



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

31 March 2026

MEDIA RELEASE

DAVID WAYNE TAMIHERE v R

(SC 82/2024) [2026] NZSC 22

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. A redacted version of the judgment can be found on Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

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

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

What this judgment is about

Under the proviso to s 385(1) of the Crimes Act 1961, where an appellate court found a miscarriage of justice had occurred, an appeal against conviction may nonetheless be dismissed if the appellate court itself is satisfied of the defendant’s guilt beyond reasonable doubt. This judgment concerns the circumstances, in law and on the particular facts of this case, in which the proviso may or may not be applied and as to when an order for a retrial is to be preferred. The specific issue is whether in its 2024 judgment the Court of Appeal was correct to apply the proviso and decline to exercise its jurisdiction under s 406(1)(a) of the Crimes Act to quash David Wayne Tamihere’s convictions for the murders of Sven Urban Höglin and Heidi Birgitta Paakkonen.

Background

David Wayne Tamihere, the appellant, was convicted in 1990, following a High Court jury trial, of the murders of Mr Höglin and Ms Paakkonen. Mr Höglin and Ms Paakkonen had been visiting New Zealand from Sweden when they disappeared on the Coromandel Peninsula after last being seen on Friday 7 April 1989 in Thames.

The Crown case at trial was largely circumstantial. Neither body had been found. The Crown case relied on the evidence of two trampers who identified Mr Tamihere as a man they met on 8 April 1989 in Crosbies Clearing. This was near to Tararu Creek Road, where Mr Höglin and Ms Paakkonen's car was seen on Sunday 9 April. They said the man they encountered was with a woman resembling Ms Paakkonen.

The trampers' evidence was supported by that of Roberto Conchie Harris. Mr Harris gave evidence of conversations he said he had with Mr Tamihere when both men were on remand in prison. In those conversations, Mr Harris said Mr Tamihere confessed to killing Mr Höglin and Ms Paakkonen, and that he had been in the bush with her and was almost "sprung" by a "couple" while there. The inference advanced by the Crown was that the two trampers were the "couple". Mr Harris also said that Mr Tamihere talked about giving Mr Höglin's watch to one of his sons, which supported other Crown evidence suggesting Mr Tamihere had the watch following the couple's disappearance.

The Crown also relied on an admission by Mr Tamihere that he had stolen the couple's car from Tararu Creek Road on 9 April and had sold or dumped the couple's possessions. He maintained that he had not met Mr Höglin and Ms Paakkonen and knew nothing of their disappearance.

Following the trial, Mr Tamihere appealed against his convictions to the Court of Appeal. Before that appeal was heard, Mr Höglin's body was discovered in the Wentworth Valley on the Coromandel Peninsula. His watch was also found on the body. The location in which the body was found is some 70 km by road from Crosbies Clearing. The Court of Appeal had new evidence about the discovery of Mr Höglin's body. This evidence indicated Mr Höglin had been killed near to where his body was found.

The Court of Appeal dismissed that appeal in 1992. The Court considered the new evidence relating to the discovery of the body, when considered with the evidence given at the trial, was not such that it might reasonably have led the jury to return a different verdict.

In 2017, Mr Harris was convicted of perjury in relation to the key aspects of his evidence at Mr Tamihere's trial, including that Mr Tamihere had talked of being in the bush with Ms Paakkonen and about almost being "sprung" while there with her.

The following year, Mr Tamihere applied to the Governor-General for the exercise of the Royal prerogative of mercy in respect of the murder convictions. Under s 406(1)(a) of the Crimes Act, the Governor-General in Council could refer the question of a conviction to the Court of Appeal for determination. Such a reference was made in this case in 2020. The reason given for the Reference was that the location of Mr Höglin's body and Mr Harris's perjury conviction, in combination, could raise doubts as to the reliability of an important aspect of the Crown case, namely the trampers' identification evidence of Mr Tamihere; and could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.

In its judgment delivered in July 2024, the Court of Appeal found that the admission of Mr Harris's evidence may have affected the jury's verdicts. Therefore, there was a miscarriage of justice. However, the Court then went on to apply the proviso to s 385(1) of the Crimes Act. Broadly, the effect of the proviso is that where the Court finds a miscarriage of justice, an appeal against conviction may nonetheless be dismissed if the appellate court itself is satisfied

of the defendant's guilt beyond reasonable doubt. The Court of Appeal said it was satisfied beyond reasonable doubt of Mr Tamihere's guilt and, accordingly, declined to quash Mr Tamihere's convictions.

The Supreme Court granted leave to appeal against the Court of Appeal's decision on the question of whether the Court of Appeal was correct to decline to quash Mr Tamihere's convictions.

The Court asked counsel to focus on these issues: whether the trial was unfair; whether there was, in light of the new evidence or otherwise, a fundamental error at trial; and finally, whether, in light of the changes to the Crown case, it was right for the Court of Appeal to apply the proviso given the importance of the constitutional role of the jury.

In his submissions before the Supreme Court, Mr Tamihere argued that the Court of Appeal erred in entering into the proviso exercise. This was because, first, the admission of the evidence of Mr Harris was a "fundamental error" giving rise to an unfair trial and precluding the application of the proviso. Mr Tamihere also said that his convictions were upheld on the basis of a new Crown case, developed in response to the evidence Mr Höglin must have been killed near where he was found, that had not been tested before a jury. He submitted that this usurped the role of the jury and the cardinal right to a trial by jury.

In response, the Crown submitted that the perjured evidence of Mr Harris was not of such importance at trial and that this means his evidence could not have caused an unfair trial. As to Mr Tamihere's second submission, the Crown argued that the exercise undertaken by the Court of Appeal in applying the proviso reflects the usual approach to fresh evidence.

Decision

The Supreme Court has unanimously allowed the appeal.

The Court has concluded that it was not right to embark on a consideration of the proviso in this case for two reasons. First, there was a fundamental error at trial which made the trial unfair. Second, the radical recasting of the Crown theory of the case meant that, in applying the proviso, Mr Tamihere's convictions were upheld on a case raising issues, including questions as to credibility and reliability, that had never been tested before a jury.

Unfair trial

As to the first reason, it is settled law that an appellate court cannot apply the proviso where a trial was unfair. That is because, as the Supreme Court said in *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1, there are some errors which are so serious that the proviso cannot save them. In this case, the error resulted from the admission of Mr Harris's perjured evidence. That evidence was directed to the critical issue for the jury's verdicts, it was concocted to secure convictions, and, by referencing corroborative detail, it provided material support for Crown identification evidence. The perjured evidence, including that of another prison informant, was also highly prejudicial. The trial Judge's directions did not cure that problem.

Change in the Crown case

As to the second reason, the discovery of Mr Höglin's body and the fact the evidence suggests he was killed close to where his body was found has led to a radically different Crown theory. That theory entails focusing on events occurring at multiple locations across a different, significantly larger geographical area, and over many hours. There are now two likely crime scenes.

The new Crown theory means other evidence needs to be seen in a new light and raises questions of credibility and reliability about that evidence. Testing of the new evidence is also required. However, the authorities are clear that it is generally not appropriate to apply the proviso to cases which turn on the "assessment of the honesty and reliability of the witnesses". That is because of the disadvantage an appellate court may have in making that assessment on the sole basis of the transcript of the oral evidence.

There are also broader problems in applying the proviso to the new Crown theory of the case. That is because, in saying the proviso is available here, the Crown is arguing for the convictions to be upheld on the basis of a case which was never tested, with all of the procedural protections under the New Zealand Bill of Rights Act 1990 that go with a jury trial. The constitutional role of the jury, reflected in the right to trial by jury protected by the Bill of Rights, is also relevant.

The Court emphasised that it was the extent and fundamental nature of the changes, the evidential and rights-related ramifications of those changes, and the resultant unknowns for the appellate court that mean this case is different from other "new evidence" cases where the proviso may be appropriately applied.

For these reasons, the Supreme Court has determined that it was wrong for the Court of Appeal to embark on a consideration of the proviso. It follows that the Court has quashed Mr Tamihere's convictions. That does not mean that a jury could not possibly be satisfied of guilt, but that would need to be decided on a retrial which the Court has now directed. It will however be for the Crown to decide whether or not to conduct a retrial.

For fair trial reasons, parts of the publicly released judgment have been redacted pending final disposition of a retrial.