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

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MEDIA RELEASE

JAMES HENRY WILSON v THE KING
(SC 60/2023)

MARK JOSEPH HOGGART v THE KING
(SC 77/2023)

[2026] NZSC 88

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. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

High Court orders prohibiting publication of the names, addresses, occupations or identifying particulars of witnesses and connected persons pursuant to section 202 of the Criminal Procedure Act 2011 remain in force.

What this judgment is about

Section 232(2)(a) of the Criminal Procedure Act 2011 provides that an appellate court "must" allow a conviction appeal from a jury verdict if, "having regard to the evidence, the jury's verdict was unreasonable". In March 2021, the appellants, James Wilson and Mark Hoggart, were found guilty by a jury of the aggravated robbery of the Red Fox Tavern in October 1987 and the murder of the publican, Christopher Bush. This judgment concerns whether the jury in this case was entitled to reach guilty verdicts against each appellant to the standard of beyond reasonable doubt.

The judgment also resolves whether the Court of Appeal was correct to conclude that a media takedown order in respect of articles relating to Mr Wilson's previous convictions was not required, and deals with the issue of his interim name suppression.

Background

Late at night on Saturday 24 October 1987, two heavily disguised, armed men held up the Red Fox Tavern in Maramarua. During the robbery, one of the intruders shot and killed the publican, Mr Bush, with a sawn-off shotgun. Neither the large-scale police investigation conducted at the time, nor a review in 1999–2000, uncovered sufficient evidence for the police to charge anyone. It was not until August 2017, following a reinvestigation in 2016, that the appellants were charged with aggravated robbery and murder.

The Crown case at trial was entirely circumstantial—there was no direct evidence tying the appellants to the Red Fox. The Crown in its opening address relied on 10 key evidential strands, which by the close of trial became 12. These can be grouped into three categories: evidence of presence, opportunity and means to commit the offending; evidence of motive and interest; and evidence of subsequent conduct said to be consistent with the appellants' guilt.

The defence case was twofold. First, much of the Crown's circumstantial evidence was weak or unreliable and, even assessing it cumulatively, the jury could not be satisfied of guilt beyond reasonable doubt. Counsel for Mr Hoggart also submitted that there was a paucity of evidence against him, as opposed to that against Mr Wilson.

Secondly, the defence case was that there was a reasonable possibility that an alternative suspect, Lester Hamilton, had committed the robbery and murder, along with an unknown co-offender. The evidence against Mr Hamilton was of much the same order as that against the appellants. It was common ground that there was no possibility of both Mr Hamilton and one of the appellants being guilty—their culpabilities were mutually exclusive. The jury therefore had to exclude as a reasonable possibility that Mr Hamilton was one of the offenders before they could be satisfied that the appellants were guilty.

In March 2021, a jury found the appellants guilty of murder and aggravated robbery.

Court of Appeal judgment

Both appellants appealed against their convictions on multiple grounds. One of their challenges was to the reasonableness of the verdicts. On 5 May 2023, the Court of Appeal dismissed the appeals against conviction, holding that guilty verdicts were reasonably available against both appellants.

The Court of Appeal also rejected Mr Wilson's challenge to the trial Judge's decision to rule evidence of an alleged confession by Mr Hamilton inadmissible. The proposed evidence comprised a statement made by Mr Hamilton to a Mr Hartshorne when discussing the Red Fox offending where Mr Hamilton allegedly said: "Well the stupid bastard shouldn't have moved."

In addition, the Court of Appeal rejected Mr Wilson's submission that a miscarriage of justice occurred due to the trial Judge's refusal to issue a takedown order in respect of all articles relating to Mr Wilson's previous convictions, including for the murder of his former girlfriend.

Issues on appeal

On 12 December 2023, the Supreme Court granted the appellants leave to appeal on two approved questions:

(a) Whether the Court of Appeal was correct to conclude that a media takedown order was not required in the circumstances of this case.
(b) Whether the Court of Appeal was correct to conclude that the verdicts were not unreasonable, including in light of admissible evidence relating to the potential culpability of Lester Hamilton (deceased).

Supreme Court decision

The Supreme Court was unanimous that the appeals be allowed. A majority, comprising Winkelmann CJ, Williams, Kós and Miller JJ, set aside the appellants' convictions and entered judgments of acquittal. Glazebrook J, dissenting in part, would have ordered a retrial.

Unreasonable verdicts—Winkelmann CJ, Williams, Kós and Miller JJ

The majority explained that the test for an unreasonable verdict, as set out by the Supreme Court in *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 is whether, "having regard to all the evidence", the verdict is one that "no jury could reasonably have reached to the standard of beyond reasonable doubt". The question is not whether the jury might have entertained doubt about whether the accused was guilty, but whether it ought to have done so (see at [19]).

In this case, the Crown needed to establish *both* (1) that the evidence placed the appellants at the crime, and (2) that a reasonable possibility that Mr Hamilton committed the Red Fox robbery and murder was excluded. The majority held that the Crown case failed to establish either to the required standard of proof (see at [23]).

As to whether the evidence placed the appellants at the crime, the evidence showed that Mr Wilson had a shotgun at the time of the robbery similar to the gun used in the robbery and gave inconsistent explanations for its acquisition and disposal. These constituted a circumstantial strand supporting guilt (see at [39]). However, much of the evidence the Crown relied upon to tie the appellants to the Red Fox directly was insufficiently reliable to be given any weight by the jury (see at [31], [33]–[35] and [40]–[41]). The descriptions evidence was equivocal (see at [26]–[29]). While the evidence established opportunity and means, there was no reliable evidence placing the appellants in Maramarua, nor at the scene of the robbery and murder (see at [42]).

The addition of the remaining strands of evidence did not alter that conclusion. The motive and interest evidence established, at a general level, need and interest in gaining funds by criminal activity. The subsequent conduct evidence of asset acquisition and lies was capable of supplying two circumstantial strands in support of guilt. But, standing back, the majority did not consider the jury, acting reasonably, could conclude that the Crown case was sufficiently strong to prove the appellants' presence at the Red Fox beyond reasonable doubt (see at [56]–[57]).

The majority also held that the Crown had failed to eliminate as a reasonable possibility that Mr Hamilton was one of the robbers. It was necessary to do so in this case because the evidence against Mr Hamilton was of much of the same order as that against the appellants and, in respect of the detailed planning he had put into a robbery of the Red Fox, stronger (see at [67]). Other evidence suggesting his involvement included that he had created two or three false alibis, propensity evidence, and that he had freely confessed (or claimed) involvement in the Red Fox robbery to criminal associates (see at [59]–[60] and [64]). Additionally, it would have been speculative for the jury to rule out the possibility of his involvement on the basis of lack of opportunity (see at [63]).

The majority therefore concluded that no jury could reasonably have been satisfied of Mr Wilson and Mr Hoggart's guilt beyond reasonable doubt (see at [68]).

Unreasonable verdicts—Glazebrook J

Glazebrook J, dissenting on the unreasonable verdicts issue, found that four pieces of Crown evidence were improperly admitted. Without this evidence, the verdicts may have been different. This gave rise to a miscarriage of justice (see at [455]–[458]).

On the remaining admissible evidence, Glazebrook J concluded that 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 that he had acquired a shotgun for this purpose (see at [463]). They would also have been entitled to conclude that the "earn" was the robbery of the Red Fox Tavern. The evidence supportive of this conclusion included 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 (see at [466]). Further, Mr Wilson had expressed interest in the Red Fox while in prison; he was in the vicinity of the Red Fox over Labour Weekend with his associate, Mr Hoggart; the height differential between the two robbers matched that between Mr Wilson and Mr Hoggart; both inexplicably came into money after the robbery; and Mr Wilson made hinted admissions of involvement to two associates (see at [464]–[467]).

While there was less evidence tying Mr Hoggart to the Red Fox Tavern robbery and murder than there was for Mr Wilson, Glazebrook J concluded that a reasonable jury could have found that Mr Hoggart was the second offender and been sure of his guilt beyond reasonable doubt (see at [468]–[471]).

Glazebrook J also considered that a properly directed reasonable jury could have concluded that there was not a reasonable possibility that Mr Hamilton was one of the offenders (see at [587]–[589]).

The jury by their verdict must have concluded that the Crown had excluded the reasonable possibility of Mr Hamilton's involvement. However, there is a risk that the verdict was tainted by inadmissible opinion evidence of Detective Senior Sergeant Hayward that Mr Hamilton had been eliminated as a suspect and that, without that evidence, the verdict could have been different. This also gave rise to a miscarriage of justice (see at [590]–[591]).

Glazebrook J would have allowed the appeals because of the errors leading to a miscarriage of justice. As aggravated robbery and murder are very serious charges, and because guilty verdicts on the remaining evidence would not be unreasonable, she would have ordered a

retrial. The interests of the victims and their families reinforced that conclusion (see at [592]–[593]).

Evidence of Mr Hartshorne

The Court unanimously held that this statement should have been admitted. Given the conclusions reached on the unreasonable verdicts issue, it was not necessary to decide whether this would have made any difference to the jury's verdicts (see at [70]–[71] and [503]).

Takedown order

Regarding the second ground of appeal, the Court was unanimous that a takedown order was required (see at [72] and [633]). The relevant material posed a real risk of prejudicing Mr Wilson's fair trial rights if accessed by a juror. 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 (see at [630]–[631]).

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 (see at [632]–[633]).

However, given the conclusions reached on the unreasonable verdicts issue, it was unnecessary for the Court to decide whether the failure to make a takedown order caused a miscarriage of justice (see at [14] and [634]).

Name suppression

Mr Wilson had interim name suppression throughout the trial and during both appeals. He initially sought name suppression on the basis that publication of his name would prejudice his right to a fair trial (see at [635]–[637]). As the majority did not order a retrial, there was no such further risk of prejudice (see at [638]). The Court therefore ordered that Mr Wilson's name suppression was to expire on the release of the judgment (see at [76]).

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