noted above, none of these proposed witnesses in fact gave evidence at trial.⁴¹⁸

[474] The Crown says that the decision to charge related to the realisation that the Birkenhead robbery could be used as propensity evidence.⁴¹⁹ I accept that a single instance of moderately similar offending can be of some probative value, but I also accept Mr Wilson’s submission that propensity evidence cannot be the central plank of a case. As noted above, there are both particular and general factors limiting the significance of the Crown’s points of similarity between the Birkenhead robbery and the present case.⁴²⁰

[475] That the reasons given for the decision to charge after such a long period are not necessarily convincing does not in fact matter if there was sufficient evidence to charge the appellants, and I have concluded above that there was. The real issue is whether the delay has an effect on the reasonableness of the verdicts. Mr Wilson submits that it did. He submits in particular that, because of the 30-year delay, the appellants were seriously disadvantaged in presenting their defence as opportunities to investigate the circumstances around the disputed conversations and to call contradictory evidence were lost.

[476] As noted above, the relevance of delay is reflected in s 122(2)(e) of the Evidence Act, which requires the judge to consider whether a reliability warning should be given in respect of “evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously”.⁴²¹ The Judge in this case did give such a warning.⁴²²

[477] The challenge that the trial was unfair because of delay was dismissed by the Court of Appeal⁴²³ and was not reprised before us. But whether a trial should be deemed unfair because of delay is a separate question to the issue of how evidence

⁴¹⁷ At [110], [155] and [168] per Glazebrook, O’Regan and Ellen France JJ.

⁴¹⁸ Above at [95]–[96] and [98].

⁴¹⁹ See above at [91].

⁴²⁰ See above at [378]–[379].

⁴²¹ See above at [151]–[152].

⁴²² See above at [118] and [262]–[263].

⁴²³ CA judgment, above n 58, at [121].

should be assessed in light of delay. This is something that the jury would have had to bear in mind when assessing the evidence, including considering any forensic disadvantages resulting from the delay.⁴²⁴

[478] The lengthy delay in this case exacerbated many evidential deficiencies given witnesses had died or faced memory issues. In terms of forensic disadvantage, I do not agree, for example, with the assessment of the trial Judge and the Court of Appeal that Mr Wilson's vague description of the drivers who gave him lifts when allegedly hitchhiking back to Napier made it difficult for the police to undertake meaningful inquiries as to their identity.⁴²⁵ Had the police advertised at the time that they were looking for such persons, it is not inconceivable that drivers would have come forward. This opportunity is now lost.

[479] Nevertheless, out of all the circumstantial evidence against the appellants, the prejudicial effects of the delay on the defence were most apparent in respect of the evidence I have held to be inadmissible. Further, the warnings given by the Judge adequately countered any residual prejudice arising from the delay.⁴²⁶ Delay therefore does not affect my previous conclusion that a reasonable jury could have reached guilty verdicts on the remaining admissible evidence.

Evidence against Mr Hamilton

[480] I have held that, considering only the admissible evidence against Mr Wilson and Mr Hoggart, a jury could reasonably have concluded that the appellants were guilty. But there was also another credible suspect, Mr Hamilton.

[481] The similarities between the case against the appellants and that against Mr Hamilton can be summarised as follows:

- (a) The evidence given by the bar staff was consistent with Mr Hamilton being the gunman (similar height) and a reasonable jury could accept Ms Prisk's evidence that the offenders were Māori or Polynesian by

⁴²⁴ See above at [153].

⁴²⁵ See above n 93; and see CA judgment, above n 58, at [118].

⁴²⁶ See above at [118] and [262]–[263].

voice (Mr Hamilton was Māori).⁴²⁷ On the other hand, the height differential between the two offenders matched the appellants and, given the difficulties with voice identification in the circumstances, the jury would have been entitled to conclude that Ms Prisk's evidence did not exclude them as the offenders (they are not Māori).⁴²⁸

- (b) Assuming Mr Hamilton was one of the offenders, a possible co-offender was not identified.⁴²⁹ By contrast, Mr Wilson and Mr Hoggart were known associates and had been together and within comfortable travelling distance of the Red Fox around the time of the offending.⁴³⁰ There is also the evidence of the substitution of the faulty Vauxhall for the Mitsubishi by Mr Hoggart.⁴³¹
- (c) Both Mr Hamilton and the appellants had a possible motive to commit the offending — the former to finance his drug habit or a heroin importation plan,⁴³² the latter to finance motorcycle purchases and secure full membership of the Filthy Few.⁴³³
- (d) Mr Hamilton was impecunious before and after the date of the offending.⁴³⁴ Whereas the appellants were able to purchase motorbikes shortly after the offending despite being seemingly short on cash beforehand.⁴³⁵ A reasonable jury could have rejected the appellants' alternative explanations as to how they acquired the funds to purchase the motorbikes.⁴³⁶
- (e) Mr Hamilton had made detailed plans to rob the Red Fox and had made what could have been a scoping visit to the Red Fox some two and a

⁴²⁷ See below at [542]–[546].

⁴²⁸ See above at [189]–[192].

⁴²⁹ See below at [547]–[548].

⁴³⁰ See above at [199] and [217].

⁴³¹ See above at [249].

⁴³² See below at [552].

⁴³³ See above at [385].

⁴³⁴ See below at [553]–[554].

⁴³⁵ See above at [385].

⁴³⁶ See above at [395] and [404].

half weeks before the robbery.⁴³⁷ Mr Wilson had spoken of plans to do an “earn up north” when he was released from prison. He had shown a general interest in the Red Fox whilst in prison, for instance by saying it was a “good one to have a look at”.⁴³⁸

- (f) Mr Wilson bought a shotgun consistent with that used in the robbery five days before the robbery and disposed of it after the robbery.⁴³⁹ Mr Hamilton’s plans included the use of a shotgun and shooting anyone present who resisted,⁴⁴⁰ although there was no evidence he had acquired such a gun before Labour Weekend.
- (g) Mr Hamilton confessed to involvement in the Red Fox offending to numerous associates.⁴⁴¹ By contrast, the evidence of all the Crown witnesses who were supposed to testify that Mr Wilson had explicitly admitted involvement in the Red Fox robbery was excluded before or during trial, leaving only Mr Ross and Mr Dunbier’s evidence of hinted admissions.⁴⁴² In respect of Mr Hoggart, there is the alleged hinted admission to Mr Talbett-Lovelace.⁴⁴³
- (h) Mr Hamilton attempted to set up a false alibi.⁴⁴⁴ Mr Wilson also attempted to set up a false alibi, assuming Mr Ross’ evidence to that effect is accepted.⁴⁴⁵
- (i) There were issues for a jury to resolve with Mr Hamilton’s final alibi and whether he would have had sufficient time to commit the robbery.⁴⁴⁶ The whereabouts of the appellants at the time of the robbery

⁴³⁷ See below at [564].

⁴³⁸ See above at [427]–[428] and [447]–[448].

⁴³⁹ See above at [301].

⁴⁴⁰ See below at [558]–[560].

⁴⁴¹ See below at [569].

⁴⁴² See above at [94]–[99], [443] and [449].

⁴⁴³ See above at [454].

⁴⁴⁴ See below at [575].

⁴⁴⁵ See above at [430].

⁴⁴⁶ See below at [582]–[585].

are unknown (assuming Mr Wilson's hitchhiking account is rejected).⁴⁴⁷

- (j) Considered in isolation, a threat allegedly made by Mr Hamilton regarding a Mr Hughes "narking" on him (assuming the jury accepted it was made) could be consistent either with guilt or innocence.⁴⁴⁸ The same applies to Mr Wilson's alleged lies about hitchhiking and the reason for the shotgun disposal, and Mr Hoggart's initial lie about the source of the funds to purchase his motorbike (again assuming the jury were satisfied they were lies). In respect of all of these alleged lies, a jury would have been entitled to draw the inference of guilt only if, in light of all the evidence, the alternative inference (innocence) was capable of displacement by reasoning, rather than speculation.⁴⁴⁹ Regarding Mr Hoggart's alleged lie about the date of his motorbike purchase, the jury would have to decide whether it was a deliberate lie (and one to cover up guilt) or whether he was merely mistaken, bearing in mind that Mr Hoggart would have known the date of purchase could be checked.⁴⁵⁰
- (k) Mr Hamilton had a history of similar offending, including the aggravated robbery of the Manurewa South Post Office (although he was only the getaway driver for this robbery). As noted above, the Red Fox robbery bears similarity to the Birkenhead propensity evidence with regard to Mr Wilson.⁴⁵¹

[482] Because of the similarities between the evidence against the appellants and that against Mr Hamilton, a verdict of guilty against the appellants could not have been reasonable unless the Crown had excluded the possible involvement of Mr Hamilton

⁴⁴⁷ See above at [249] and [325]–[328].

⁴⁴⁸ See below at [555]–[556].

⁴⁴⁹ See above at [136]–[137], [329], [333]–[334] and [413].

⁴⁵⁰ See above at [414].

⁴⁵¹ See below at [541] and above at [376] and [378]–[379].

beyond reasonable doubt.⁴⁵² I turn next to that question, after considering whether Mr Hartshorne's evidence of an alleged confession by Mr Hamilton should have been admitted.

Should the Hartshorne evidence have been admitted at trial?

Mr Hartshorne's evidence

[483] Mr Hartshorne was Mr Hamilton's neighbour and the relative by marriage of one of his associates, Mr Wawatai. In October and November 1987, Mr Hartshorne gave statements to police disclosing that he and Mr Hamilton had visited the Red Fox less than a month before the robbery and that he had lent Mr Hamilton yellow rope similar to that used by the offenders.⁴⁵³ In 2021, Mr Hartshorne and his wife spoke to a private investigator engaged by defence counsel. They told the investigator then that, after the Red Fox robbery, Mr Hamilton came to their house looking for Mr Wawatai. Something came up about the Red Fox Tavern and Mr Hamilton said: "Well the stupid bastard shouldn't have moved." The defence sought to rely on this statement as a confession from Mr Hamilton.

Trial Judge's ruling

[484] The trial Judge ruled the hearsay statement inadmissible on the basis that he was not satisfied that the circumstances relating to the statement provided reasonable assurance that the statement was reliable in terms of s 18(1)(a) of the Evidence Act.⁴⁵⁴

[485] The Judge said the statement was equivocal: it was common knowledge that the victim had got to his feet, so Mr Hamilton's statement could have originated from a newspaper report.⁴⁵⁵ Moreover, Mr Hartshorne and his wife did not tell police of this conversation when giving statements in 1987. "Their account of an equivocal

⁴⁵² If there was a reasonable possibility that Mr Hamilton was the gunman, then there must have been a reasonable doubt that Mr Wilson was. There was no suggestion that either of the appellants were associated with Mr Hamilton and could have been the second offender, assuming Mr Hamilton was the gunman.

⁴⁵³ These aspects of Mr Hartshorne's evidence were before the jury at trial.

⁴⁵⁴ *R v W* HC Auckland CRI-2017-092-10119, 18 March 2021 (Bench Note No 7 of Woolford J) at [3].

⁴⁵⁵ One report at the time indicated Mr Bush was shot at close range after he stood up. Another said he rose to his feet and was immediately shot in the left side at chest height: at [4].

comment 33 years later does not give reasonable assurance that the statement is reliable.” The Judge said it had “very low probative value – if any”.⁴⁵⁶

Court of Appeal decision

[486] The trial Judge’s exclusion of this evidence was challenged in the case on appeal. The Court of Appeal found it had been rightly excluded for three reasons:⁴⁵⁷

- (a) The statement was consistent with being a statement of opinion by Mr Hamilton about the widely reported fact Mr Bush had defied the intruders’ instructions to remain still.
- (b) The statement therefore had no probative value.
- (c) There could be no reasonable assurance the statement was reliable.

[487] Even if the statement ought to have been admitted, the Court considered that no prejudice was caused to Mr Wilson by its exclusion. This was because there was “ample other evidence” before the jury which Mr Wilson could rely upon to argue that Mr Hamilton was responsible for the Red Fox aggravated robbery and murder.⁴⁵⁸

Submissions on appeal

Mr Wilson’s submissions⁴⁵⁹

[488] Mr Wilson submits that the statement should have been admitted. The statement met the appropriately low threshold for relevance under s 7.⁴⁶⁰ He points to the admission of similar evidence in support of the Crown case: the trial Judge considered Mr Dunbier’s evidence that Mr Wilson had said to him that “one [shotgun] and a bat was enough” was of “some probative weight”.⁴⁶¹ But that statement, too, was a comment upon publicly known facts.

⁴⁵⁶ At [5].

⁴⁵⁷ CA judgment, above n 58, at [227].

⁴⁵⁸ At [228].

⁴⁵⁹ Mr Hoggart’s submissions adopt Mr Wilson’s submissions on this issue.

⁴⁶⁰ See above at [142].

⁴⁶¹ *R v W* [2018] NZHC 2457 (Woolford J); aff’d generally SC admissibility judgment, above n 62, at [148]–[151] per Glazebrook, O’Regan and Ellen France JJ.

[489] In terms of s 18,⁴⁶² Mr Wilson submits the circumstances provided reasonable assurance the statement was reliable: the statement aligned with the other confessions made by Mr Hamilton in evidence; Mr Hamilton made the statement freely and unprompted; and Mr Hartshorne was a reliable narrator. He was not a criminal, did not know the appellants and had no incentive to be anything but truthful. The 33-year delay in first reporting the alleged confession could not be determinative, as again similarly delayed evidence had been admitted in support of the Crown case: the trial Judge allowed Mr Ross to give evidence regarding a statement allegedly made by Mr Wilson in 1988 which Mr Ross raised for the first time in 2018. Mr Wilson points out that this Court upheld the admissibility of that evidence on appeal, noting Mr Ross could be cross-examined about why he did not mention the statement to police earlier.⁴⁶³ Mr Wilson also submits (invoking ss 6 and 25(e) of the New Zealand Bill of Rights Act) that the hearsay rules should be relaxed where — as here — evidence is necessary to support a defendant’s right to present an effective defence.⁴⁶⁴

[490] Finally, Mr Wilson says the Court of Appeal was wrong to conclude that no prejudice was caused by the statement’s exclusion. A court may not exclude relevant and probative exculpatory evidence because the defendant has “plenty of the same”. Its exclusion was a breach of the appellants’ fundamental right to present an effective defence,⁴⁶⁵ as it deprived them of the opportunity to call the only living witness without a criminal history or connection to anyone in the case who could say that Mr Hamilton had confessed.

Crown submissions

[491] The Crown submits the statement was rightly excluded. In its submission, the statement had no real relevance or probative value, as it was a comment by Mr Hamilton upon publicly known facts. Moreover, its admission would have risked unfairly prejudicing the proceeding, as the jury were likely to place unfair weight

⁴⁶² See above at [148]–[149].

⁴⁶³ SC admissibility judgment, above n 62, at [166]–[167] per Glazebrook, O’Regan and Ellen France JJ and [341] per Winkelmann CJ and Williams J.

⁴⁶⁴ Citing overseas caselaw including *R v Finta* [1994] 1 SCR 701; *Chambers v Mississippi* 410 US 284 (1973); and *Bannon v The Queen* (1995) 185 CLR 1.

⁴⁶⁵ New Zealand Bill of Rights Act 1990, s 25(e).

upon it. The Judge would have been justified in excluding it on this basis without even considering the test in s 18.

[492] In s 18 terms, the Crown submits that the Courts below were correct that the circumstances relating to the statement could not provide reasonable assurance that it was reliable. Mr Hartshorne was describing a statement made some 33 years earlier and, unlike Mr Ross, he gave no reason for having failed to report the statement to police at the time he provided them with other information implicating Mr Hamilton as a possible offender (or at any time since).

My assessment

[493] In terms of s 7 of the Evidence Act, the Hartshorne evidence is relevant as having the tendency to prove a fact in issue, noting that this is not an exacting test.⁴⁶⁶ While Mr Hamilton may merely have been commenting on publicly known facts, the comment is at least capable of pointing to his involvement in the offending, with Mr Hamilton expressing a view on the robbery in a manner that an offender might. Whether it was in fact a confession and the weight to be put on it would be matters for the jury to evaluate in light of all of the evidence.⁴⁶⁷

[494] Mr Hartshorne's delay in reporting the discussion does not make this evidence so unreliable that it should have been excluded under s 7. It will be a rare case where evidence is excluded under that section on the basis of a lack of reliability.⁴⁶⁸ Further, I accept Mr Wilson's submission that Mr Hartshorne was not a criminal, did not know the appellants and had no incentive to be anything but truthful. This contrasts with the other reported confessions by Mr Hamilton to cellmates, the reliability of which the Crown strongly challenged in closing and in respect of which the Judge gave reliability warnings in summing up.⁴⁶⁹

⁴⁶⁶ Evidence Act, s 7(3); and *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

⁴⁶⁷ *Wi*, above n 466, at [8]: "The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency."

⁴⁶⁸ SC admissibility judgment, above n 62, at [41] per Glazebrook, O'Regan and Ellen France JJ; and see above at [144].

⁴⁶⁹ See below at [516]–[519] and [566]–[567].

[495] In terms of the definition of “statement” in the Evidence Act, the caselaw clarifies that a meaning implied within a statement only qualifies as a hearsay “statement”, as defined in s 4(1), if that meaning was intended (such that it qualifies as an “assertion”).⁴⁷⁰ The argument for the appellants is that Mr Hamilton intended to imply that he killed (or was involved in the killing of) the victim of the Red Fox Tavern robbery when he said, “[w]ell the stupid bastard shouldn’t have moved.” This is an available inference from the words used. On that basis the hearsay rules in ss 16–18 of the Evidence Act apply.⁴⁷¹

[496] Mr Hamilton’s death means he is unavailable as a witness for the purposes of s 18(1)(b).⁴⁷² The dispute centres on whether the circumstances relating to the statement provide reasonable assurance that the statement is reliable for the purposes of s 18(1)(a).

[497] The trial Judge found that Mr Hartshorne’s “account of an equivocal comment 33 years later does not give reasonable assurance that the statement is reliable”.⁴⁷³ The Judge here was concentrating not on the statement (except in the use of the word “equivocal”) but on the credibility and reliability of Mr Hartshorne. That the reporter of the statement may not be reliable is not relevant to the test under s 18.⁴⁷⁴

The focus of s 18(1)(a) is the reliability of the *hearsay statement*, not the reliability of the *evidence* through which that hearsay statement is offered in evidence. Hence the assessment of reliability should not be concerned with potential problems with the testimony of a witness who offers evidence that some person (other than a witness) made a hearsay statement. The reliability of a witness’s testimony is not part of the inquiry under s 18 ...

[498] Mr Hartshorne’s delay in reporting the comment could, and no doubt would, have been a subject of cross-examination, meaning the jury would have been able to assess Mr Hartshorne’s explanation and his credibility and reliability. As pointed out by Mr Wilson, the delay in reporting could not in any event be determinative. Similarly delayed evidence had been admitted in support of the Crown case: Mr Ross

⁴⁷⁰ “Statement” is defined in the Act as a “spoken or written assertion by a person of any matter”, and an “assertion” requires an intention to assert: *R v Holtham* [2008] 2 NZLR 758 (HC) at [44]. See also *Preston v R* [2016] NZCA 568, [2017] 2 NZLR 358 at [43].

⁴⁷¹ See above at [146]–[149].

⁴⁷² Evidence Act, ss 16(2)(a) and 18(1)(b)(i).

⁴⁷³ Bench Note No 7 of Woolford J, above n 454, at [5].

⁴⁷⁴ *Optican and McDonald*, above n 240, at [EV18.02] (footnotes omitted, emphasis in original).

was allowed to give evidence regarding discussions about the Red Fox with Mr Wilson while in prison and about Mr Wilson asking for an alibi, both of which Mr Ross only raised for the first time in 2018.⁴⁷⁵

[499] The trial Judge's focus should have been on the reliability of Mr Hamilton's statement. Assuming it was a confession (an available inference), then it is an inculpatory statement against his interests and made freely by him. This means that there is a reasonable assurance of reliability.

[500] The other factor the trial Judge placed some emphasis on was that this was an equivocal statement, only referring to facts in the public domain.⁴⁷⁶ This has nothing to do with threshold reliability under s 18. Had the statement been admitted, it would have been up to the jury to assess whether or not it was a confession and, if so, whether or not it was a true confession or whether Mr Hamilton was simply "big noting", as the Crown asserted. As Mr Wilson points out, a similar statement allegedly made to Mr Dunbier by Mr Wilson that "one [shotgun] and a bat was enough" was held by the trial Judge to be of "some probative weight".⁴⁷⁷

[501] The Crown submits that the jury would be likely to place undue weight on the statement such that it would have an unfairly prejudicial effect on the proceeding and should have been excluded under s 8.

[502] I do not accept this submission. It is hard to see why a jury would place undue weight on the alleged confession, given the other (more explicit) evidence of confessions made by Mr Hamilton. In any event, this assertion is difficult to reconcile with the Crown's assertion that it was not a confession. Further, s 8(2) requires that, in determining whether the probative value of evidence is outweighed by the risk that 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. The statement to Mr Hartshorne was directly relevant to one of the central planks of the defence case. This must tip the balance against exclusion.

⁴⁷⁵ See above at [102], [428] and [430].

⁴⁷⁶ Bench Note No 7 of Woolford J, above n 454, at [4].

⁴⁷⁷ See above at [488].

[503] I conclude that the trial Judge was wrong to have excluded the evidence. Given my conclusion on the next issue, however, I do not need to come to a definitive view on whether the failure to admit this evidence could have made a difference to the jury's evaluation of whether there was a reasonable possibility that Mr Hamilton was one of the offenders.

Were the jury entitled to think that there was no reasonable possibility that Mr Hamilton was one of the offenders?

[504] I turn now to whether the Crown had excluded the possibility of Mr Hamilton being one of the offenders beyond reasonable doubt. I first briefly summarise the evidence at trial, the closing addresses on this issue, and the Judge's summing up and question trail. I then outline the submissions on appeal, before summarising the strands of evidence against Mr Hamilton in greater detail, as well as Mr Hamilton's changing alibis. Finally, I analyse the evidence and reach a conclusion on whether a reasonable jury would have been entitled to think there was no reasonable possibility Mr Hamilton was one of the offenders.

Evidence at trial

[505] I discuss the evidence related to Mr Hamilton in detail below. Here I just note that relevant Crown witnesses included Mr Griffiths, his then-girlfriend Ms Ellis and Mr Poa (all giving evidence related to a Valiant car seen at the Red Fox).⁴⁷⁸ Defence witnesses were Mr Hartshorne (with evidence about the rope),⁴⁷⁹ Mr W⁴⁸⁰ and Mr McKinnel (a private investigator).⁴⁸¹

[506] By agreement, and as part of the Crown case, DSS Hayward provided the bulk of the evidence about Mr Hamilton, narrating how Mr Hamilton came to be a suspect in relation to the Red Fox and the police investigation into him. His full statement was provided to the jury as an exhibit and was read out to them by DSS Hayward. It included summaries of statements about Mr Hamilton's alleged alibi and confessions allegedly made by him.

⁴⁷⁸ See below at [532].

⁴⁷⁹ See below at [527].

⁴⁸⁰ See below at [537].

⁴⁸¹ See below at [580].

[507] DSS Hayward's statement said that inquiries into Mr Hamilton and his associates, including Mr Atkinson, were "one of the principal lines of enquiry undertaken by the original investigation team". DSS Hayward said that Mr Hamilton had ultimately been eliminated by the investigation team in late 1987. Mr Hamilton's name had nevertheless "continued to feature in nominations and informant information in the years since". Some of these were detailed by DSS Hayward and dismissed as unreliable.

[508] I comment here that DSS Hayward made it plain in his statement and in his evidence that he considered that Mr Hamilton had been rightly excluded as a suspect. Although the Judge warned the jury not to take into account DSS Hayward's opinion that it was appropriate to lay charges against the appellants, nor the fact that no charges had been laid earlier, they were not warned against taking into account DSS Hayward's opinion on Mr Hamilton generally.

[509] DSS Hayward should not have been expressing an opinion on this point, as opposed to merely relaying the evidence the police had relied on and leaving the jury to come to its own conclusion.⁴⁸² I discuss the effect of this inadmissible opinion evidence below.

Closing addresses at trial

[510] After reviewing the evidence pertaining to Mr Hamilton, the Crown put the question for the jury as follows:

The question is, on the evidence you have heard, are you sure the defendants were the offenders? ... The body of evidence linking [Mr Hamilton] to the Red Fox offending is a collection of red herrings and unreliable cellmate evidence which just doesn't stand to reason when you consider his alibi. The defence theory about Mr Hamilton can be put to one side, much like the other matters that have been raised.

[511] This language of putting the defence theory "to one side" was used throughout the Crown closing (three times in relation to Mr Hamilton and numerous more times

⁴⁸² This Court similarly found that the evidence of another police officer included material of an argumentative nature which caused prejudice for the defendant in *Kuru*, above n 126, at [59]–[61] per Winkelmann CJ, Ellen France and Williams J and [195] per Glazebrook J.

in relation to other aspects of the defence case the Crown said should be put to one side). For example, counsel said:

... I'll address Lester Hamilton and the theory that he was one of the true offenders. The Crown says this too can be readily disproved and that once you've carefully considered all the evidence, you'll be able to put that theory to one side.

Similarly, Crown counsel said:

When you look at this evidence on its own, and in context, the Crown says the idea that Mr Hamilton was one of the offenders just doesn't stand up to scrutiny and can be safely disregarded as you consider the ultimate issue of whether Mr Wilson and Mr Hoggart were the Red Fox Tavern offenders.

[512] I comment that the jury were not entitled to "disregard" or "put to one side" the evidence relating to Mr Hamilton's involvement unless they were sure that there was no reasonable possibility that Mr Hamilton was one of the Red Fox offenders. It may be that is what the Crown meant, but the language used was imprecise and potentially misleading.

[513] In his closing address, counsel for Mr Wilson first emphasised to the jury that the case against Mr Hamilton was far superior to the case against Mr Wilson and Mr Hoggart. Mr Stevenson, also counsel for Mr Wilson at trial, then framed the jury's task (correctly) as follows:

... the question thankfully, Mr Foreman and members of the jury, is ... what's the state of this evidence, is it of such high quality that we're sure, no reasonable doubts in our mind? Yep, that's what the prosecution wants you to say, yeah. And in doing so, of course, they have to prove to you that Lester Hamilton didn't do it, that's part of it isn't it, they have to blow out the reasonable possibility Hamilton did it, they have to blow that out of the water. They have to disprove the reasonable possibility he did it. And you know what I say about this, much more than a reasonable possibility Lester Hamilton did it. Again, the task for you is more simple, has the prosecution eliminated the reasonable possibility Hamilton did it? No they haven't.

Summing up

[514] The Judge first mentioned Mr Hamilton halfway through his summing up. This was in the context of his summary of the Crown's case and its rebuttal of the defence proposition that the true offender was Mr Hamilton. The Judge drew attention

to DSS Hayward's evidence and the Crown's submission that it provided a comprehensive basis for the jury to reject the alternative case against Mr Hamilton based on his alibi and consequent lack of opportunity to have committed the offending, and also to reject any admissions he allegedly made to incentivised witnesses.

[515] Moving on, then, to the defence case, the Judge said that defence counsel was correct to say that the defence did not have to prove that Mr Hamilton was one of the offenders. He said that the defence was:

... right in telling you that before you can even consider the position of Mr Wilson and Mr Hoggart, you have to rule out the reasonable possibility that Mr Hamilton was one of the offenders. In other words, you have to be sure it was not Mr Hamilton.

[516] The Judge then canvassed defence counsel's submissions about Mr Hamilton, including the alleged confessions made by him. Defence counsel had gone into some detail about Mr Hamilton's criminal history, including his commission of the Manurewa South Post Office robbery, which bore some similarity to the Red Fox robbery. The Judge noted that counsel had emphasised Mr Hamilton's plan for the robbery, in particular the time — 11.30 pm on a Sunday night — as well as the selection of a drop-off and pick-up point, and "the expressed intention to shoot anyone who played the hero". Counsel had also emphasised Mr Hamilton's visit to the Red Fox recently before the date of the robbery. The Judge reiterated counsel's submission that Mr Hamilton's final alibi was falsely manufactured by him and Mr Duffy, who had claimed to be watching American football at the time of the offending when, although initially scheduled, it had not screened that night. Finally, the Judge reiterated counsel's submission that Mr Hamilton had also admitted to the offending multiple times over the years, including to Mr W, who, counsel had submitted, had nothing to gain by giving evidence of the alleged confession.

[517] The Judge returned to the issue of Mr Hamilton's alleged confessions when giving directions in the final part of his summing up. The Judge at this stage repeated directions he had given before DSS Hayward gave evidence as to how the jury may use the statements Mr Hamilton had allegedly made claiming he was involved in the Red Fox robbery and murder. The Judge emphasised that the ultimate question was whether the reported statements by Mr Hamilton caused the jury to have a reasonable

doubt that Mr Wilson and Mr Hoggart were the two offenders. The jury were first to consider whether Mr Hamilton made the reported statements. The Judge said the jury may have “sufficient concerns about the circumstances” relating to those statements that they could not consider he had in fact made them, in which case the statements could not be used as evidence Mr Hamilton was one of the offenders.

[518] Second, if the jury accepted Mr Hamilton had made the statements, they were to consider whether the statements were reliable, or whether Mr Hamilton was merely “big noting”, or falsely bragging about his involvement to improve his reputation in prison. If the jury concluded that Mr Hamilton was not one of the offenders, the Judge said they were not to “automatically jump to the conclusion that” it was Mr Wilson and Mr Hoggart. Conversely, if the jury thought it reasonably possible that Mr Hamilton was one of the offenders, that should cause the jury to have reasonable doubt that Mr Wilson and Mr Hoggart were the offenders. The Judge suggested the jury might have such reasonable doubt if they thought it possible Mr Hamilton was one of the offenders because of his planning, his attempt to construct a false alibi and the statements he had made to associates, including Mr W.

[519] These directions adequately addressed the alleged confessions but failed to mention the other evidence against Mr Hamilton. Although that evidence had been canvassed in the discussion of the defence case, the Judge ought to have included a direction that, even discounting the alleged confessions, the jury could still have concluded, on the basis of the other evidence, that there was a reasonable possibility Mr Hamilton was one of the offenders.

Question trail

[520] It would have been best, given the importance of the Hamilton issue, for there to have been a specific and preliminary question in the question trail directing the jury to answer whether the Crown had excluded Mr Hamilton to the requisite standard and to acquit the appellants if they were not sure.

[521] The trial Judge had, however, made it very clear in his summing up what the task of the jury was and had also repeated that direction in answer to a jury question.⁴⁸³ He said that he had suggested to the jury in his summing up that a logical way to proceed with their deliberations was to look at Mr Hamilton first and that they should only consider the position of Mr Wilson and Mr Hoggart if they were sure that Mr Hamilton was not one of the offenders. This was around half an hour before the jury returned their verdict and so this direction was fresh in their minds.

*Submissions on appeal*⁴⁸⁴

[522] Mr Wilson submits that there was compelling evidence that Mr Hamilton was the true offender. In his submission, the “compounding improbabilities”⁴⁸⁵ generated by the evidence of Mr Hamilton’s likely involvement ought to have left the jury with a reasonable doubt.

[523] The Crown submits that the evidence against Mr Hamilton did not create a reasonable doubt that Mr Wilson and Mr Hoggart were the offenders. Indeed, the Crown submits that the evidence conclusively eliminated Mr Hamilton as a suspect.

[524] I note that the Crown accepted before us that the jury had to exclude as a reasonable possibility that Mr Hamilton was one of the offenders. It therefore did not challenge the Judge’s direction in this regard. Given the amount of evidence suggesting Mr Hamilton was one of the offenders and, as I discuss above, the similarities of that evidence and the evidence against the appellants, I agree that the Judge’s direction was necessary in this case. Nevertheless, in the normal run of cases, the existence of other suspects would go into the assessment of reasonable doubt, and it would not usually be necessary for the Crown to exclude any other possible suspect beyond reasonable doubt.

⁴⁸³ The jury had asked for a copy of the summing up. Instead, after checking with the jury that they wanted clarification on the law and the charges, it was agreed by the parties that the Judge would read the relevant portions of the summing up to them.

⁴⁸⁴ Mr Hoggart adopts Mr Wilson’s submissions on this issue.

⁴⁸⁵ Mr Wilson takes this phrase from *Pell v The Queen* [2020] HCA 12, (2020) 268 CLR 123 at [119].

My approach

[525] I first assess each strand of evidence relating to the case that Mr Hamilton was one of the Red Fox offenders and then assess whether the jury were entitled to be satisfied that the Crown had disproved Mr Hamilton's involvement to the requisite standard on the basis of the totality of the evidence against him.⁴⁸⁶ As the trial Judge instructed, if there was a reasonable possibility of Mr Hamilton being one of the robbers, then Mr Wilson and Mr Hoggart should have been acquitted.

Strands of evidence relating to Mr Hamilton

[526] The strands of evidence relating to Mr Hamilton were:

- (a) his access to equipment similar to that used in the Red Fox offending;⁴⁸⁷
- (b) Mr Hamilton's offer to plead guilty;⁴⁸⁸
- (c) evidence of a Valiant seen outside the Red Fox the night of the robbery;⁴⁸⁹
- (d) Mr Hamilton's history of similar offending;⁴⁹⁰
- (e) the identification evidence;⁴⁹¹
- (f) the absence of a likely co-offender;⁴⁹²
- (g) motive;⁴⁹³
- (h) Mr Hamilton's finances;⁴⁹⁴

⁴⁸⁶ I of course do not know how the jury assessed these strands, but I consider the evidence below in terms of what a reasonable jury could have concluded or would have been likely to conclude.

⁴⁸⁷ See below at [527]–[528].

⁴⁸⁸ See below at [529]–[530].

⁴⁸⁹ See below at [531]–[535].

⁴⁹⁰ See below at [536]–[541].

⁴⁹¹ See below at [542]–[546].

⁴⁹² See below at [547]–[548].

⁴⁹³ See below at [549]–[552].

⁴⁹⁴ See below at [553]–[554].

- (i) an alleged threat made by Mr Hamilton in respect of Mr Hughes for having “narked” on him for the Red Fox offending;⁴⁹⁵
- (j) evidence Mr Hamilton undertook detailed planning in relation to a robbery of the Red Fox;⁴⁹⁶
- (k) confessions allegedly made by Mr Hamilton to nine informants;⁴⁹⁷
- (l) Mr Hamilton’s changing alibis;⁴⁹⁸ and
- (m) his final alibi.⁴⁹⁹

(a) Access to equipment

[527] Mr Hartshorne gave evidence that, in mid-to-late 1987, he provided Mr Wawatai with brand new yellow rope to help tow Mr Hamilton’s car. Yellow rope had been used at the Red Fox to tie up the offenders. The agreed facts record that a large number of nominations identifying the three-strand yellow rope were received from the public in the weeks that followed the robbery, and that police established the rope was not distinctive and was in wide circulation. A reasonable jury would likely have concluded that this diminished, but did not necessarily eliminate altogether, the value of this evidence.

[528] Mr Stevenson suggested in closing that the gloves described by Ms Prisk, one of the bar staff, resembled cricket gloves which have knuckle padding as she described. There was also evidence that Mr Hamilton may have been involved in a burglary at a college where cricket gear was stolen. The stolen gloves had, however, been recovered. Given this, a reasonable jury would have concluded that it seems unlikely these were the gloves used.

⁴⁹⁵ See below at [555]–[556].

⁴⁹⁶ See below at [557]–[565].

⁴⁹⁷ See below at [566]–[569].

⁴⁹⁸ See below at [570]–[575].

⁴⁹⁹ See below at [576]–[585].

(b) Offer to plead

[529] On 3 and 4 December 1987, Mr Hamilton spoke to Detective Chief Inspector Rowe after he and Ms Webster had been arrested in relation to a heroin importation.⁵⁰⁰ On these occasions, Mr Hamilton offered to plead guilty to the Red Fox offending if that meant a better outcome for Ms Webster in relation to her role in the heroin importation.

[530] A reasonable jury would likely have considered that Mr Hamilton's offer to plead guilty did not weigh strongly either way, given that his offer to plead was conditional on Ms Webster receiving a better outcome and given he still maintained to the police that he was not responsible for the Red Fox murder.

(c) The Valiant

[531] There was evidence from Mr Bill Wilson, the Red Fox barman, that the night before the fatal robbery, Friday 23 October, he had seen a group of "jokers" in three cars. The men from the cars were "standing around drinking" and "making a bit of noise". One of the cars was a "darky blue sort of colour" Valiant. There were two men in it, who Mr Bill Wilson thought were Māori, that were "acting oddly". Mr Hamilton was Māori. On the other hand, DSS Hayward recounted Mr Duffy, a former prison associate of Mr Hamilton, saying that Mr Hamilton slept at his house on Friday 23 October, arriving intoxicated between 9 and 10 pm. It might be thought too that the attention-seeking behaviour described by Mr Bill Wilson is not that of someone scoping out a robbery.

[532] Three witnesses — Mr Poa, Mr Griffiths and his girlfriend, Ms Ellis — gave evidence about a Valiant seen outside the Red Fox on the night of the robbery. Mr Poa's evidence was that, after leaving a friend's address at about 11.40 pm and driving for five to 10 minutes, he passed the Red Fox and saw an iridescent blue Chrysler Valiant Hemi Pacer, about a 1974 or 1975 model, parked parallel to the Red Fox bottle store. Mr Griffiths in evidence described parking his grey 1972 Chrysler Valiant parallel to the bottle store sign at the Red Fox. Mr Griffiths made a

⁵⁰⁰ Discussed below at [550]–[552].

telephone call from the public telephone outside the Red Fox at 11.17 pm.⁵⁰¹ Ms Ellis' evidence largely confirmed Mr Griffiths'.

[533] A reasonable jury would likely have concluded that the vehicle seen by Mr Poa outside the Red Fox Tavern belonged to Mr Griffiths. The car seen by Mr Poa was parked in the same position as that of Mr Griffiths and the jury were entitled to accept the submission of the Crown that any differences in the descriptions of the cars were explicable by the fact Mr Poa was observing the car late at night, through a watery or foggy passenger window, and while travelling at speed. Further, the jury could also have accepted the submission that, while the timings did not align exactly, there were no reliable external time markers for Mr Poa's observation.⁵⁰²

[534] A reasonable jury could also have considered it significant that there was no evidence linking Mr Hamilton to a blue Valiant at the relevant time. While he was linked to a Valiant in 1980 (prior to his prison term), that Valiant was green. DSS Hayward's evidence was that, by mid-October 1987, Mr Hamilton was only using a grey Mini and that this was the car he was driving during the afternoon and evening of 24 October 1987. That is not to say, however, that Mr Hamilton could not have gained access to another car, noting Mr Hughes (an associate and former fellow prison inmate of Mr Hamilton) told police that Mr Hamilton's plan was to steal a car when they were planning the Red Fox.

[535] Mr Stevenson pointed out in closing that one confidential informant's statement referred to Mr Hamilton saying he had to get rid of a Valiant after the robbery. This nomination was seen by the police as one of the least reliable as it contained several details inconsistent with the facts of the robbery, particularly as to the timing of the shooting. As to the Valiant detail, DSS Hayward in his statement noted "it was well known that a grey Valiant was a vehicle of interest to the Bush homicide team", implying the informant could have got this detail from elsewhere.

⁵⁰¹ Ms Ellis stayed in the car.

⁵⁰² As the Crown stressed in closing, Mr Poa's assessment of the timing was based on his friend's assessment of when Mr Poa had left his house. The friend had passed away a few weeks before trial, and Mr Poa accepted the possibility that the timings were inaccurate.

(d) History of similar offending

[536] Mr Hamilton's criminal history included involvement in the robbery of the Manurewa South Post Office. He was the getaway driver. His co-offenders — his brother and his cousin — entered the Post Office armed with a shotgun and a bat and wearing overalls, balaclavas and gloves. In the course of the robbery, one co-offender discharged the shotgun, injuring a customer and the other co-offender.

[537] According to the evidence of Mr W (a former prison associate of Mr Hamilton), Mr Hamilton had been responsible for the planning of the Post Office robbery, including by sourcing the disguises and weapons. DSS Hayward, by contrast, said that a witness to the planning (giving no details as to who that was) told police that the co-offenders "were doing most of the talking" when the plan was hatched and that witness statements suggested that the co-offenders sourced the shotgun and the disguises. There was no detail given as to who those witnesses were or the source of their knowledge.⁵⁰³

[538] DSS Hayward also outlined Mr Hamilton's criminal history since his release from his six-year sentence for the Post Office robbery. This included burglaries to support his drug habit. The Crown argued at trial that this later offending was different from the "type of sophisticated armed robbery that played out at the Red Fox Tavern over Labour Weekend".

[539] Mr Wilson submits that this categorisation of the later offending as lacking sophistication is wrong. He points in particular to Mr Hamilton's burglary of the Wordsworth Chemist eight months before the Red Fox Tavern offending. This was a planned crime involving the carrying of tools to open the safe and a loaded firearm. A firearm was discharged as they made their escape. Mr Hamilton's co-offender was Mr Atkinson.

⁵⁰³ In cross-examination, counsel for Mr Wilson put it to one of Mr Hamilton's co-offenders that the planning for the Post Office robbery was mainly undertaken by him and the other co-offender (not Mr Hamilton), relying on statements made by associates of theirs at the time. The witness denied this.

[540] At trial Mr Stevenson similarly rejected the Crown’s suggestion that Mr Hamilton was a small-time crook incapable of a sophisticated crime. To the contrary, it was submitted that he was “a reasonably out of control criminal in Auckland ... operating right at the top level”. At the time of the Red Fox robbery, Mr Hamilton was involved in a sophisticated plan to import heroin into New Zealand, and the Post Office robbery had many similarities to the Red Fox Tavern offending.

[541] I accept the submission of the appellants that a reasonable jury could have determined that Mr Hamilton’s criminal history disclosed a relevant pattern of offending. As with the Birkenhead propensity evidence against Mr Wilson, the probative value of this evidence may be diminished by the fact that armed robberies were prevalent at the time and also because aspects of the robberies — such as the use of firearms and disguises — were not particularly unusual.⁵⁰⁴ The jury could have considered it further diminished by the fact that Mr Hamilton was only the getaway driver in the Post Office robbery. As the Crown submitted in closing, the jury would have been entitled to be at least unsure of the extent to which Mr Hamilton was involved in the planning, given the conflicting evidence in this regard and his less front-facing role in the robbery.

(e) Identification evidence

[542] In closing at trial, Mr Stevenson submitted that Ms Prisk had given identification evidence consistent with Mr Hamilton being the offender. Mr Hamilton fitted the description of the smaller offender, being about five feet and seven inches tall. Moreover, Ms Prisk had identified the offenders as Māori by voice. As I have noted, Mr Hamilton was Māori.

[543] It is true, Mr Wilson submits, that Mr Hamilton matches Ms Prisk’s physical description of the gunman as five feet and seven inches tall. DSS Hayward’s statement refers to official records describing Mr Hamilton as “male, Māori, 171 cm tall (5’7”) and solid build”. Ms Prisk did not describe the gunman as being solidly built: she described the gunman as being of “medium” build. A reasonable jury could have considered this was not consistent with the gunman being Mr Hamilton. On the other

⁵⁰⁴ See above at [378(a)–(c)].

hand, Ms Prisk described the second offender as “solid”. The jury could have considered she was making a comparison between the builds of the two offenders and that there was a possibility that Mr Hamilton’s possible unidentified co-offender was simply more solidly built than he was. It would have been up to the jury to decide which of these alternatives was correct.

[544] Mr Wilson relies also on Ms Prisk’s identification of the gunman as Māori by his voice. He says that the jury were not entitled to reject the unchallenged and uncontradicted evidence of Dr Innes, a forensic linguistics expert, that there is a “Māori-English vernacular” and that New Zealanders can tell the difference.

[545] I have rejected the submission that this evidence was necessarily exculpatory for Mr Wilson and Mr Hoggart (who are not Māori), drawing attention to Dr Innes’ evidence that New Zealanders can make mistakes and that the conditions may have engendered a mistake in this case. I also note that other witnesses gave conflicting evidence (although Ms Prisk had more interaction with the offenders and in particular the second offender).⁵⁰⁵ I add, too, that while Mr Hamilton was Māori, there was no evidence as to whether he spoke Māori-English, and Dr Innes explained that not all people who are Māori speak in that vernacular.

[546] Overall, a reasonable jury would have concluded that the description evidence did not exclude Mr Hamilton but that it otherwise was of minimal value in determining whether or not he was the gunman.

(f) Absence of co-offender

[547] The Crown submitted in closing that, even assuming Mr Hamilton was one of the offenders, a possible co-offender had not been identified. DSS Hayward gave uncontested evidence that Mr Atkinson, the man identified by several informants as Mr Hamilton’s co-offender, was alibied by his parents. He also did not fit the appearance of the second offender, being only 175 cm (five feet and nine inches compared to the second offender at five feet and 11 inches) and thin (whereas the second offender was of solid build). DSS Hayward also gave evidence that

⁵⁰⁵ See above at [180]–[181] and [191]–[192].

Mr Wawatai and Mr Hughes were alibied and eliminated as suspects. Mr Hughes was apparently at a marae some 25 km from the Red Fox. No details of Mr Wawatai's alibi were given.

[548] I accept that this means that Mr Hamilton's most likely criminal co-offenders had been eliminated. A reasonable jury could have considered this a matter of high significance, although they would have had to consider the possibility that there was an unidentified associate. DSS Hayward suggested that Mr Hamilton had a "revolving cast of other associates".⁵⁰⁶

(g) Motive

[549] Mr Wilson submits that Mr Hamilton had a motive for the offending, namely to finance his drug habit. There is evidence that Mr Hamilton was a drug user and had committed several crimes connected to drugs (including burglaries recorded as being "for drugs").

[550] The theory was also floated in Mr Stevenson's closing that Mr Hamilton robbed the Red Fox Tavern in order to help finance the heroin importation which was underway over Labour Weekend, noting the coincidence that in early October Mr Hamilton had stopped at the Red Fox for a drink on the way back from a meeting with the person responsible for financing the importation, Mr Patel. There is evidence to suggest that police had doubts as to whether Mr Patel could afford to finance the importation entirely. A job sheet dated 15 December 1987 records that police told Mr Hamilton they were "concerned over the financing of the heroin importation" and were not convinced that Mr Patel had been able to finance the whole operation.⁵⁰⁷ Mr Wilson also points to the statements of two of the informants, who each refer to the Red Fox job having something to do with drug habits or heroin.

[551] On the other hand, the Crown argues that the heroin importation provided a motive for Mr Hamilton *not* to commit a robbery over Labour Weekend. By then his partner, Ms Webster, was in Australia, waiting to collect heroin from their

⁵⁰⁶ Despite having a criminal history and at the time being recently released from prison, Mr Duffy does not seem to have been treated as a possible suspect, but DSS Hayward did not explain why.

⁵⁰⁷ This job sheet was before the jury as an appendix to DSS Hayward's statement.

co-conspirators who were to meet her there after collecting it in India. The plan was that she would bring the heroin back to New Zealand on 30 October without arousing the suspicions of Customs. The Crown submits that it seems unlikely that Mr Hamilton would have risked drawing police attention to himself at such a critical stage in this plan. Indeed, a statement given by Mr Atkinson in 2019 records that he and Mr Hamilton “had both agreed to keep our heads down while this job was happening”.

[552] It would have been up to the jury to decide which submission to accept: the appellants’ submission that Mr Hamilton’s motive to commit the Red Fox robbery was to finance his drug habit or the heroin importation, or the Crown submission that the heroin importation meant he did not commit the Red Fox robbery as that risked drawing attention to himself and derailing the importation. In this regard, the jury would have been entitled to reject the appellants’ submission that the money was needed for the heroin importation as the evidence supporting that proposition was mere police speculation about a possible shortfall in the financing. A reasonable jury could also have considered, in relation to Mr Hamilton’s ability to fund his drug habit, that the heroin importation was presumably designed to bring in significant funds, and that this rendered a robbery at the time he wished to “keep his head down” both superfluous and dangerous as it risked compromising the heroin importation.

(h) Mr Hamilton’s finances

[553] The Crown submitted in closing that Mr Hamilton’s financial position after the offending was not consistent with his being one of the offenders. On 29 October, Mr Hamilton was still broke; he and Mr Atkinson borrowed money off a Mr Thompson for car parts. They also borrowed \$20 from his wife. On 5 November, Mr Hamilton committed petty theft, stealing a pair of jeans worth \$87.

[554] In deciding whether or not this evidence of impecuniosity pointed against Mr Hamilton having been involved in the Red Fox offending, a reasonable jury would have had to consider whether the robbery proceeds were needed to subsidise the heroin importation, his drug habit, or both. A reasonable jury would have been entitled to

consider that they were not or, if they were, that this would not have depleted the funds to such a degree that he would be reduced to stealing a pair of jeans.

(i) Threat

[555] The appellants also rely on the account of Ms Donaldson (Mr Hughes' partner) of a visit by Mr Hamilton and Ms Webster on 18 November 1987. She told police that Mr Hamilton was angry about Mr Hughes having "narked" on him, saying that he was going to come back and kill him.⁵⁰⁸ By this stage Mr Hughes had told police about Mr Hamilton's plans to rob the Red Fox.

[556] A reasonable jury could legitimately have considered that this account of Mr Hamilton's conduct weighs in favour of Mr Hamilton's involvement in the Red Fox offending, although before coming to this conclusion they would have needed to consider the perhaps equally plausible possibility that his threat may have been consistent with Mr Hamilton being angry about Mr Hughes' inculpatory account to police, even if he had not been involved.

(j) Planning

[557] Mr Hamilton, Mr Hughes and Mr Wawatai had discussed, and in some cases gone as far as planning, several crimes. Most of these plans did not come to fruition, for various reasons.⁵⁰⁹

[558] One of the plans discussed in late June or early July 1987 was a robbery of the Red Fox Tavern. This plan, as described by Mr Hamilton's associates, does bear some similarities to the robbery that actually occurred, namely the rough timing (at 11.30 pm on Mr Wawatai's account, albeit on a different day of the week) and the weapons that would be used (baseball bats on Mr Wawatai's account and sawn-off shotguns on Mr Hughes' account). There were, however, marked differences between each associate's account, and between those accounts and the actual Red Fox offending. This is an important factor a reasonable jury would have had to take into account.

⁵⁰⁸ Mr Hamilton had also told Mr Wawatai that Mr Hughes had "narked" on him on 22 November 1987.

⁵⁰⁹ For example, one planned robbery was abandoned after Mr Hamilton failed to show up at the agreed time.

[559] According to Mr Wawatai, the plan involved taking the manager hostage at his home on a Sunday night, tying up his family, and cutting off his wife's toe if he refused to go to the Red Fox and open its safe. They (that is, Mr Hamilton, Mr Wawatai and Mr Thompson) would be armed with knives and steel bars or bats. According to Mr Hughes, however, the plan was to hit the Red Fox on a Monday morning. They (that is, Mr Hamilton, Mr Wawatai and Mr Hughes) would be armed with sawn-off shotguns, and the getaway car would be blown up with gelignite after the job. The Crown described these plans in closing as having been cooked up by "a group of small-time crooks with their heads full of elaborate schemes [that] they were never going to be organised or sophisticated enough to be able to pull off".

[560] It is, however, true, as the appellants submit, that the Red Fox planning was detailed. Mr Hughes' account⁵¹⁰ was that he and Mr Hamilton had visited Maramarua to scope out the Red Fox and nearby properties in order to identify a suitable location for their getaway driver to wait.⁵¹¹ They had also discussed going to the Red Fox for a meal "for the purpose of pegging the place out", to "check out where everything was, like the office where the safe was". On Mr Hughes' account, the plan to rob the Red Fox was "dropped" after police seized two shotguns and other items of "robbery kit". Mr Hughes' partner told police she heard Mr Hamilton say: "If anyone wants to play the hero shoot them."

[561] The Crown submitted at trial that the Red Fox plan was abandoned, at the latest, after police executed a search of Mr Hughes' address on 4 September 1987 and seized a robbery kit, including gloves, head disguises constructed from black jerseys, shotgun cartridges and two sawn-off shotguns, one of which was a side-by-side shotgun. The Crown referred to evidence that Mr Hamilton had vetoed the plan for being "too local" with no place to hide.⁵¹² Notably, it says, the shotgun cartridges in the robbery kit were tested and were not a match with the cartridges used at the

⁵¹⁰ Mr Wawatai said only on this point that Mr Hamilton "had said he was getting someone to suss it out".

⁵¹¹ Mr Hughes' account contained considerable detail, including that he and Mr Hamilton had "checked out the forest along Te Kauwhata Road ... the purpose being to dump the stolen car and clothing" and had driven past the Red Fox "to see how many houses were in Finlayson Road, where we discussed [Mr Wawatai] would be waiting for us".

⁵¹² Mr Hamilton had been living in a flat at the back of the Pipiroa Tearooms, approximately 25 km from Maramarua, but had left to move back to Auckland on 16 October 1987 after having been given an eviction notice. Some belongings had been left there to collect later.

Red Fox.⁵¹³ Further, the Crown said, by the time of the Red Fox offending, Mr Hamilton was in the midst of a more complicated criminal enterprise organised by Mr Atkinson and Mr Patel. The plan was at its most critical stage by Labour Weekend. Mr Hamilton's de facto partner, Ms Webster, had flown to Australia to receive heroin to bring back to New Zealand. By October 1987, the Crown submitted, it was this plan and not the Red Fox Tavern that was Mr Hamilton's priority.

[562] In closing, Mr Stevenson submitted that the plan was not abandoned once the robbery kit was discovered. The police only became aware that Mr Hamilton had been planning to rob the Red Fox when police spoke to Mr Hughes and Mr Wawatai after the robbery. Mr Hamilton could have found another co-offender and other gear. Mr Stevenson pointed to Mr Hartshorne's evidence that, in early October, he gave Mr Hamilton a ride to Auckland to meet with Mr Patel, his co-offender in the heroin import plan. On the way back, they stopped at the Red Fox. Mr Hartshorne told police that he did not recall whose idea it was to stop in and suggested in evidence that it was a "spur of the moment" decision, which does not necessarily exclude the possibility that it was a planned scoping visit by Mr Hamilton but does make that much less likely. There was no suggestion that Mr Hartshorne was the second offender.

[563] Further, the week before the Red Fox offending, Mr Thompson told police that Mr Hamilton said he had "a big job coming up that weekend" and "something big planned for Saturday". The Crown said in closing that the latter could well have been a reference to the heroin importation plan and a reasonable jury could have accepted that submission, as certainly the heroin importation was a very significant criminal undertaking.⁵¹⁴

[564] A reasonable jury would have considered it significant that Mr Hamilton had considered robbing the Red Fox and that his plans were detailed. They could nevertheless legitimately have concluded that the significance of this evidence was

⁵¹³ This is, however, hardly surprising as they had been seized before the Red Fox Tavern robbery and murder.

⁵¹⁴ Although, on the evidence before this Court, it does not appear that anything of note took place as part of that plan on the Saturday. Mr Hamilton's de facto partner, Ms Webster, flew to Australia on the Friday, and their co-conspirators (carrying the heroin) flew from India to Australia the following Monday. The record is, however, incomplete, and there is some suggestion that plans changed.

diminished by the fact that the plans outlined by Mr Hughes and Mr Wawatai differed in significant respects both from each other and from aspects of the actual Red Fox robbery. A reasonable jury would have had to incorporate into its assessment the confiscation of the robbery kit by police on 4 September and whether or not this meant that the plan had been abandoned. In this regard, a reasonable jury would have needed to take into account the visit to the Red Fox some two and a half weeks before the robbery and murder, and whether or not it was a scoping visit. A reasonable jury could have concluded it was not, given the involvement of Mr Hartshorne.

[565] Overall, it would have been up to the jury to decide whether or not the plan to rob the Red Fox had been abandoned, bearing in mind that, despite the comprehensive investigation into Mr Hamilton (one of the main suspects at the time), no evidence was found to suggest the robbery kit had been replaced, nor that he had acquired a shotgun prior to Labour Weekend. They also would have had to take into account Mr Thompson's comment that Mr Hamilton had "vetoed" the idea of robbing the Red Fox "because it was too local and there was no place to hide", and that no possible accomplice had been identified.

(k) Confessions

[566] Evidence of confessions made by Mr Hamilton to the Red Fox offending came from seven informants, although it appears that the jury only had access to the full statements or interview records of two. Only one, Mr W, gave evidence in person. The informants' evidence was otherwise summarised in the statement by DSS Hayward. I observe that, while the means by which this evidence was conveyed to the jury was agreed between the parties, it was less than ideal. DSS Hayward's statement only provides excerpts from the relevant statements and interviews, and it is difficult to assess their reliability from isolated fragments. With one exception, each description of the alleged evidence of confessions summarised by DSS Hayward is also accompanied by his assessment of why it was unreliable. I do not consider DSS Hayward's opinion evidence as to reliability was admissible.⁵¹⁵ The jury should have been left to assess the reliability or credibility for themselves. In these

⁵¹⁵ Nor was his opinion evidence as to whether it was appropriate to lay charges against the appellants, nor his opinion on Mr Hamilton: see above at [509].

circumstances, there is a risk that the jury may have simply accepted DSS Hayward's assessments of the nominations and disregarded them as unreliable on that basis alone.⁵¹⁶

[567] The Crown said in closing that all of these "cellmate"⁵¹⁷ witnesses were either unreliable or Mr Hamilton was just "big noting" and claiming responsibility for the crime for clout, credit or notoriety. Mr W, the Crown said, had a motive to give false evidence, and his evidence was inconsistent and confusing. The other witnesses giving evidence of confessions were in the same category. Prison rumour was that Mr Hamilton and Mr Atkinson were the leading suspects for the murder and the cellmate confessions were "examples of either people attempting to leverage this rumour" or they were simply mistaken, having taken Mr Hamilton's "big noting" at face value.

[568] Although there may be reason to doubt some of the evidence of confessions, a jury acting reasonably would have been likely to conclude that Mr Hamilton had claimed that he was responsible for the Red Fox offending. This is because of the volume of the evidence to this effect, the concession by DSS Hayward when giving evidence that the police essentially "accepted that he'd been telling people he was the shooter",⁵¹⁸ and because some of the evidence does appear sufficiently reliable. For example, the jury were given no reason to doubt the nomination of the confidential informant from 2004. I cannot rule out the possibility that the admission of Mr Hartshorne's evidence would have strengthened this conclusion.

[569] It would have been up to the jury to decide whether or not Mr Hamilton's confessions were true or false, taking into account the evidence of Mr Hamilton's tendency to brag and, at times, exaggerate and the evidence that could be seen as pointing to his involvement in the offending, such as the plans for robbing the Red Fox.

⁵¹⁶ See also above at [508].

⁵¹⁷ Not all of them were in fact in prison at the time of the alleged confessions.

⁵¹⁸ Statements obtained from Mr Thompson and Mr Atkinson in 2019 both mentioned Mr Hamilton's tendency to big note.

(1) Changing alibis

[570] Mr Hamilton initially (on 4 November 1987) tried to set up a false alibi for the Red Fox offending, telling police he had been with Ms Scott (the cousin of Ms Webster). Later that day, he, Ms Webster and Ms Nixon (the widow of Mr Hamilton's brother) visited Ms Scott and her partner to ask them to confirm to the police that he had been with them.⁵¹⁹

[571] When interviewed one week later (on 11 November 1987), Mr Hamilton said that he spent the night at Mr Duffy's with Ms Nixon; they arrived at about 10.30 pm and "slept the night in the same bed and had sex".⁵²⁰ Ms Webster had telephoned Mr Duffy and told him that Mr Hamilton was going to change his story and tell police he had been at Mr Duffy's house.⁵²¹ Mr Duffy, when spoken to by the police, said that Mr Hamilton had arrived alone at his place. Mr Hamilton then changed his story again, saying that he stayed at Mr Duffy's after dropping Ms Nixon and her friend, Ms Taiaroa, in Mount Roskill.

[572] The Crown says the initial attempt to set up a false alibi was explicable. The evidence was that Mr Hamilton had spent time that evening with Ms Nixon, with whom he had previously had an affair, and that he was trying to conceal this from Ms Webster.

[573] I accept Mr Wilson's submission that there are real issues with this explanation if the final alibi was true (in other words, if Mr Hamilton had stayed at Mr Duffy's house alone). If Mr Hamilton was never alone with Ms Nixon on Labour Weekend, the alleged motive to lie would have evaporated. As Mr Wilson points out, Ms Webster plainly knew Mr Hamilton and Ms Nixon would be spending time together that weekend, as they both went to the airport to see her off. In addition, both Ms Webster and Ms Nixon accompanied Mr Hamilton to ask Ms Scott for an alibi.

⁵¹⁹ It is unclear whether they agreed to provide the alibi, but in any event, they did not do so, as the next day they told the police about Mr Hamilton's request.

⁵²⁰ DSS Hayward's statement records that Mr Hamilton actually slept with Ms Nixon at Mr Duffy's house the following weekend, on Friday 30 October 1987.

⁵²¹ She said she telephoned because Mr Duffy had requested that he be informed if Mr Hamilton decided to change his story.

I accept that it seems odd that Ms Webster would be so involved in manufacturing a false alibi if it were created to deceive her.

[574] Alternatively, the Crown said in closing, Mr Hamilton was trying to keep police attention off Mr Duffy, who himself was “no stranger to crime”. Mr Duffy suggested the same to police, although exactly why Mr Hamilton was trying to protect Mr Duffy from police attention was never explained.

[575] The fact that Mr Hamilton tried to construct a false alibi and then changed his story to fit in with what Mr Duffy had said about him coming alone would have had to be taken into account by a reasonable jury when assessing the validity of the final alibi.

(m) Final alibi

[576] As noted above,⁵²² the evidence on Mr Hamilton’s movements (and on his alleged confessions) was summarised in DSS Hayward’s statement, which included some extracts from the relevant police statements. The Crown submitted in closing that Mr Hamilton’s movements around 24 October 1987 were inconsistent with his being the offender. It summarised the evidence on his movements as follows:

- (a) On 23 October, Mr Hamilton dropped his de facto partner, Ms Webster, and daughter at the airport. They were flying to Australia, where Ms Webster would collect a package of heroin to smuggle back into New Zealand.
- (b) During the day on 24 October, Mr Hamilton worked on his grey Mini at Mr Duffy’s house.
- (c) At around 4 pm, he stopped at Raven Avenue in Mount Roskill and picked up Ms Nixon and her friend, Ms Taiaroa.

⁵²² Above at [506].

- (d) At 6.25 pm, he completed a bail card at the Thames Police Station. He, Ms Nixon and Ms Taiaroa then drove to nearby Turua, where Mr Hamilton showed them the site of his son's death.
- (e) They then drove to the Pipiroa Tearooms (where Mr Hamilton had been living) to collect some clothes. His ex-landlady, Ms Fagan, said they left around 7.30 pm. Ms Nixon and Ms Taiaroa said they stayed between half an hour and two hours. As well as collecting clothes, Mr Hamilton had to do some more work on his Mini, which was overheating.
- (f) On the way back to Auckland, they called into Mr and Mrs Squires' place in Māngere.⁵²³ Mr Squires (another former prison associate of Mr Hamilton) thought they arrived at 8.45 pm; Mrs Squires thought it was about 9 pm or about 30 minutes after the film *Oliver* started playing. *Oliver* began playing at 8.07 pm. They drank gin and smoked hash and stayed between half an hour and two hours (accounts varied).
- (g) Mr Hamilton dropped Ms Nixon and Ms Taiaroa back at Raven Avenue in Mount Roskill. Mr Hamilton did not stay. Ms Nixon thought it was between 10 and 11 pm (but maybe later). Ms Taiaroa said she made a coffee and, about 10 minutes after sitting down, an "older type of movie like a second world war picture ... type of thing" came on. *The Odessa File* started playing at 11.06 pm.
- (h) According to Mr Hamilton's later statement to police, he then went to Mr Duffy's place at Locarno Avenue in Mount Albert. Mr Duffy said Mr Hamilton arrived while he was watching television and was at his place when he went to bed at 11.30 pm. He was still there the next morning.

⁵²³ Mr Hamilton's initial statement to the police (taken in the presence of his partner, Ms Webster, on 4 November 1987) described reporting to the Thames Police Station earlier that day and going to the Pipiroa Service Station, but he said he was "by myself" and did not mention visiting the Squires.

[577] The Crown submitted that the jury could accept the second alibi from Mr Duffy. The jury could accept Mr Hamilton and Mr Duffy's accounts that, at the time of the robbery between 11.30 pm and 12.10 am, Mr Hamilton was at Mr Duffy's house in Mount Albert. Even without Mr Duffy's testimony, however, the Crown submitted it was inconceivable that Mr Hamilton could have committed the robbery. The evidence was that Mr Hamilton was in Mount Roskill at around 10.45 pm. Police testing, using roads as they were in 1987, indicated it would have taken between 55 minutes and one hour and seven minutes (driving at or below the speed limit) to get to the Red Fox. Even without building in time for preparation, he would have struggled to arrive in time to commit the robbery. Importantly, at this point Mr Hamilton was still driving his old Mini. Only a few hours earlier he had needed to put water in it because it was overheating. A constable at the Thames Police Station that evening observed that Mr Hamilton had trouble starting it.

[578] In closing, Mr Stevenson highlighted several issues with Mr Hamilton's "alibi 2.0". First, as noted above, after Mr Hamilton's first alibi fell through, Ms Webster contacted Mr Duffy to warn him that Mr Hamilton was changing his story. Second, Mr Hamilton's and Mr Duffy's stories did not match: Mr Hamilton initially claimed that he spent the night at Mr Duffy's home with Ms Nixon; Mr Duffy told police Mr Hamilton arrived alone. Third, Mr Duffy said he was watching American football between 10.15 and 11.15 pm, but American football did not air that night (though it was scheduled to in the newspaper). Mr Stevenson submitted this was evidence of a manufactured, researched alibi.

[579] I interpolate that the Crown, in its closing, dismissed these as simple errors, pointing out that Mr Duffy prefaced his comment on what he had been doing by saying he could not remember. His familiarity with the timing could suggest that watching American football was his regular habit. Moreover, if this were a researched alibi, the Crown submitted that he would not have mentioned perhaps watching *The Krypton Factor*, which did not feature in the newspaper listings or air on television that evening.

[580] Without Mr Duffy's alibi, Mr Stevenson submitted Mr Hamilton had ample time to commit the robbery. Ms Scott said that Ms Nixon told her Mr Hamilton had

left their place at about 8.30 pm, heading to South Auckland. Using Ms Nixon's earlier estimate of when Mr Hamilton had dropped her and Ms Taiaroa back in Mount Roskill (10 pm), and with the robbery beginning at approximately 11.30 pm, there would have been time for Mr Hamilton to meet up with a co-offender and commit the robbery.⁵²⁴ Even with Mr Hamilton leaving Mount Roskill at 10.45 pm, as the Crown submitted, that would have left sufficient time to make the 55-minute drive to the Red Fox. The evidence of Mr McKinnel, the private investigator, was that the drive could have been done more quickly if driving over the speed limit.

[581] There are several factors that could throw doubt on the final alibi; namely the inconsistencies in Mr Duffy and Mr Hamilton's accounts (the former saying Mr Hamilton arrived alone, the latter initially saying he was with Ms Nixon and then changing his account), Ms Webster's warning call to Mr Duffy, the coincidence that Mr Duffy's account of watching American football between 10.15 and 11.15 pm exactly matched the newspaper listings but not what actually aired, and the fact that Mr Hamilton had already given one false alibi.⁵²⁵

[582] It would have been up to the jury to weigh up the Crown and defence submissions on the final alibi, and determine whether they accepted Mr Duffy's account or the alibi was false. Given the issues with the final alibi, and the fact that Mr Duffy was not called to explain them, a reasonable jury could not have decided that the final alibi evidence on its own meant that Mr Hamilton could not have been the gunman. They therefore would have needed to consider whether, without the Duffy alibi, Mr Hamilton had the opportunity to commit the Red Fox robbery.

[583] The jury would have been entitled to reject the submission that Mr Hamilton left Mount Roskill at 10 pm, given that Ms Nixon said it was between 10 and 11 pm, and the timing of *The Odessa File* placed his departure closer to 10.45 pm. They therefore could legitimately have concluded that this left too tight of a timeframe for Mr Hamilton to have committed the robbery.

⁵²⁴ Defence counsel also submitted that Mr Hamilton could have made the drop-off earlier. This submission invited the jury to speculate and should not have been made.

⁵²⁵ Mr Duffy did not give evidence at trial, and this means the jury did not have the opportunity to hear him questioned on these matters.

[584] Further, in deciding whether or not Mr Hamilton had the opportunity to commit the robbery a reasonable jury would have had to take into account the fact that he would have been unlikely to have been able to make this journey in his unreliable Mini. However, the jury could have taken into account that the earlier planning had included stealing a car and the possibility that his co-offender could well have had a vehicle (although, of course, a possible co-offender had not been identified).

[585] In summary, even if Mr Duffy's final alibi was rejected, the jury could have rejected the submission that Mr Hamilton dropped Ms Nixon and Ms Taiaroa off at 10 pm. They therefore could legitimately have concluded that this left insufficient opportunity for Mr Hamilton to commit the robbery.

Conclusion on Mr Hamilton

[586] I reiterate that it was not the task of the jury to decide whether or not Mr Hamilton was one of the offenders. Their task was to consider whether or not the Crown had proved beyond reasonable doubt that he was not — in other words, that the Crown had proved that there was no reasonable possibility that Mr Hamilton was one of the offenders.

[587] Depending on the view they took of the totality of the evidence, I consider that a reasonable jury could have concluded that the Crown had excluded Mr Hamilton as being one of the offenders beyond reasonable doubt.⁵²⁶

[588] As indicated above, a reasonable jury could have concluded that, although there had been plans to rob the Red Fox, these differed in important respects from the actual robbery and, in any event, had been abandoned. A reasonable jury could also have taken the view that Mr Hamilton would not have involved himself in a robbery at the same time as the heroin importation was to occur and could have rejected the submission that funds may have been needed for that heroin importation. A reasonable jury could therefore have considered that the evidence of Mr Hamilton's impecuniosity after the Red Fox Robbery meant that he had not been involved.

⁵²⁶ As noted above, reasonable minds may differ on matters of fact and it is not the role of an appellate court to substitute its view of the facts for that of the jury: see principles (d)–(e) above at [133]. This is of course unless the factual conclusion could not have been reached by a reasonable jury.

In reaching this conclusion, the jury would also have been able to place some weight on the fact that, despite the comprehensive police investigation, no possible co-offender was identified.

[589] A reasonable jury would also have been entitled to conclude that Mr Hamilton did not have the opportunity to commit the Red Fox offending. Even if they did not accept the final alibi evidence, a reasonable jury could have accepted the Crown submission that there was not time for Mr Hamilton to have committed the robbery, given the evidence as to the time to drive to the Red Fox, his unreliable Mini and the fact that no possible second offender with access to a vehicle had been identified.

[590] In this case the jury, by their verdict, must have concluded that the Crown had excluded the reasonable possibility of Mr Hamilton's involvement. For the reasons set out above, they would have been entitled to come to this conclusion. The difficulty is that there is a risk that the jury may have been swayed by the inadmissible opinion evidence of DSS Hayward that Mr Hamilton had been eliminated as a suspect.⁵²⁷

[591] Without DSS Hayward's opinion evidence, there is a risk that the jury may not have reached the conclusion it did in this case. This risk may have been exacerbated by the misleading way in which the Crown phrased its submissions related to Mr Hamilton in closing,⁵²⁸ as well as the potentially confusing directions given by the Judge in summing up.⁵²⁹ All of this means there was a risk the outcome of the trial was affected and therefore there was a miscarriage of justice on this ground too.

Outcome of the appeal

[592] I have held that certain evidence outlined above at [455] was not admissible and that the outcome of the trial may have been different without that evidence. I have also concluded that, while a reasonable jury could have come to the view that the Crown had excluded the reasonable possibility of Mr Hamilton being one of the offenders, there is a risk that the jury in this case came to that view on the basis of the

⁵²⁷ See above at [506]–[508] and [566]. Even had they been warned, this would not have eliminated the risk the jury were nevertheless swayed by the opinions expressed by DSS Hayward.

⁵²⁸ See above at [510]–[512].

⁵²⁹ See above at [514]–[519].

inadmissible opinion evidence of DSS Hayward. There was thus a miscarriage of justice on both of these grounds, and the appeals must be allowed.

[593] Aggravated robbery and murder are very serious charges. I have held that verdicts of guilty on the remaining evidence would not be unreasonable. I would therefore have ordered a retrial. The interests of the victims and their families reinforce that conclusion.

Refusal to make a takedown order

[594] I now turn to the third ground of appeal: whether the trial Judge should have issued a takedown order. I first set out the background and summarise the decisions of the Courts below, as well as setting out the directions given at trial by the Judge. I then summarise the submissions and the applicable legal principles before conducting my analysis.

Background

[595] Mr Wilson sought a takedown order pursuant to ss 199A and 199B of the Criminal Procedure Act in respect of all articles relating to his previous convictions, including his conviction in 2000 for the murder of his former girlfriend.⁵³⁰ His application, dated 24 September 2020 (and amended 7 October 2020), specified some 22 articles,⁵³¹ including two print articles, on topics including the murder trial, Mr Wilson's bids for parole and his association with the Filthy Few. The articles referenced in the application were mostly published from 2013–2017 but included one article published in 2000 at the time of, and relating to, Mr Wilson's trial for the murder.

[596] One of the articles described Mr Wilson as a “ruthless, unconscionable callous criminal”, with a “ruthless criminal history ... includ[ing] convictions for two aggravated robberies” and “being a party to the production of methamphetamine.” Another article mentioned that he had “90-plus convictions”. Two articles described Mr Wilson's murder of his former girlfriend as “execution-style”, and one said that

⁵³⁰ CA judgment, above n 58, at [123].

⁵³¹ *R v W* [2020] NZHC 3155 (Woolford J) [HC takedown judgment] at [2].

“[a]fter shooting her three times in the head while she lay asleep in bed, he dragged her body outside and dumped it down a bank.”

[597] Mr Hoggart did not apply for a takedown order, although in the Court of Appeal he supported Mr Wilson’s ground of appeal relating to the trial Judge’s refusal to grant Mr Wilson’s application for a takedown order.

High Court decisions refusing a takedown order

[598] Woolford J initially refused Mr Wilson’s application for a takedown order on 30 November 2020. He gave numerous reasons for the refusal, including that Mr Wilson’s fair trial rights were adequately protected prior to trial by the name suppression order granted in October 2017 by Downs J.⁵³² He also considered that in light of the new oath for jurors introduced on 31 July 2020,⁵³³ and the directions not to make any internet searches that would be given at trial,⁵³⁴ there was only a small risk that jurors might undertake their own inquiries.⁵³⁵

[599] Woolford J in any event doubted the effectiveness of a takedown order. Some of the articles referencing Mr Wilson were likely not capable of being taken down, including an article in an overseas newspaper, an article with its host identity obscured by security software, an article hosted by a blog with no email or physical address and a Facebook article.⁵³⁶

[600] Woolford J said that takedown orders should only be made “where it can be demonstrably shown as reasonably necessary to preserve a defendant’s fair trial rights”. The Judge said that, although the right to a fair trial is an absolute right, freedom of expression is also important.⁵³⁷ There therefore needed “to be some

⁵³² At [13] citing *R v Wilson* [2017] NZHC 2532 [HC name suppression judgment] at [15].

⁵³³ HC takedown judgment, above n 531, at [15] citing Jury Rules 1990, sch 1 form 2, introduced by r 15(2) and sch of the Jury Amendment Rules 2020. See also Jury Rules, r 22(a); and *Exley v NZME Publishing Ltd* [2025] NZSC 90, [2025] 1 NZLR 184 at [22(a)].

⁵³⁴ HC takedown judgment, above n 531, at [16]. Woolford J noted that jurors would be given “a direction in the strongest terms” not to make internet searches as, under s 13 of the Contempt of Court Act 2019, doing so may result in the imposition of a fine not exceeding \$5,000, and may also result in the trial being aborted and a retrial ordered. See also *Exley*, above n 533, at [22(b)].

⁵³⁵ HC takedown judgment, above n 531, at [17].

⁵³⁶ At [18].

⁵³⁷ At [19].

evidential foundation” showing the takedown order was necessary. The Judge was not satisfied there was such a foundation in this case.⁵³⁸

[601] Mr Wilson made a further unsuccessful application for a takedown order to the High Court shortly before the trial commenced. He advanced two additional arguments, which were rejected by that Court.⁵³⁹

[602] First, Mr Wilson relied on a new expert witness statement. Professor Parry, a computer scientist, concluded that, having reviewed the list of uniform resource locators (URLs) and online content pertaining to Mr Wilson, it was possible to remove access to the sites in New Zealand.⁵⁴⁰ Woolford J was unconvinced, pointing out that Professor Parry accepted that the use of virtual private networks (VPNs) to access blocked content was relatively common in New Zealand.⁵⁴¹ The Judge further noted that, despite Professor Parry claiming that Google will remove search results for “legal reasons”, Google had declined counsel’s request to do so in Mr Wilson’s case.⁵⁴²

[603] Second, Mr Wilson contended that *Solicitor-General v Wellington Newspapers Ltd* was relevant.⁵⁴³ In that case, various newspapers were found to be in contempt of court for publishing articles about the defendant Mr Gillies’ previous convictions a few days before his upcoming trial.⁵⁴⁴ Woolford J did not consider that *Wellington Newspapers* was relevant. This was because Mr Wilson had name suppression until trial and the articles were several years old, as opposed to having been published immediately prior to trial as in Mr Gillies’ case.⁵⁴⁵

⁵³⁸ The Judge correctly noted that the takedown test does not involve the balancing of the right to a fair trial against other rights such as freedom of expression: at [19], and see *Exley*, above n 533, at [42].

⁵³⁹ *R v W* [2021] NZHC 11 (Woolford J) [HC second takedown judgment].

⁵⁴⁰ At [4]–[7].

⁵⁴¹ At [9].

⁵⁴² At [10].

⁵⁴³ At [8] citing *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 (HC).

⁵⁴⁴ *Solicitor-General v Wellington Newspapers Ltd*, above n 543, at 52 per Eichelbaum CJ and 59 per McGechan J.

⁵⁴⁵ HC second takedown judgment, above n 539, at [12].

Directions given relating to not searching on the internet

[604] At the trial, Woolford J gave several directions to the jury, both oral and written, about not searching on the internet and the consequences of doing so.⁵⁴⁶

Opening remarks

[605] In his opening remarks, Woolford J gave a comprehensive set of directions to the jury not to undertake their own inquiries. He first explained that the jury's role is as judge of the facts and that this required the jurors to decide the case "solely on the evidence you hear in this courtroom and on the directions on the law I give you to apply". He told the jury that they were not to make their own inquiries about the case, including internet searches. He explained that the reason for this was that outside evidence is not tested in court.

[606] Woolford J distributed a written notice to the jury to retain and explained that they could show it to family members to explain why they could not discuss the case with them. A copy was also pinned on the noticeboard in the jury room. When explaining the written notice, Woolford J again directed the jury not to look for information on the internet. The written notices are reproduced as Appendix F to this judgment.

[607] Woolford J also explained that, should a juror undertake internet searches, they could be found in contempt of court and liable to a fine. He further explained that it was the jury's collective responsibility to follow the rules and that any juror who suspected another had breached the rules should speak to the court attendant or write a note to be delivered to the Judge via the court attendant.

⁵⁴⁶ There is no challenge to the adequacy of the directions. I agree that they were appropriate and comprehensive.

Directions given during the trial

[608] The Court of Appeal said that it understood that Woolford J gave the jury further oral instructions not to search the internet for information relating to the trial “on at least one other occasion during the course of the trial”.⁵⁴⁷

Summing up

[609] In his summing up, Woolford J instructed the jury that “it is vitally important that you decide this case solely on the evidence that has been presented here in Court”. He also told the jury they must ignore any news media reports about the case.

[610] It does not appear that Woolford J required each juror to confirm on oath that they had not undertaken their own inquiries before the verdict was delivered.⁵⁴⁸

Court of Appeal decision

[611] In his conviction appeal to the Court of Appeal, Mr Wilson argued that a miscarriage of justice occurred due to Woolford J’s refusal to issue a takedown order.⁵⁴⁹ The Court disagreed, finding that a takedown order was not required due to the combined effects of:⁵⁵⁰

- (a) the jurors’ oath not to conduct their own research;
- (b) Woolford J’s oral and written directions to the jury; and
- (c) the name suppression order in Mr Wilson’s favour.

[612] First, the Court observed that there was no direct evidence that any jurors had looked on the internet for information about Mr Wilson’s criminal history.⁵⁵¹ Despite counsel for Mr Wilson referring to cases which have accepted the risk of jurors

⁵⁴⁷ CA judgment, above n 58, at [134]. We were not referred to this direction and I have not been able to locate details of it.

⁵⁴⁸ In *Exley*, above n 533, this Court said that this was a step judges should consider taking: at [76].

⁵⁴⁹ CA judgment, above n 58, at [127].

⁵⁵⁰ At [151].

⁵⁵¹ At [135].

undertaking internet inquiries,⁵⁵² the Court considered that most authorities support the conclusion that suitable judicial directions mitigate this risk.⁵⁵³ The Court also referred to authorities for the proposition that the continued operation of the jury trial system depends upon the assumption that, in the absence of evidence to the contrary, juries abide by judicial directions.⁵⁵⁴

[613] The Court then contrasted the results of research published by Professor Cheryl Thomas in 2010 and 2020, the latter of which concluded that jurors then had significantly improved understandings of their responsibilities.⁵⁵⁵ This improvement was attributable to England and Wales making it a specific statutory offence for jurors to undertake their own inquiries, as well as the promulgation of a new juror notice and practice directions on jury directions. The Court noted that New Zealand had enacted a similar statutory provision, and that the information jurors received in the pilot project was similar to that provided by Woolford J in this case.⁵⁵⁶ Although the Court accepted that Professor Thomas' recent research related to jurors' understanding of their responsibilities (whereas her earlier research specifically concerned jurors conducting their own research), it considered that enhanced juror understanding is likely to promote compliance with judicial directions.⁵⁵⁷

[614] Overall, the Court accepted that in some cases a determined juror might disregard their oath and judicial directions and research a defendant. However, without evidence of this, it could not conclude that a juror in the present case was likely to have done so.⁵⁵⁸ The Court was therefore satisfied that the Judge's refusal to make a takedown order did not result in a miscarriage of justice.⁵⁵⁹

⁵⁵² At [136]–[137] citing *R v B (CA 459/06)* [2008] NZCA 130, [2009] 1 NZLR 293 at [78] per William Young P and Robertson J and *Singh v R* [2021] NZHC 3019, [2022] 2 NZLR 400 at [33], in turn citing *Parangi v R* [2018] NZHC 3123 at [87].

⁵⁵³ CA judgment, above n 58, at [138] citing *Lyttelton v R* [2015] NZCA 279, [2016] 2 NZLR 21 at [64] and *R (CA340/2015) v R* [2015] NZCA 287 at [22].

⁵⁵⁴ CA judgment, above n 58, at [139] citing *Solomon v R* [2017] NZCA 164 at [51], in turn citing *Weatherston v R* [2011] NZCA 276 at [24], and *Scott v R* [2020] NZCA 448 at [49]. See also CA judgment, above n 58, at [149].

⁵⁵⁵ CA judgment, above n 58, at [141]–[146] citing Cheryl Thomas *Are Juries Fair?* (Ministry of Justice (UK), Ministry of Justice Research Series 1/10, February 2010) at 43 and Cheryl Thomas “The 21st Century Jury: Contempt, Bias and the Impact of Jury Service” [2020] 11 Crim LR 987 at 988.

⁵⁵⁶ CA judgment, above n 58, at [143]–[145].

⁵⁵⁷ At [146].

⁵⁵⁸ At [150].

⁵⁵⁹ At [151].

Submissions on appeal

Mr Wilson's submissions⁵⁶⁰

[615] Mr Wilson submits that a takedown order should have been made in this case because the extensive online reporting was intensely prejudicial to his fair trial rights.

[616] In Mr Wilson's submission, there is a baseline risk of jurors conducting online searches despite judicial instructions not to do so: internet searching is an integral part of New Zealanders' lives. Mr Wilson contends that additional factors elevated the risk of jurors conducting online research in this case, including that the trial was lengthy and high profile, and that it was based on circumstantial evidence.⁵⁶¹ The jurors were aware that he had past convictions and had been involved with a gang. Mr Wilson accepts that he had name suppression but the jury were not given the reason for the suppression, which would have increased their curiosity.

[617] Mr Wilson submits that Parliament has recognised through s 199A of the Criminal Procedure Act — which provides for the automatic suppression of the details of previous convictions unless the court orders otherwise — that evidence of earlier convictions in the context of a criminal trial is inherently prejudicial. Mr Wilson submits that the courts have likewise recognised this risk.⁵⁶²

[618] Mr Wilson submits that the prejudice arising from Woolford J's refusal to make a takedown order was extreme and irremediable, and that the failure to grant one renders the verdicts unsafe.

Mr Hoggart's submissions

[619] Mr Hoggart submits that the online material about Mr Wilson was easily accessible and carried a risk of irreconcilably prejudicing the jury against Mr Wilson and Mr Hoggart. In his submission, the risk of jurors searching online was especially

⁵⁶⁰ Counsel for Mr Wilson and Mr Hoggart were heard in the *Exley* appeal, and a summary of their submissions on the issues of principle relating to takedown orders is contained in that judgment: *Exley*, above n 533, at [38], [49]–[50], [66]–[68] and [83]. I do not repeat that summary here.

⁵⁶¹ In respect of the latter, Mr Wilson cites *R v Lyttle* [2017] NZHC 2426 at [19(e)].

⁵⁶² Mr Wilson refers to the statement of Eichelbaum CJ in *Wellington Newspapers*, above n 543, that “a jury's knowledge of previous convictions creates an unacceptable risk of prejudice regardless of the directions that may be given”: at 47.

great, given the gravity of the crimes for which they were being tried and the fact that Mr Hoggart's name had not, unlike Mr Wilson's, been suppressed.

[620] Mr Hoggart submits that information about a defendant (and people in general) has never before been so widely available. In his submission, the enactment of the Contempt of Court Act 2019 and the insertion of ss 199A, 199B, 199C and 199D into the Criminal Procedure Act comprise a legislative recognition that the name suppression provisions and the practice of judicial directions to the jury are themselves insufficient to protect defendants' fair trial rights.

[621] In addition, Mr Hoggart submits that a takedown order would have been effective in this case because, contrary to the High Court's finding that VPN use is relatively common,⁵⁶³ the average juror would not use a VPN.

[622] Mr Hoggart submits that the failure to make the takedown order has given rise to a real and appreciable risk that the trial miscarried.

Crown submissions

[623] The Crown submits that Woolford J was not in error in declining the takedown request because the online material did not pose a real risk of prejudice to fair trial rights. Mr Wilson had name suppression before trial and, until the jury were empanelled, potential jurors did not know his name. The articles were historical and contemporaneous reporting of the Red Fox trial did not link to older articles about Mr Wilson's previous convictions. The Crown submits that the trial process, including the juror's oath which includes a specific reference to a juror not undertaking his or her own inquiries, and Woolford J's directions to the jury, ensured the trial was fair.

[624] The Crown finally submits that a takedown order would have been ineffective, and therefore not necessary, in respect of articles hosted on overseas websites, because these would rely on the voluntary cooperation of the site host, and also articles on New Zealand websites, because the common use of VPNs would defeat a New Zealand-directed block on Google searches.

⁵⁶³ See above at [602].

[625] The Crown submits that, even if a takedown order should have been made, there is no miscarriage of justice. The suggestion that jurors may have accessed the internet is speculative and does not amount to a real risk that the outcome of the trial was affected.

Stuff Ltd's submissions⁵⁶⁴

[626] Stuff Ltd submits that Woolford J and the Court of Appeal were both correct in their decisions relating to Mr Wilson's application for a takedown order. Stuff says there was no real risk of prejudice to a fair trial as Mr Wilson had name suppression in the lead-up to, and throughout, the trial. Several of the webpages referred to were not published by primary New Zealand news sources, and the others were old and likely to have faded from readers' memories. Any remaining risk factors were carefully addressed by Woolford J in his directions to the jury, which were exemplary and were supplemented by clear written materials.

The principles

[627] This Court in *Exley v NZME Publishing Ltd* has set out the principles governing whether a takedown order should be made.⁵⁶⁵ In summary, the overarching test is whether the material is likely to create a real risk of prejudice to a fair trial.⁵⁶⁶ In order to assess this, a court must consider the nature of the material, the extent and accessibility of the material and the circumstances of the trial.⁵⁶⁷ The more prejudicial the material, the greater the fair trial risk. In the case of very prejudicial material, this risk would in itself be sufficient to justify an order being made.⁵⁶⁸

[628] Regarding the extent and accessibility of the material and the circumstances of the trial, while the analysis must start from the legislative recognition of the risk that jurors might undertake internet searches about a defendant and be influenced prejudicially by doing so, a judge can consider the likelihood in a particular case of

⁵⁶⁴ Before the hearing of these appeals, Stuff Ltd was granted permission to appear as intervener and to file written submissions. Counsel for Stuff was also heard at the oral hearing.

⁵⁶⁵ *Exley*, above n 533. See at [103]–[113] for a summary of the principles relating to takedown orders contained in that judgment.

⁵⁶⁶ See at [41].

⁵⁶⁷ See at [87].

⁵⁶⁸ See at [92].

such access occurring. The circumstances of the particular trial are relevant, including the length of, and publicity attracted by, the trial.⁵⁶⁹

Issues

[629] The issues therefore are:

- (a) Was there a fair trial risk?
- (b) Was a takedown order necessary to ensure a fair trial?
- (c) If so, does this mean there was a miscarriage of justice?

Was there a fair trial risk?

[630] The relevant material in this case posed a real risk to Mr Wilson's fair trial rights if accessed by a juror. It highlighted Mr Wilson's past gang associations, as well as his serious and extensive criminal history. The articles also — understandably, given the seriousness of Mr Wilson's past convictions — described Mr Wilson in very unfavourable terms. Importantly, much of the material was inadmissible at trial, meaning the jury received no specific directions on it, as they would have had the previous convictions it related to been admissible as propensity evidence.⁵⁷⁰ Crucially, several of the articles described Mr Wilson's past murder conviction in some detail and in inflammatory language. As noted by Downs J in the pre-trial judgment granting Mr Wilson name suppression, that offending has “obvious similarity to these charges”.⁵⁷¹

[631] The material subject to the application for a takedown order related only to Mr Wilson. I nevertheless accept Mr Hoggart's submission that, because the Crown's case against Mr Hoggart was largely based on his association with Mr Wilson around

⁵⁶⁹ See at [93].

⁵⁷⁰ Mr Wilson's previous conviction for the aggravated robbery of the Birkenhead Licensing Trust was before the jury as propensity evidence. The jury were accordingly given directions on propensity evidence (although these obviously did not cover the internet material not before the jury as evidence).

⁵⁷¹ HC name suppression judgment, above n 532, at [13].

the time of the Red Fox aggravated robbery and murder, if the material was accessed by a juror it also carried a real risk of prejudicing Mr Hoggart's right to a fair trial.

Was a takedown order necessary to ensure a fair trial?

[632] The material in this case was so prejudicial, both in terms of nature and extent, that this in itself was grounds for an order.⁵⁷² Further, the risk of a juror accessing the material was elevated in the circumstances of the trial: it was a high-profile trial which was based on circumstantial evidence and which received considerable media coverage. The trial was also lengthy, lasting for over six weeks.

[633] Because Mr Wilson's name was suppressed, the risk of relatives or friends passing the prejudicial material on to a juror was reduced. I nevertheless accept Mr Wilson's submission that the fact that Mr Wilson had name suppression may have made jurors curious and therefore more likely to search his name (once they knew his name after they had been empanelled). This is particularly true given that, as Mr Hoggart submitted, his identity was not similarly protected. For these reasons, I consider that a takedown order ought to have been made. On the *Exley* approach, the order would have been limited in its scope to the URLs specified by Mr Wilson.⁵⁷³ And, despite Woolford J's concerns as to the effectiveness of the order in respect of some of the articles,⁵⁷⁴ again on the *Exley* approach, the fact the order may not have been wholly effective does not mean it should not have been made.⁵⁷⁵

Was there a miscarriage of justice?

[634] Given I have already concluded that the appeals should be allowed, it is not necessary for me to decide this issue.

⁵⁷² *Exley*, above n 533, at [92].

⁵⁷³ At [54]. Although, had Mr Wilson been aware of that restriction, he may have identified other material he sought to be taken down.

⁵⁷⁴ See above at [599].

⁵⁷⁵ *Exley*, above n 533, at [55].

Name suppression

[635] Before trial, Mr Wilson sought name suppression on the basis that publication of his name would prejudice his right to a fair trial.⁵⁷⁶ Downs J granted Mr Wilson interim name suppression, to expire at trial.⁵⁷⁷ At the commencement of trial, Mr Wilson applied for continued name suppression through to verdict.⁵⁷⁸ Woolford J declined that application but, having been made aware that Mr Wilson intended to appeal that decision, made an interim order suppressing Mr Wilson's name until the appeal was finally determined.⁵⁷⁹ As a consequence of this, Mr Wilson had interim name suppression throughout the trial and also during the hearing of his appeal against conviction.

[636] The Court of Appeal, after dismissing Mr Wilson's appeal against conviction, also dismissed Mr Wilson's appeal against the order declining interim name suppression.⁵⁸⁰ Before delivering that judgment, the Court of Appeal was advised that Mr Wilson had applied to this Court for interim name suppression. The Court of Appeal therefore deferred its judgment taking effect until 5 pm on 9 June 2023.⁵⁸¹ That same day, Kós J in a minute extended the High Court interim name suppression order until further order of the Court and directed that submissions on suppression were to accompany submissions on leave to appeal.⁵⁸²

[637] In its judgment granting leave to appeal, this Court made an order extending Mr Wilson's interim name suppression in the following terms:⁵⁸³

[10] The interim order suppressing the name of [Mr Wilson] and any identifying particulars made on 9 June 2023 is to continue until further order. It will be re-evaluated when the appeal is heard and determined.

⁵⁷⁶ Criminal Procedure Act, s 200(2)(d).

⁵⁷⁷ HC name suppression judgment, above n 532, at [22].

⁵⁷⁸ *R v W* [2021] NZHC 172 at [1].

⁵⁷⁹ At [2] and [28]–[29].

⁵⁸⁰ *Wilson v R* [2023] NZCA 213 (French, Gilbert and Collins JJ).

⁵⁸¹ At [24]–[25].

⁵⁸² *Wilson v R* SC 60/2023, 9 June 2023.

⁵⁸³ SC leave judgment, above n 59.

[638] As, on the majority view, there is to be no retrial, there is no risk of prejudice to Mr Wilson’s right to a fair trial.⁵⁸⁴ There is therefore no reason to continue to suppress his name and identifying particulars.

Summary

Unreasonable verdicts

[639] The evidence against the appellants set out above at [455] was inadmissible. There is a risk that, without this evidence, the verdict may have been different. This constitutes a miscarriage of justice.⁵⁸⁵

[640] When reviewing the reasonableness of any verdict, the task is not for the court to decide for itself whether the case has been proved beyond reasonable doubt. The question is whether the jury ought to have had a reasonable doubt.⁵⁸⁶ In undertaking this analysis, due regard must be had to the constitutional role of the jury to decide what evidence they will accept, the weight to give to each strand of evidence they do accept and the inferences they draw from that evidence.⁵⁸⁷ If there is any legitimate path to a finding of guilt beyond reasonable doubt based on evidence the jury were entitled to accept and inferences they were entitled to draw, then a verdict of guilty would not be unreasonable.⁵⁸⁸

[641] On the remaining admissible evidence, and contrary to the view of the majority, a properly directed reasonable jury could have found the case against Mr Wilson proved beyond reasonable doubt. A reasonable jury would have been entitled to accept that Mr Wilson was planning an “earn up north” and conclude that he had acquired a shotgun for this purpose.⁵⁸⁹ They would also have been entitled to conclude that the “earn” was the robbery of the Red Fox Tavern and that Mr Wilson was the gunman involved. The timing (five days before the Red Fox robbery) of the acquisition of a shotgun consistent with the one used in the robbery and the lies told about its disposal

⁵⁸⁴ Criminal Procedure Act, s 200(2)(d). Mr Wilson does not seek name suppression on any other grounds.

⁵⁸⁵ See above at [455]–[458].

⁵⁸⁶ See above at [462].

⁵⁸⁷ See above at [460].

⁵⁸⁸ See above at [462].

⁵⁸⁹ See above at [463].

and acquisition would have been crucial to such a conclusion.⁵⁹⁰ Other evidence supportive of this conclusion would have included that he had expressed interest in the Red Fox while in prison, that he was in the vicinity of the Red Fox over Labour Weekend with his associate, Mr Hoggart, and that the height differential between the two robbers matched that between Mr Wilson and Mr Hoggart. The jury would have been entitled to conclude that Mr Wilson lied in his account of hitchhiking at the time of the robbery. Considering also the alibi request to Mr Ross, the hinted admissions to Mr Dunbier and Mr Ross, and the evidence as to money and motive, a reasonable jury would have been entitled, on the remaining evidence, to conclude that Mr Wilson was guilty beyond reasonable doubt.⁵⁹¹

[642] While there was less evidence tying Mr Hoggart to the Red Fox Tavern robbery and murder than there was for Mr Wilson, a reasonable jury could also have concluded that Mr Hoggart was guilty beyond reasonable doubt. The evidence on which the jury could have based that conclusion includes that the height differential between the offenders matched that between the appellants. They were known associates who were together and in the vicinity of the Red Fox over Labour Weekend. Mr Hoggart's whereabouts at the time of the robbery were unknown, and he had a similar motive to Mr Wilson to commit the robbery. A reasonable jury would have been entitled to conclude that he had lied about the timing of the motorbike purchase after Labour Weekend and how he financed it, and that these lies were indicative of guilt. Considering also the hinted admission to Mr Talbett-Lovelace, a reasonable jury could have been satisfied beyond reasonable doubt that Mr Hoggart was the second offender.⁵⁹²

[643] This conclusion is not changed by any prejudicial effects of the 30-year delay before the appellants were charged in this case.⁵⁹³

⁵⁹⁰ See above at [464].

⁵⁹¹ See above at [464]–[467].

⁵⁹² See above at [468]–[471].

⁵⁹³ See above at [479].

Hartshorne confession evidence

[644] The trial Judge was wrong to have excluded Mr Hartshorne's evidence of an alleged confession by Mr Hamilton.⁵⁹⁴ Given my conclusion on the next issue, I do not need to come to a definitive view on whether the failure to admit this evidence could have affected the jury's evaluation of whether there was a reasonable possibility that Mr Hamilton was one of the offenders.⁵⁹⁵

Mr Hamilton

[645] Because of the similarities between the evidence against the appellants and that against Mr Hamilton, the Judge was correct that the possibility that Mr Hamilton was one of the offenders needed to be excluded beyond reasonable doubt.⁵⁹⁶

[646] A properly directed reasonable jury could have concluded that there was not a reasonable possibility that Mr Hamilton was one of the offenders. A reasonable jury would have been entitled to conclude that Mr Hamilton's plans to undertake a differently orchestrated robbery of the Red Fox had been abandoned. They also could have concluded that Mr Hamilton did not have the opportunity to commit the Red Fox offending, either because they accepted his final alibi or, if not, because the window of opportunity he had to commit the robbery was too small, especially in light of his unreliable Mini and the fact that no possible second offender had been identified despite the comprehensive police investigation at the time.⁵⁹⁷

[647] However, in this case, there is a risk that the verdict was tainted by the inadmissible opinion evidence of DSS Hayward and that, without that evidence, the verdict could have been different. There was therefore a miscarriage of justice on this ground as well as on the unreasonable verdicts ground.⁵⁹⁸

⁵⁹⁴ See above at [493]–[503].

⁵⁹⁵ See above at [503].

⁵⁹⁶ See above at [524].

⁵⁹⁷ See above at [587]–[589].

⁵⁹⁸ See above at [590]–[591].

Outcome of the appeal

[648] I would have allowed the appeals and ordered a retrial.⁵⁹⁹

Takedown order

[649] A takedown order should have been made. The relevant material posed a real risk to Mr Wilson's fair trial rights if accessed by a juror.⁶⁰⁰ The material also posed a real risk of prejudicing Mr Hoggart's right to a fair trial, given the case against Mr Hoggart was largely based on his association with Mr Wilson.⁶⁰¹

[650] The material in this case was so prejudicial, both in terms of nature and extent, that this in itself was grounds for a takedown order. Further, the risk of a juror accessing the material was elevated in the circumstances of the trial, including its length, media interest in the trial, and the fact that Mr Wilson had name suppression but Mr Hoggart did not. The fact the order may not have been wholly effective does not mean it should not have been made.⁶⁰²

[651] Given my conclusion on the other grounds of appeal, I do not need to decide whether the failure to make a takedown order caused a miscarriage of justice.⁶⁰³

Name suppression

[652] As, on the view of the majority, there is to be no retrial, there is no risk of prejudice to Mr Wilson's right to a fair trial and therefore no reason to continue to suppress his name and identifying particulars.⁶⁰⁴

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent
LeeSalmonLong, Auckland for Intervener

⁵⁹⁹ See above at [592]–[593].

⁶⁰⁰ See above at [630].

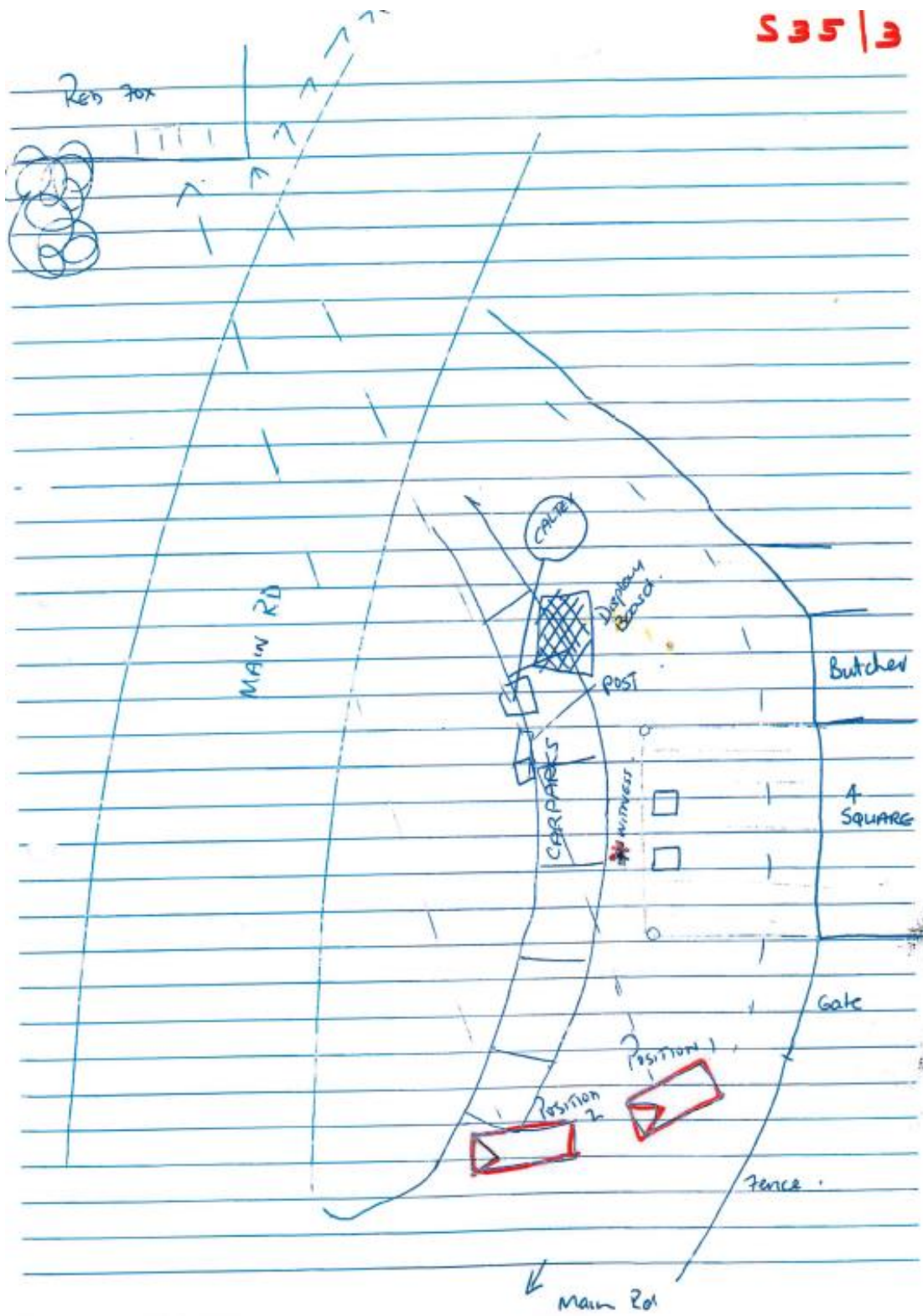
⁶⁰¹ See above at [631].

⁶⁰² See above at [632]–[633].

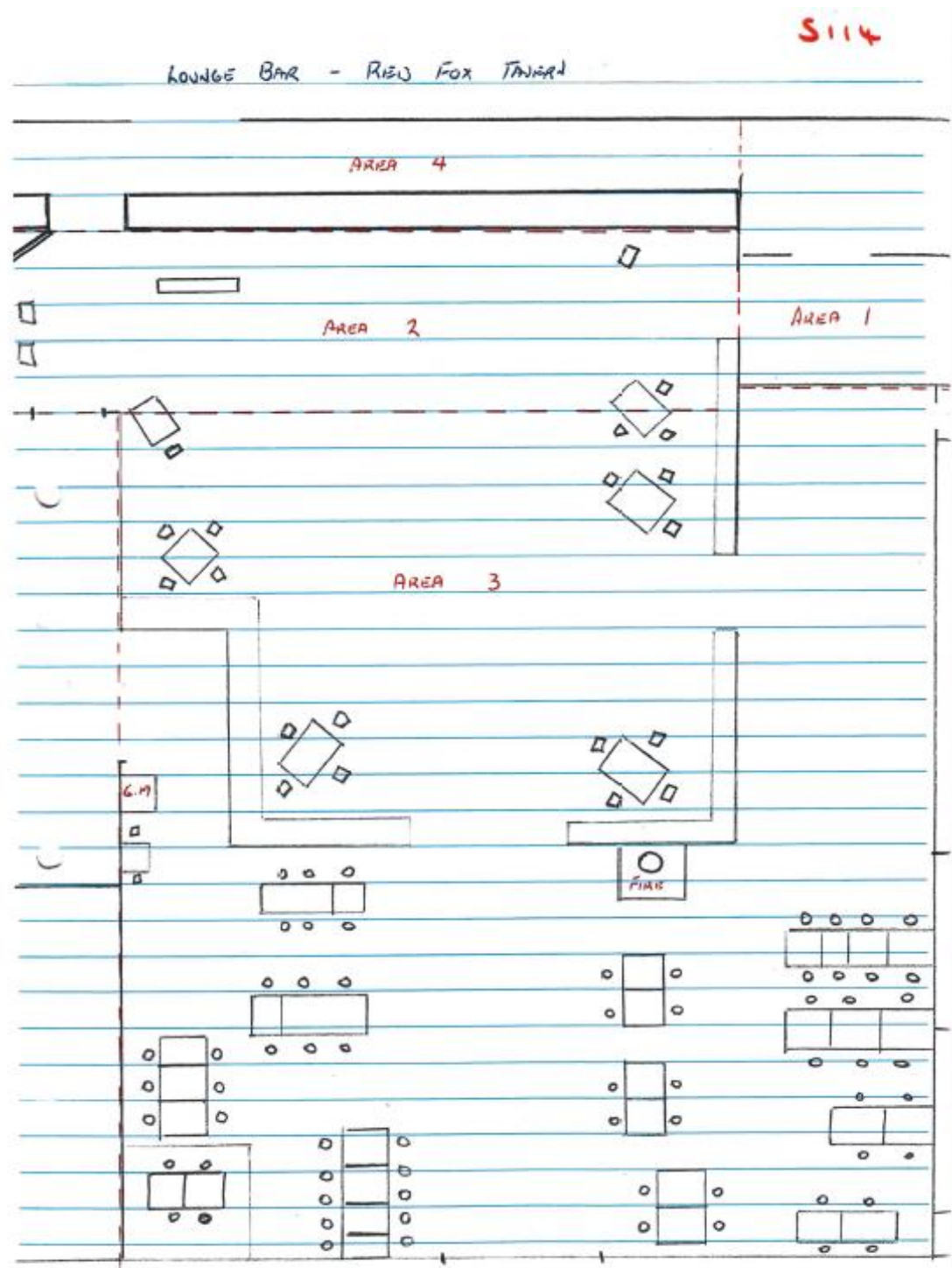
⁶⁰³ See above at [634].

⁶⁰⁴ See above at [638].

Appendix A: Mrs Pyle's diagram



Appendix C: Detective Inspector Lendrum's floor plan

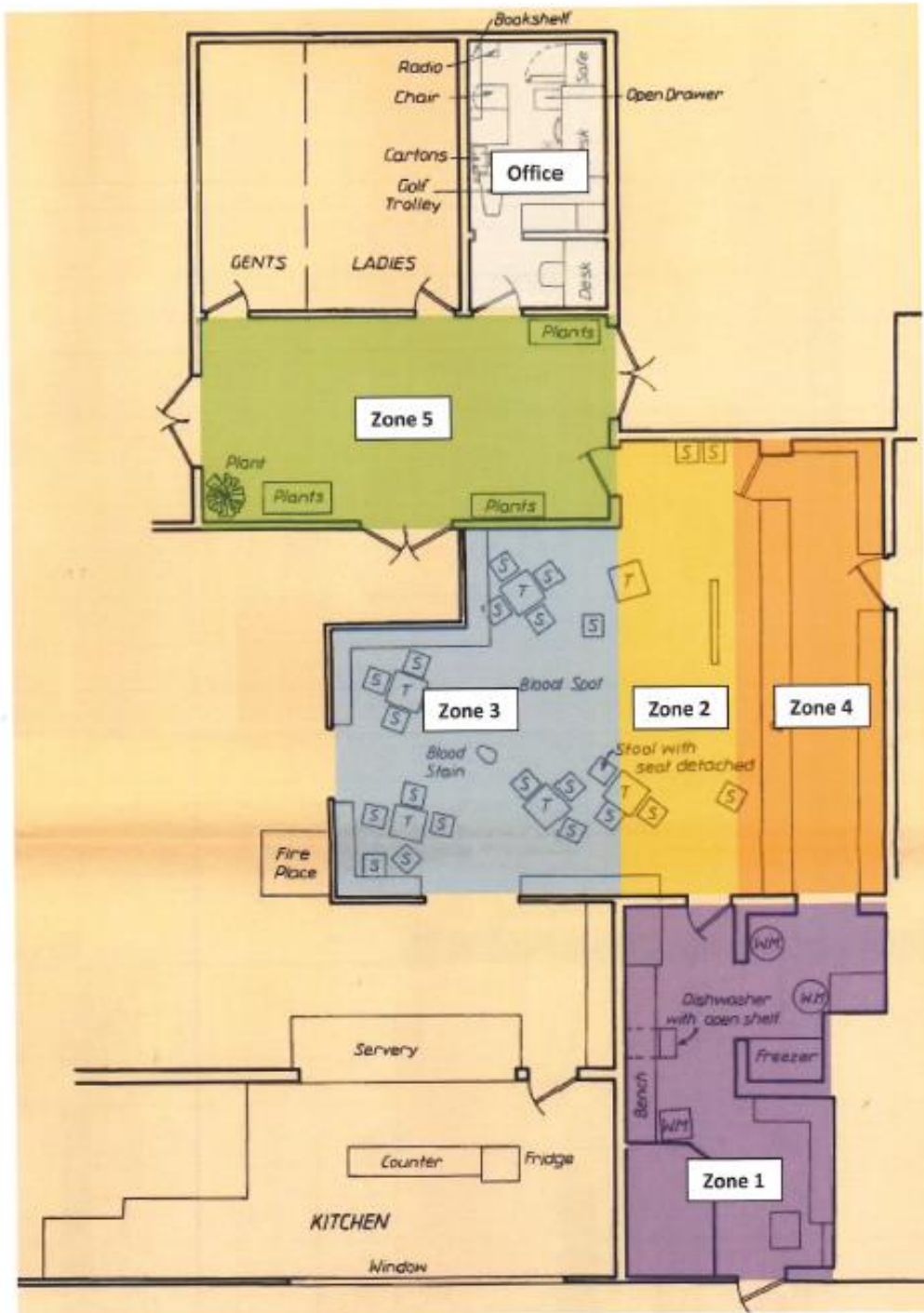


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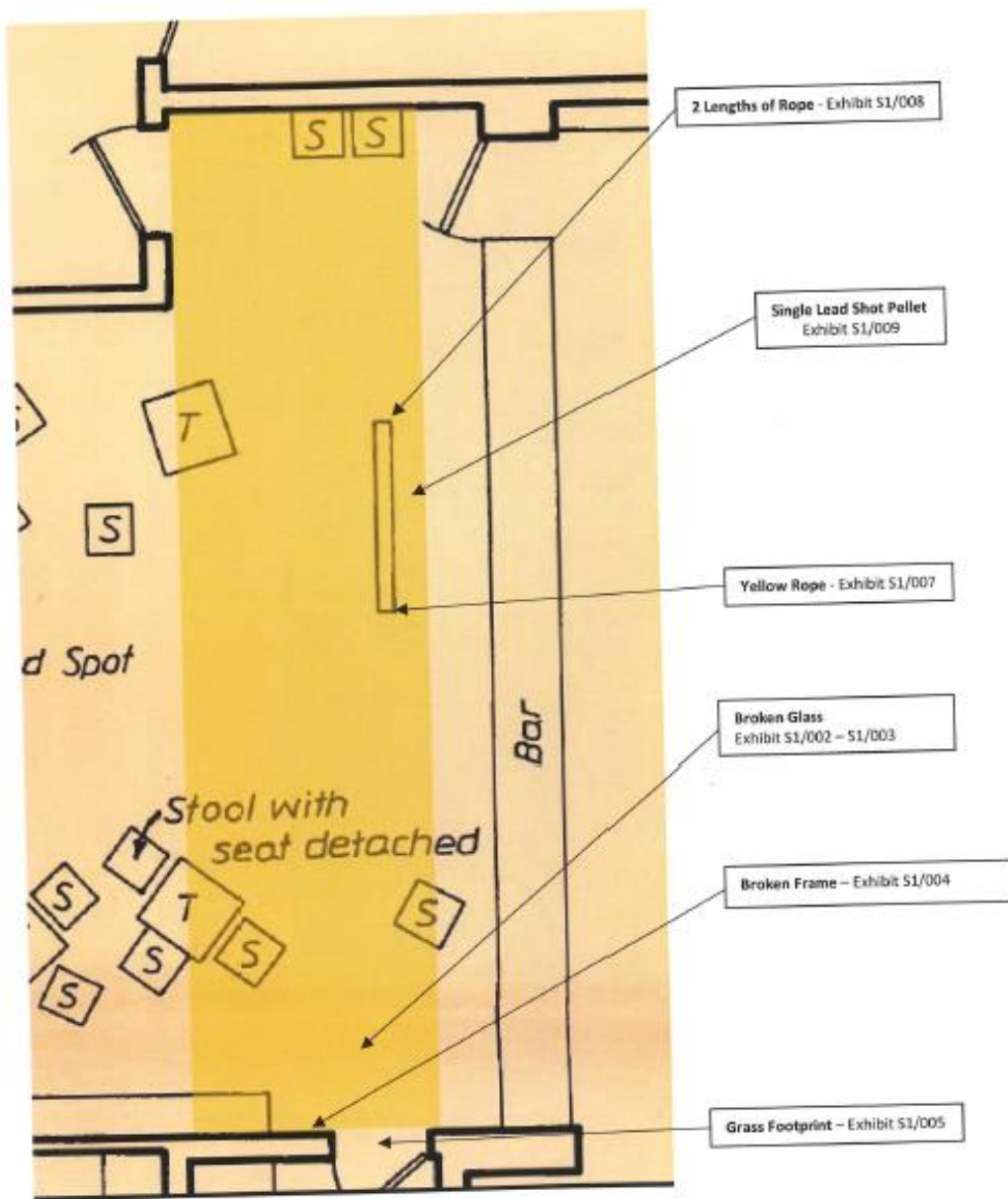
PREPARED BY: *[Signature]*
G. LINDSAY DETECTIVE 6248 25/10/87.

Appendix D: diagrams of Red Fox Tavern interior

Red Fox Tavern: Zone Allocation



Red Fox Tavern: Zone 2 – Lounge Bar



Appendix E: photograph of lounge bar



Appendix F: written notice on jurors' responsibilities

As a juror you have taken a **LEGAL OATH** or **AFFIRMATION** to try the defendant based **ONLY** on the evidence you hear in court.

This means the **FAIRNESS** of the trial depends on you following a few very **IMPORTANT LEGAL RULES**. These rules are explained to you in this Notice.



You need to **READ** these rules, and make sure you **UNDERSTAND** and **FOLLOW** these rules at all times.

You should keep this Notice with your **SUMMONS** at all times while you are on Jury Service.



What Would Happen If You or Any Juror Did Not Follow These Rules?



If you do not follow the rules in this Notice, you may be in **CONTEMPT OF COURT** and liable to a **maximum fine of \$5,000**. This is because these rules about what you can and cannot do as a juror are **ORDERS OF THE COURT** and are also part of the **Contempt of Court Act 2019**. The Judge can initiate an investigation and if he or she finds you are guilty of the prohibited conduct, he or she may impose a fine.

THE RULES

Looking for Information About Your Case



It is **ILLEGAL** for you to **LOOK** for any information at all about your case on the **INTERNET** or **ANYWHERE ELSE** during the trial.

This means you **CANNOT LOOK** for any information about:

- Any **PERSON** involved in the case. This means any **DEFENDANT, WITNESS** or anyone associated with the case including the **JUDGE** and **LEGAL TEAMS**.
- The **CRIME** or **CRIME SCENE**.
- The **LAW** and **LEGAL TERMS** used in the case.
- **COURT PROCEDURES**.

It is also **ILLEGAL** for you to ask **ANYONE** else to **LOOK FOR YOU**.

What Do I Do If I Think Any of These Rules Have Not Been Followed?



If you think that any of these rules have not been followed during the trial it is extremely important that you **TELL THE COURT** about this **IMMEDIATELY**, but do not discuss it with your fellow jurors or anyone else.

To tell the Court, you can speak with your **JURY OFFICER** or you can write a note to the **JUDGE** and give it to the jury officer.

Why Do I Need to Follow These Rules?



It is your **DUTY** to **REPORT** any **BREACHES** of these rules by anyone, including any juror. This is necessary to ensure the trial is **FAIR**.

If every juror does not follow these rules the **TRIAL** may be **STOPPED**, the jury dismissed and the trial will have to start again with a new jury.

This will cause **PROBLEMS** for everyone involved in the case and will waste everyone's time and a lot of taxpayers' **MONEY**.