NOTE: ORDER MADE IN THE HIGH COURT SUPPRESSING THE NAME OF THE PRISON INFORMANT AND PARTS OF HIS EVIDENCE REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA39/2019
[2020] NZCA 386

	BETWEEN	RANGITERA SPENCER WALKER Applicant
	AND	THE QUEEN Respondent

Hearing:	27 July 2020
Court:	French, Woolford and Dunningham JJ
Counsel:	N Levy QC and O S Winter for Applicant S K Barr for Respondent
Judgment:	2 September 2020 at 9.30 am

JUDGMENT OF THE COURT

A The application to adduce the evidence of Shaun Sullivan is declined.

B The application for an extension of time to appeal is declined.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] In 2009, Mr Walker was convicted of murder. The conviction followed a three week jury trial in the High Court where he was represented by the late Mr Greg King.

The trial Judge, Wild J, sentenced Mr Walker to life imprisonment with a minimum period of imprisonment of 11 years.[1]

[2] Ten years later, Mr Walker seeks to appeal his conviction primarily on the grounds that a co-offender has recently claimed he was solely responsible for the murder.

[3] Mr Walker accordingly applies for leave to adduce new evidence from that co-offender. It is contended that if the new evidence is accepted, this Court should substitute Mr Walker's conviction for murder with a conviction for causing grievous bodily harm, rather than ordering a retrial.

[4] As an alternative ground of appeal, it is argued there was or may have been a miscarriage of justice because the trial Judge failed to give the jury either an intoxication direction or a direction to consider Mr Walker's state of mind having regard to his youth. Mr Walker was aged 15 at the time of the murder.

The Crown case at trial

[5] At approximately 6.30 am on 9 October 2008, Mr Paul Irons was found lying unconscious in the shrubbery of Triangle Gardens in Featherston. He had been severely beaten and some of his property stolen. As the Crown prosecutor later told the jury, the intensity of the attack was such that parts of his body and head were literally broken. He had been punched, kicked and stomped on.

[6] Mr Irons never regained consciousness and died in hospital a few days later.

[7] When interviewed by police, Mr Walker admitted he had been with a group who attacked Mr Irons. However, he denied personally ever hitting him. He said all he had done was to steal Mr Irons' property. He only made physical contact with Mr Irons as he tried to wrest his bag off him. Mr Walker further stated that after the others had finished beating him, he went back to where Mr Irons lay on the ground to check his jacket to see if there was anything to steal. The others told him to put

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1 *R v Sullivan* HC Wellington CRI 2009-485-86, 10 February 2010 at [42].

Mr Irons in the recovery position which he did. He said he could hear Mr Irons moaning and making gargling noises.

[8] Mr Walker declined to name the others in the group. He said he did not know why they had given Mr Irons "a hiding" but suggested they were drunk.

[9] In light of other evidence, the police did not accept Mr Walker's claims about having only a peripheral role in the attack. He was charged with murder, along with two associates Mr Sullivan, a man aged 25 years, and a 19 year old, Mr Kupa-Caudwell.

[10] The Crown case at trial was that all three had administered the beating. The blows each of them had inflicted had materially contributed to Mr Irons' death and were done with murderous intent. It was said the three had been overtaken by a pack mentality, fuelled by aggression, alcohol and stupidity and that in beating Mr Irons to the extent they did, they knowingly ran the risk of killing him but simply did not care.

[11] The evidence called by the Crown was to the following effect.

[12] On the night of 8 October 2008, the three accused were at a party also attended by Mr Irons. During the course of the evening, Mr Walker threatened Mr Irons and Mr Sullivan got involved in a physical altercation with another partygoer.

[13] The three left the party at approximately 12.30 am and headed into the centre of town. They were accompanied by two other associates, Messrs Poutu and Murray.

[14] En route, the group encountered Mr Irons. He was behaving oddly as he came towards them. This annoyed the group. Mr Kupa-Caudwell swung a punch at him, prompting Mr Irons to run off. Mr Walker and Mr Sullivan gave chase. The latter tackled Mr Irons to the ground on the footpath by the local museum. As he lay on the ground, both Mr Sullivan and Mr Walker punched and kicked him.

[15] Mr Irons managed to get up and run towards the Triangle Gardens. He tripped and fell into a grassy area. There, Messrs Sullivan and Walker set upon him again,

kicking him on the ground, as did Mr Kupa-Caudwell. The kicks were aimed at his body and head. Mr Kupa-Caudwell stopped and withdrew near to where Messrs Murray and Poutu were standing watching. Messrs Sullivan and Walker continued to assault Mr Irons.

[16] At some stage, the two dragged Mr Irons into the shrubbery area of the garden and both resumed kicking and stomping him in the head and body. According to the Crown case, it was in the shrubbery area where the bulk of the fatal injuries was administered.

[17] Before leaving the scene, the three accused rifled through Mr Irons' belongings. Most of the property they stole was dumped in a bin near the museum apart from a cell phone and car keys which they took away with them.

[18] They then walked to a house where they knew Mr Irons was staying and tried unsuccessfully to open a vehicle using the stolen keys. The group then dispersed.

[19] Based on evidence of cell phone records and Mr Walker's best guess of the time between when he left the party and the time the group dispersed, the Crown case was that the attack occurred between 12.30 am and 3.30–4.00 am.

[20] None of the three accused gave evidence at trial. Each ran defences that to a greater or lesser extent sought to put the blame on one or both of the others. Mr Walker's defence was that what he said in his police interview was true. It was also submitted on his behalf that even if the jury were to decide he had participated in the assault, they could not be sure he was guilty of the extreme violence that ended Mr Irons' life and could not be sure he had murderous intent.

[21] The main items of evidence against Mr Walker were:

(a) His admission to police that he was present during the attack and had threatened Mr Irons at the party.

(b) The evidence of the two eyewitnesses Messrs Murray and Poutu.

(c) Evidence of Mr Irons' blood on his trousers and shoes.

(d) His lies to the police about the extent of his involvement and the shoes he was wearing that night.

(e) The evidence of highly incriminating admissions made by Mr Walker to four of his friends on 9 October 2008. They included a witness whom Wild J described at sentencing as a particularly impressive witness in terms of the clarity of her evidence.[2] She said that Mr Walker had told her that he had done a lot of head damage and stomped on Mr Irons' head a lot.

(f) Inferences to be drawn from his conduct in leaving Mr Irons lying at the scene unconscious and trying to steal his vehicle as well as attempts to wash blood off his shoes.

[22] The jury found Mr Walker and Mr Sullivan guilty of murder. The jury acquitted Mr Kupa-Caudwell of murder but found him guilty of manslaughter. At sentencing Wild J said the verdict of manslaughter indicated the jury was not sure that Mr Kupa-Caudwell joined in the kicking with murderous intent, that is, knowing that the kicks might result in Mr Irons' death and not caring whether they did or not.[3]

[23] The Judge sentenced Mr Kupa-Caudwell to a term of imprisonment of six years with a minimum period of imprisonment of three years.[4] Mr Sullivan was sentenced to life imprisonment with a non-parole period of 12 years.[5] As already mentioned, Mr Walker was sentenced to life imprisonment with a minimum period of imprisonment of 11 years.[6] The Judge said he was unable to differentiate between the two in terms of their respective roles in the murder but a shorter non-parole period was justified in the case of Mr Walker because of the age disparity, Mr Walker's lack of previous convictions and his remorse.[7]

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2 At [19].
3 At [22].
4 At [57].
5 At [31].
6 At [42].
7 At [39]–[42].

[24] Both Mr Kupa-Caudwell and Mr Sullivan unsuccessfully appealed their convictions to this Court in 2010.[8] Mr Kupa-Caudwell also appealed his sentence which was allowed in part, this Court quashing the minimum period of imprisonment of three years.[9]

[25] Mr Walker did not appeal at the time.

The new evidence

[26] The new evidence Mr Walker seeks to adduce consists of affidavit evidence from Mr Sullivan in which Mr Sullivan purports to disclose that he and he alone was responsible for Mr Irons' death.

[27] Both Mr Sullivan and Mr Walker are still in prison.

[28] In response to Mr Sullivan's affidavit, the Crown filed an affidavit from Ms Perkins, a psychologist from the Department of Corrections, who oversaw the process by which the alleged confession was taken by Corrections and Mr Walker informed. The Crown also filed an affidavit from a police detective, David Keane, analysing recorded telephone calls made by Mr Sullivan and Mr Walker from the prison in December 2018 and January 2019.

[29] The affidavit from the detective prompted Mr Walker to file an affidavit himself proffering an explanation for the phone calls.

[30] The circumstances of Mr Sullivan's disclosure are that on or about 11 December 2018 he arrived at the same prison where Mr Walker has been serving his sentence. The two men had not seen other since the trial in 2009.

[31] On 21 December 2018, Mr Sullivan told his therapist at the prison that after seeing Mr Walker in the unit, he had become overwhelmed by guilt. He said he had carried a secret for many years, namely that it was him and him alone who had administered the fatal blows. It had been a heavy burden, but he could no longer

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8 *Kupa-Caudwell v R* [2010] NZCA 357.
9 At [106].

maintain his lie. He wanted to tell Mr Walker the true story and follow correct legal process as he believed that Mr Walker had been wrongly convicted of murder.

[32] Mr Sullivan then proceeded to tell the therapist a new account of how Mr Irons died that night. The account given to the therapist is essentially the same as that given by Mr Sullivan in his affidavit tendered in this Court.

[33] Mr Sullivan says that while a group assault did occur as alleged at the trial, it was him who ordered the group to attack Mr Irons and threatened to harm them if they did not comply. Mr Walker did not want to become involved, but Mr Sullivan told him he had no choice, otherwise he would join Mr Irons.

[34] Mr Sullivan said he thought they stopped the group attack because they found the cell phone and the car keys. After going to Mr Irons' house to see if the keys fitted any cars, they went to a friend's house. After using the bathroom there, he left on his own.

[35] He walked past where the group had left Mr Irons, but then turned back and went to where Mr Irons was. He said he was not sure why he did that.

[36] When he returned to where Mr Irons was, Mr Irons had gotten back up. He was on his feet and looking directly at Mr Sullivan. At that point, Mr Sullivan "freaked out". Mr Irons started to walk away, limping. He had only taken one or two steps away from Mr Sullivan when the latter hit him from behind on the side of the head. Mr Sullivan says he remembers thinking that he was going to kill Mr Irons because Mr Irons might identify him.

[37] Mr Sullivan claims he then hit Mr Irons a second time. Mr Irons went down again and Mr Sullivan continued to hit him. He kicked and punched him all over his upper body and head. He stomped on him and jumped on his head. He says he does not know how many times he stomped on Mr Irons, but it would have been around six times or more. It was with full force with some blows using both of his feet at the same time.

[38] Mr Irons was "out to it" and Mr Sullivan then walked off to another friend's house. He went inside and slept on his couch. The friend did not see him enter. Mr Sullivan says he was not sure if the friend was there or not.

[39] The alleged solo attack consists of the same sort of violence — kicking, punching and stomping — as the group attack. It also is said to have taken place in the same shrubbery area where the group attack finished and time wise must have taken place within less than four hours of the group attack finishing. For those reasons, it is consistent with the forensic evidence given at trial both as to the location of the attack, the nature of the trauma sustained by Mr Irons and the estimated likely time of the attack. The forensic experts are not able to say how many separate attacks there were.

[40] After making his disclosure to Corrections staff, Mr Sullivan was asked how Mr Walker was likely to react once he heard the confession. Mr Sullivan said he would expect Mr Walker to hit him. That raised obvious safety concerns. Mr Sullivan promised he would not say anything to Mr Walker until the therapists had returned from their Christmas break.

[41] On 7 January 2019, Mr Sullivan advised his therapist that he had managed to maintain confidentiality over the break. Subsequently Corrections staff met with Mr Sullivan to advise of possible dates for a meeting with Mr Walker and the process. That included advice that after disclosure to Mr Walker, Mr Sullivan would be removed from the unit.

[42] On 16 January 2019, Mr Sullivan told his psychologist that he had accidentally told Mr Walker that he was moving out of the unit. Mr Walker was asking a lot of questions. Mr Sullivan said he wanted to do the meeting straight away because he did not believe he would be able to withhold it from Mr Walker any longer.

[43] The meeting with Mr Walker duly took place that same day. It was described by Corrections staff in attendance as highly emotional. Both men were tearful. Mr Walker was so shocked by Mr Sullivan's disclosure that he became physically sick.

Analysis of the new evidence

[44] The principles governing the admission of new evidence on appeal are that the evidence must be fresh, credible and cogent.[10]

[45] There is no question that Mr Sullivan's new evidence is fresh. He has never told anyone this account before and it could not with reasonable diligence have been obtained by Mr Walker at trial.

[46] However, we have come to the very clear view that the evidence is not credible. It has all the hallmarks of a story that has been concocted by the two co-offenders.

[47] We say that for the following reasons.

[48] First, there is the fact the two both went out of their way to create the impression — which we find to be false — that prior to the joint meeting on 16 January 2019 they had never discussed the new evidence with each other. They made that claim both to Corrections staff and on oath to this Court.

[49] However, taped phone calls between Mr Walker and third parties in December and January before the joint meeting show that claim to be demonstrably untrue. It is clear in our view that Mr Walker knew all along what Mr Sullivan's story was going to be and that his apparent shock at the joint meeting was regrettably feigned to deceive. Mr Walker attempted in evidence to explain away the phone calls but his explanations at times bordered on the absurd.

[50] We are reinforced in this conclusion by consideration of the fact that on 20 December 2018 — the day before Mr Sullivan made his all-important disclosure to his therapist — Mr Walker was recorded as having disclosed to a different therapist that he believed Mr Sullivan had gone back to the scene of the crime and murdered the man they attacked. Mr Walker said he had always had this suspicion but had never disclosed it to anyone before.

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[10] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

[51] We consider it a highly improbable coincidence that Mr Walker would without knowing about the new evidence have told his therapist the exact same story as Mr Sullivan was to disclose the very next day. The much more likely inference is that the two had already discussed it and knew what they were each going to say.

[52] Other questions arise from the evidence of what Mr Walker said to his therapist. Questions which further detract from Mr Walker's credibility.

[53] Mr Walker said he had always entertained this suspicion of a later attack primarily because when Mr Walker last saw Mr Irons he had his trousers on whereas when Mr Irons was found his trousers were down. That would be something Mr Walker knew at the time of the trial. If he had truly entertained these suspicions, it would be reasonable to expect him to mention this to trial counsel Mr King. He did not.

[54] Another explanation Mr Walker gave for always entertaining these suspicions was the condition that Mr Irons was in when he left the scene. Mr Walker told the therapist Mr Irons was alive, and that Mr Walker's fear was that Mr Irons would come looking for him and attack him. He was therefore, he said, very surprised to hear subsequently that Mr Irons had died.

[55] That claim is totally at odds with the evidence of what he told his friends in the aftermath of the attack about Mr Irons' condition. He told them he had smashed up Mr Irons really badly and left him not moving. He asked one friend to hide him and asked another "did we kill him?" When the person replied he thought they had, Mr Walker's response was not one of surprise, but "[t]hat's gangster."

[56] Moreover, if Mr Walker had always harboured these suspicions about a later attack, it does not make sense why he would be quite so shocked and astounded to the point of being physically ill at the joint meeting in January 2019.

[57] A further reason we reject the new evidence is that Mr Sullivan's account is inherently implausible. It involves a scenario that after lying in the shrubbery for at least two hours or more, Mr Irons happens to stand up just at the very moment

Mr Sullivan happens to walk past. It also involves Mr Irons only managing to get a couple of steps away from where he was standing before Mr Sullivan knocks him to the ground again, therefore conveniently still being in the shrub area.

[58] Not only is this account inherently implausible, Mr Sullivan added new implausible details under cross-examination when pressed to explain why he turned around. As mentioned, in his affidavit he said he did not know why he had turned around. Under cross-examination however, he said he heard gurgling and choking in the garden and that was most probably the reason he turned around. His affidavit had made no mention of hearing gurgling and choking. And he never told his therapist that either.

[59] When asked to explain why it had not been mentioned in his affidavit, the only explanation Mr Sullivan could give was that it had just come out of his mouth.

[60] As already mentioned Mr Walker himself told the police he heard Mr Irons moaning and gargling blood. We consider it most unlikely that Mr Irons was still gurgling or gargling after several hours.

[61] It also does not make sense that Mr Sullivan "freaked out" when he saw Mr Irons stand and look at him. If, as is now claimed, Mr Irons was ok and not at risk of dying when the group left him, he was always going to be able to identify them.

[62] Another important aspect of Mr Sullivan's new evidence we find lacking in credibility is his claim that he forced Mr Walker to join in the attack. The claim is supported by Mr Walker who says he was scared of Mr Sullivan. His professed fear of Mr Sullivan is important to his narrative because it is also the reason he advances for never telling anyone about his suspicion of a later attack.

[63] There was certainly a significant age disparity between the two. Mr Walker was 15 and Mr Sullivan 25. However, we do not accept as credible the claim that Mr Walker was scared of Mr Sullivan for the following reasons:

(a) Mr Walker had known Mr Sullivan all his life. He told police in 2008 that they "have some good laughs" and had "been getting a bit closer".

(b) Both are members of the same gang and when Mr Sullivan arrived at the unit, Mr Walker defended him to his fellow inmates and told them Mr Sullivan was his friend.

(c) The claim about being too fearful of Mr Sullivan to make allegations about him is at odds with the evidence of the statements Mr Walker made to his friends the day after the attack. According to their evidence, he named Mr Sullivan as one of the attackers and described the violence Mr Sullivan had meted out to Mr Irons. He also never told them that Mr Sullivan forced him to join in.

(d) The claim is also at odds with the defence run on his behalf by Mr King at trial. Mr King put the blame on Mr Sullivan for the fatal blows. There is no suggestion that Mr King was not acting on instructions in trying to put the blame on Mr Sullivan.

[64] Finally, we note that Mr Sullivan's new evidence is inconsistent with any account he has previously given, including a detailed account which he gave to a prison informant. Mr King on behalf of Mr Walker described the informant's evidence at trial as gold standard because it contained information regarding attempted destruction of clothing that was found to be true and which the informant could only have acquired from Mr Sullivan.

[65] The informant testified that Mr Sullivan had told him that at the very end of the group attack, he put in two big stomps while Mr Irons was lying on the ground in the shrubbery area. Mr Sullivan stated he did that, saying to the rest of the group words to the effect "let's finish him off and put him out of his misery". Mr Irons was gurgling blood. There was a cracking noise after each of the two stomps and Mr Irons stopped moving. According to Mr Sullivan's account as relayed by the prison informant, Mr Walker then farted in Mr Irons' face.

[66] In cross-examination before us, Mr Sullivan did not deny ever saying these things to the informant. Surprisingly, given the subject matter, he said he could not recall.

[67] To summarise, in our view, the two men have deliberately lied when they claimed never discussing with each other that Mr Sullivan would come forward with a new story of a later attack. The account of the alleged later attack is itself inherently implausible and was embellished at the hearing before us. It does not make sense. Mr Walker's claims of being fearful of Mr Sullivan at the time are also not credible being inconsistent with the way his case was run at trial and the evidence of his friends at trial. So too his claims that at the time he was surprised to hear that Mr Irons had died. Mr Sullivan's new account is also inconsistent with accounts he has given previously.

[68] In light of all the above, we have come to a clear conclusion that the new evidence is fabricated. Leave to adduce it as further evidence on appeal is therefore declined.

[69] Finally, for completeness we record that in coming to this conclusion we have not overlooked competing submissions about Mr Sullivan's possible motives in coming forward. The Crown argued he had nothing to lose by fabricating this story to help out a friend and fellow gang member. Conversely, Mr Walker's counsel Ms Levy QC contended Mr Sullivan would have no motive to fabricate evidence and that he did have something to lose. Mr Sullivan said he had been advised (by Mr Walker's co-counsel Mr Winter) that it might impact adversely on his chances of getting parole.

[70] The possibility that Mr Sullivan might suffer a personal disadvantage in coming forward is a factor which is favourable to Mr Walker's case. However, it is completely outweighed by the other matters identified above which strongly point to the evidence being false.

[71] We now turn to the alternative ground of appeal, namely that a miscarriage of justice has arisen from the Judge's failure to give an intoxication and youth direction.

It was common ground that the Judge did not give a direction on intoxication and nor did any of the defence counsel, including Mr King, seek one.

Absence of directions on intoxication and youth

[72] In order to advance an appeal based on alleged failings in a summing up that was given 10 years ago, Mr Walker requires leave to appeal out of time.

[73] The test to be applied in determining whether to grant an extension of time is whether it is in the interests of justice, taking into account all relevant circumstances.[11] This Court has held that a "long delay is a major factor weighing against leave being granted and, if unexplained, would usually be decisive".[12] The merits, or lack of merit, of an appeal are also a weighty factor.

[74] Mr Walker told us that Mr King spoke to both him and his family after the sentencing and advised that it was not worth appealing. Mr Walker did not ask for a second opinion. He did not say this expressly, but we infer the advice from Mr King was the reason he did not appeal at the time. There was no other explanation about the delay in the intervening years. He did not say he had never consulted other lawyers before the story about fresh evidence surfaced.

[75] As regards the merits, the first point we would make, in fairness to Mr King, is that in our view it is much more likely he made a deliberate tactical decision not to seek a direction on intoxication rather than overlooking it as Ms Levy submitted. The thesis she advanced on behalf of Mr Walker involves Mr King forgetting the matter not only at trial but again when advising on appeal prospects. This despite the fact that the consumption of alcohol was a feature at the trial, the Crown suggesting it had the effect of disinhibiting the group and the defence suggesting the alcohol explained the otherwise inexplicable callousness. Mr King was an experienced and highly respected advocate who, as a number of other cases demonstrate, was well versed in the law relating to intoxication and intent. The trial record shows that he represented Mr Walker with considerable skill and competence.

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11 *R v Lee* [2006] 3 NZLR 42 (CA) at [96]–[99]. See also *R v Knight* [1998] 1 NZLR 583 (CA) at 587.

12 At [115].

[76] We also note that after the Judge had given his summing up, there was a lengthy discussion with all counsel during which counsel identified a number of concerns with the summing up and which led to the Judge recalling the jury and making some additional comments. The need for an intoxication direction was never raised by any of the defence counsel, who like Mr King, were also experienced lawyers. We further note that the failure to give an intoxication direction was never part of the appeals that were taken to this Court in 2010.

[77] In any event, regardless of what Mr King's thinking may have been, we consider that having regard to all the evidence it is not tenable to suggest that an intoxication direction may have affected the outcome. Indeed, we consider that giving such a direction carried with it the real risk that it would undermine Mr Walker's primary defence which relied on the detailed account he gave police. He claimed to be able to recall the detail of his own actions, the assaults by the others as well as the injuries to Mr Irons. The account he gave also involved him being capable of participating actively in the stealing of the property, putting Mr Irons in the recovery position, dumping the stolen property, considering whether to burn it to get rid of the evidence, consciously deciding against that course of action because it might attract unwanted attention from the fire brigade as well as trying the keys in several vehicles. He has now of course sworn an affidavit saying he can recall the state of Mr Iron's clothing.

[78] As regards the Judge's failure to give a youth direction, Ms Levy relies on the decision of this Court in *Churchward v R*, a decision that was actually issued two years after the trial.[13] Even under *Churchward v R* however such a direction while described as "preferable" is not mandatory.[14] In this case, as in *Churchward v R* itself, the jury was well aware of Mr Walker's age. Mr King had also specifically drawn it to the jury's attention and asked them to take it into account when assessing Mr Walker's knowledge and appreciation of the likely consequences of the assault. No counter-intuitive evidence was required to establish that 15 year olds do not always foresee the consequences of their actions. That was self-evident. In our view, the

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13 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
14 At [12].

absence of a direction on youth in this case could not conceivably have caused or created the risk of a miscarriage.

[79] The length of the delay, the absence of any cogent explanation for the delay and the lack of merit in the proposed appeal have persuaded us it would not be in the interests of justice to grant an extension of time.

Outcome

[80] The application for leave to adduce the further evidence of Shaun Sullivan is declined.

[81] The application for an extension of time to appeal is declined.

Solicitors:
Crown Law Office, Wellington for Respondent