IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 21/2022

ALAN RUSSELL HALL

Appellant

v

THE QUEEN

Respondent

SUBMISSIONS IN SUPPORT OF APPEAL AGAINST CONVICTION
Next event date: 8 June 2022

Counsel for the appellant confirms that this document is suitable for publication

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MAY IT PLEASE THE COURT:

Introduction

1 Thirty-six years' ago, in 1986, Alan Hall was found guilty of murdering Arthur Easton, and wounding one of Mr Easton's sons. He was sentenced to life imprisonment.

2 Mr Hall's appeal against conviction was dismissed by the Court of Appeal on 27 August 1987.[1]

3 The Crown alleged that Mr Hall was an intruder who entered the deceased's home on the evening of 13 October 1985. The single issue at trial was whether the Crown had correctly identified Mr Hall as the offender.

4 The deceased's sons, Kim and Brendon Easton, engaged at close quarters with the offender. At the time of trial, they were six feet and one inch and six feet in height respectively. Immediately and consistently in their statements thereafter, the Eastons described the intruder as a man very close to their height. Messrs Easton were consistent in their descriptions of a man who was sturdy and strong (and stronger than them), with dark medium length hair, wearing a dark top (possibly a blue sweatshirt), jeans and sports shoes. While neither ultimately provided an opinion in their statements to police or at trial about the intruder's ethnicity, they described him as Māori to those to whom they spoke in the immediate aftermath.

5 The man that the Crown said was the intruder was seen fleeing the scene by Ronald Turner. The Crown invited the jury to infer this was Mr Hall because Mr Turner purportedly told police that a blue top owned by the appellant matched that worn by the fleeing assailant.

6 The Crown's visual identification evidence was not reconcilable with what is known about Mr Hall. He is five foot and seven inches in height, Pakeha, slim in build (and asthmatic), left-handed and, on the defence case, wearing a red sweatshirt on the night of the murder.

7 The five grounds of appeal proposed by Mr Hall in his notice of application address the methods adopted by the prosecution to counteract the fact that, if its key eyewitnesses had correctly described the height, build, strength, and ethnicity

[1] *R v Hall* [1987] 1 NZLR 616 [CA judgment]: **Tab 1 in the appellant's original bundle**.

of the offender, then Mr Hall simply could not be the murderer. The trial Judge described the issue to the jury in the following way:[2]

> … but of course if this was an accurate measure of height that these boys gave as 6 foot and that the suspicion that he was a Maori was correct and he really was a Maori, then of course the intruder was not the accused.

8 It is submitted that it is not hyperbolic to assert that a starker example of a trial gone wrong would be hard to find. That explains the Crown's concession – for which it is to be commended – that one of Mr Hall's proposed grounds is "unanswerable", and, as a consequence, that, "will likely cast a long shadow and limit some of the arguments which can responsibly be made in answer to Mr Hall's remaining allegations".[3]

9 On 3 May 2022, this Court granted Mr Hall leave to appeal on general terms. In doing so, it invited the appellant to identify whether he wishes to pursue all five grounds contained in his notice of application. In light of the Crown's concession that the appeal should be allowed, Mr Hall accepts that it is not necessary for this Court to conduct the full review originally sought. However, to do justice to the case, it is respectfully submitted that this Court should engage with three of the grounds Mr Hall proposed. For clarity's sake, what were described in the notice of application as grounds (a) and (e) will not be squarely addressed in these submissions, except where the argument has a bearing on the remaining grounds.[4]

10 Mr Hall has unyieldingly maintained his innocence notwithstanding the many setbacks he has faced satisfying the State that he is the victim of a miscarriage of justice. Mr Hall recognises that an appellate court, except in those rare cases in which the Crown seeks to rely upon the proviso, is not required to directly assess for itself whether an appellant is guilty. He accepts that the establishment of innocence is not a function that falls to an appellate court. That being said, it is submitted that the preponderance of evidence that the jury heard in 1986, combined with what is now known about the deceitful way in which the prosecution secured Mr Hall's convictions, persuasively vindicates why the

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[2] Summing up of Justice Prichard at p 47**: Tab 2 in appellant's original bundle**.
[3] Crown's submissions regarding leave, at [10].
[4] Ground (a) asserted that the trial Judge's summing up was not balanced and fair. Ground (e) asserted that the Crown adduced misleading opinion evidence from a pathologist that the intruder was lefthanded, as is Mr Hall. The ground relies upon fresh expert evidence from Alexander Kolar, forensic pathologist, who opines that there was no way to determine the handedness of the intruder based on the wounds.

appellant's supporters have, for over three decades, proclaimed his innocence. The real killer remains at large.

The three grounds of appeal that are addressed in these submissions

11 A comprehensive notice of application outlined Mr Hall's proposed arguments in detail. In addition, a bundle was filed, which contains the relevant trial documents and evidence substantiating the proposed grounds of appeal. For convenience, counsel will set out in full the three grounds that these submissions address, in the order they are dealt with.[5]

The first ground: Both the jury and Mr Hall were deceived

12 The jury were misled because the statement of a key witness, Mr Turner, omitted reference to the fact the man he observed, who the Crown said was the fleeing offender, was Māori. It is beyond dispute that police intentionally redacted Mr Turner's statement. This meant that Mr Turner's evidence conformed with the Crown's theory that Mr Hall was the man seen running from the scene by Mr Turner, and contradicted the defence case, based on the initial descriptions provided by Messrs Easton, that the intruder was Māori. The Crown did not disclose the two earlier statements made by Mr Turner in which he steadfastly maintained that the man he saw was Māori.

The second ground: The width of the disclosure failings and its impact on the fairness of Mr Hall's trial

13 The fairness of Mr Hall's trial was undermined by the failure by the prosecution to meet its disclosure obligation. The Crown is unlikely to resist the submission that there are six categories of information that were not disclosed by the prosecution prior to Mr Hall's trial (or his appeal). These are: Mr Turner's statements; information pertaining to a "reconstruction" and a "sighting experiment" that police undertook with Messrs Easton and Mr Turner respectively, which explained crucial changes in the evidence presented at trial vis-à-vis what the witnesses had said earlier in time; various statements made by Brendon and Kim Easton describing the offender and the way in which events unfolded in the hallway during the confrontation (including those provided early in the investigation, containing the most detail); jobsheets recording the Eastons'

[5] Which are grounds (c), (d) and (b) in the notice of application.

certainty that the intruder was righthanded; the statement made by a first-attender, an ambulance officer, on 13 October 1985, which recorded one of the earliest descriptions of the intruder provided by the Eastons - tall and Māori; and additional information about the man who was police's primary suspect before Mr Hall, Suspect A, which undermines the notion that police persuasively excluded him as the offender. All of this cogently demonstrates that the Court of Appeal was misled in 1987, which undermines its conclusion that the prosecution met its disclosure obligations and that no miscarriage of justice arose in the context of a case that was exclusively about whether the Crown had proved that the appellant was the offender.

The third ground: Mr Hall's dealings with police

14 It is now known that Mr Hall has autism spectrum disorder (ASD), which is not something that appears to be in dispute. There is fresh expert evidence available that provides an explanation for the prejudicial way in which Mr Hall acquitted himself, and answered questions, during his interviews with police. The Crown's case hinged on the fact that Mr Hall appeared to lack credibility, and his behaviour was consistent with guilt because he provided various different explanations. Mr Hall has filed evidence from the clinical psychologist, Tanya Breen, who diagnosed him in 2019. He also filed evidence from Dr Clare Allely, Associate Professor in forensic psychology, which addresses the ways in which Mr Hall's ASD is likely to have impacted on his ability to participate in the lengthy interviews conducted by police. Dr Allely's evidence provides substantially helpful explanations for the ways in which Mr Hall's ASD affected his behaviour and responses when interrogated. It also addresses the ways in which ASD could have affected the reliability of Mr Hall's memory.

15 Mr Hall's dealings with police on 11 and 16 December 1985 culminated in two statements that were of critical importance to the Crown at trial, which it acknowledges in its leave submissions.[6] As the Court of Appeal said in its judgment:[7]

> The Crown's case rested mainly on the appellant's admissions that he had owned the bayonet [the murder weapon] and he had possession of the hat which were found at the scene of the crime, that his explanations for not being in possession of them at the material time were inconsistent and not credible

[6] Crown's leave submissions at [28].
[7] CA judgment at 619.

> and he had admitted taking a walk in the vicinity of the deceased's house at about the time of the homicide.

16 At the outset, it is acknowledged that this Court is not required to engage with the vexing issue of whether Mr Hall's ASD meant that he was vulnerable to the questioning techniques adopted by police, to determine whether the circumstances in which the statements were made adversely affected their reliability. Second, it need not decide whether the statements were the product of oppressive conduct by police.

17 While highlighting the logistical challenges posed by a fully-fledged exploration of the relevance of Mr Hall's ASD and the propriety of police's conduct, the Crown tacitly accepts the persuasiveness of the argument that the statements would, when viewed through the modern lens of s 30(5)(c) of the Evidence Act 2006, in all likelihood be found to have been unfairly, therefore improperly, obtained.[8] In its leave submissions, it said:[9]

> On its face, given the package of factors replied on by the [appellant], there is a reasonable foundation for the argument that Mr Hall's statements were unfairly obtained. With that said, this Court has previously expressed the view that it is not the appropriate forum for complex, fact-based enquiries requiring examination of witnesses. Given the overriding merits of Mr Hall's application, the Crown submits that there is no need for this Court to depart from the established practice and undertake what would amount to substantial factual enquiry at this late appellate stage on the proceedings.
>
> [Footnote omitted]

18 Even if Mr Hall's 2019 ASD diagnosis is put to one side for the purposes of this appeal, that does not diminish the fact that police knew in 1985 that he was a vulnerable suspect. The unfair methods adopted by police to elicit Mr Hall's statements, and the likely downstream impact that has on their admissibility, explains the Crown's decision not to seek a retrial. It is respectfully submitted that the circumstances relied upon by the Crown to justify the dispositional stance it has taken should be made known to this Court.

19 To explain why the Crown made its concession, these submissions summarise the behaviour and tactics of the police officers who dealt with Mr Hall, the responses elicited, and the opinions they expressed to the jury about why the way in which the appellant acquitted himself under interrogation bore on his guilt. It is not

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[8] Sections 4(2) and 5(3) of the Evidence Act 2006 relevantly provide that while the pre-Act law governs this appeal, it would apply at any retrial: per *R v Bain* [2008] NZCA 585.
[9] Crown's leave submissions at [31].

expected that the Crown will dispute the provenance of the synopsis, given that it builds upon the evidence adduced at trial and information contained in police documents annexed to Mr McKinnel's affidavit.

The evidence at trial

20 The essential factual narrative will be described before turning to the grounds of appeal.

The description of the offender vis-à-vis Mr Hall

21 Mr Easton was murdered in his home by an intruder, who he and his two sons confronted. The three men grappled with the intruder, who was armed with a bayonet, in the hallway. Kim Easton armed himself with a squash racquet and landed three blows to the intruder's head, breaking the racquet in the process. The intruder was able to fend-off the three occupiers, open the door through which he had entered and escape. While momentarily trapped in the doorway, the woollen hat he was wearing was removed. He left behind the bayonet in the hallway.

22 The intruder climbed through a hedge adjacent to an accessway and ran. Blue fibres were found by police on the hedge where the intruder egressed.

23 All three of the Eastons suffered wounds. The deceased suffered three stab wounds and died soon after police and the ambulance arrived.

24 On the Crown case, the intruder was seen fleeing by one of its witnesses, Mr Turner. Mr Turner described the man he saw as between five foot seven inches and six feet in height, of average build and wearing a blue sweatshirt. At trial, the jury had Mr Turner's written statement in which he stated that the jersey the man was wearing matched one owned by Mr Hall, which had been seized by police and which was produced as Exhibit 31 by the Crown.

25 Brendon Easton's first description of the offender was provided to the 111 operator at 8:11pm. He said that the intruder was Māori, approximately 18 years' old, about six feet tall and with brownish hair.[10]

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[10] As Mr McKinnel states in his affidavit at [37], it not clear whether the 111 transcript was disclosed prior to trial. A copy of the transcript is **annexed as TM1**.

26 A prison officer provided evidence of Mr Hall's height and weight.[11]

The visual identification evidence heard at trial

27 At trial, Brendon Easton's evidence describing the intruder was vague. He asserted that the only thing he could remember about the man was that he was wearing blue jeans and a balaclava that was pulled all the way over his face; albeit without any eyeholes.[12]

28 When asked by the prosecutor to describe the man's height, Mr Easton said that he was, "not taller than myself and he was approximately Constable Lamb's height". At this point, Constable Lamb entered the courtroom.[13] Constable Lamb later gave evidence that he was 175cm in height (five foot, nine).[14]

29 Mr Easton was closely examined on the differences between his trial evidence and what he had previously said to police. When it was put to him that he had previously said that the intruder was about six feet tall, he answered, "I accept that the height of the intruder was approximately Constable Lamb's height".[15] Mr Easton ultimately accepted that the intruder was about the same height as he was. Indeed, Mr Hall was invited to stand up by trial counsel and Mr Easton was asked whether the intruder was taller than him. Mr Easton answered, "In fairness, I wouldn't know".[16]

30 Kim Easton said that the intruder was wearing something woollen on his head, which came down to his forehead. Like his brother, Kim Easton said that the only thing he could recall about the intruder's clothing was that he was wearing jeans. Unlike his brother, he said that the intruder, "was approximately Brendon's height, my height".[17] However, the prosecutor asked him if he had "had the opportunity to compare him with the height of Constable Lamb", which he agreed he had. Again, the Constable entered the courtroom, but Mr Easton was not asked a follow-up question.[18]

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[11] NOE 135.
[12] NOE 5.
[13] NOE 6.
[14] NOE 75.
[15] NOE 11.
[16] NOE 11.
[17] NOE 21.
[18] NOE 21.

31 In cross-examination, Mr Easton confirmed he is six feet and one inch tall. He was asked whether the intruder was "about" his height and said, "yes, approximately, yes".[19]

An interpolation – a "reconstruction" with the Crown's two witnesses

32 The vagueness of Brendon and Kim Easton at trial regarding the description of the offender contrasted with the detail they were able to provide to police in their statements; particularly those withheld from the defence by the prosecution. More critically, Brendon's assessment of the offender's height was an obvious departure from what he had consistently said pre-trial about the man (at least) matching his height of six feet.

33 While not something with which this Court must grapple, Mr McKinnel addresses in his affidavit the "reconstruction" undertaken by police with Brendon and Kim Easton on 30 January 1986, after Mr Hall became the primary suspect.[20] Little documentary evidence describing the methodology employed, or who was present, remains (if it ever existed). Nothing was disclosed to Mr Hall's trial counsel. What is apparent, however, is that Constable Lamb was present during the reconstruction. Given what is known about the way in which police approached the impediment to the prosecution case that Mr Turner's statement presented, there is a strong hint that the "reconstruction" was designed to dilute the pre-trial descriptions provided by Messrs Easton. If so, it worked.

The bayonet and hat

34 The most cogent circumstantial evidence adduced by the Crown that identified Mr Hall as the murderer was that he had owned a bayonet that matched that taken into the Eastons' home by the intruder.[21]

35 Mr Hall became the prime suspect after police became aware in December 1985 that he had possessed a bayonet and a hat matching that worn by the intruder.

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[19] NOE 23.
[20] At [221]-[227].
[21] The bayonet was a Swedish Army item. 300 were imported into New Zealand two to three years before the homicide. Mr Hall had purchased one of the bayonets imported on 27 June 1983. The hat purchased by Mr Hall's brother in about 1982 was one of only 50 manufactured and sold in New Zealand. He had not seen it since 1983 and said that both his brothers, Alan and Geoff, had borrowed it from time to time.

He was subjected to lengthy interviews by police on 11 December 1985 and 16 December 1985.

Mr Hall's interviews with police – a brief overview

36 While the Crown was not able to conclusively state that the bayonet left at the scene was the same one purchased by Mr Hall, the prosecution's case largely rested on the appellant's admissions when interviewed by police that this item and that hat were his. As the Court of Appeal said in its judgment, "… while at all times asserting his innocence, [Mr Hall] gave various explanations why he did not have the bayonet and hat on the night of the murder".[22]

37 Mr Hall told police that he had taken a walk in the vicinity of the Eastons' home on the evening of 13 October 1985. The Crown asserted that this provided Mr Hall with the opportunity to offend.

The defence evidence

38 While Mr Hall did not testify, he called evidence. In summary:

(a) His sister stated that Mr Hall was wearing a red sweatshirt when he returned from his walk on the evening of 13 October.[23]

(b) Evidence about the appellant's intellectual and physical attributes were led from members of his family: his sister, grandfather, and uncle.[24]

(c) Production of the receipt affirmed that the blue sweatshirt that Mr Turner purportedly asserted he recognised as that worn by the man he saw on 13 October was purchased by Mr Hall in December 1985; thus, *after* the date of the homicide.[25] This meant that the item of clothing exhibited by the Crown could not have been that worn by the intruder.

Unhappily, the trial Judge undermined this evidence when he told the jury that Exhibit 31, "has really got nothing to do with this case, notwithstanding that it does fit the description given by Mr Turner". Indeed, Prichard J

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[22] At p 619.
[23] NOE 138.
[24] His sister described Mr Hall as "Bit slow, bit backward" at school. She also described his physical prowess as "pathetic": NOE 138. His grandfather described Mr Hall as honest, but a "loner". He said that Mr Hall "… could converse with average people bit slow to answer": NOE 139. His uncle described the impact that Mr Hall's asthma had: NOE 140.
[25] The defence called the merchandise manager of the store where the top was purchased, the salesperson who sold it and a friend who was present when Mr Hall purchased it: NOE 135-136.

speculatively suggested that the sweatshirt worn by the offender would have had blood staining on it. The Judge invited the jury to assess the possibility that Mr Hall "could well have" worn another shirt on 13 October, and then burned it.[26]

(d) Mr Hall's family and colleagues said that they observed no injuries on Mr Hall on 14 October 1985, as might have been expected had he been struck by a wooden squash racquet.[27] In addition, the defence called expert evidence from a medical practitioner who, as well as being a squash afficionado, described the type of lacerations typically caused by wooden racquets.[28] His evidence undermined the Crown's case that Mr Hall, if he had been the man struck by Kim Easton, could have been left physically unscathed.

An overview of the evidence filed in support of the first two grounds of appeal

39 The following evidence is relevant to both the first ground regarding Mr Turner's evidence and the second, which addresses the significant ways in which the prosecution failed to meet its disclosure duty:

(a) The affidavit of Ronald Turner dated 22 August 1988.[29] This establishes two critical and uncontested facts:

i. Mr Turner was not aware, when he signed the statement dated 24 June 1986 that was read to the jury, that police had omitted reference to the man's ethnicity.[30] Mr Turner stated that he did not know about, or agree to, this omission. Mr Turner establishes that police closely challenged him on his assertion in his statements dated 14 October 1985 and 19 February 1986[31] that the man he saw fleeing was Māori, but remained adamant that there was no possibility he was mistaken. Had the omission been drawn to his attention, Mr Turner would not have agreed to it because, "I still believe that the person I saw that

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[26] Judge's summing up at p 51-52.
[27] As well as Mr Hall's sister, the defence called three people who worked with Mr Hall at Sterling Pharmaceutical: NOE 137-138.
[28] NOE 133-135.
[29] **Tab 7 in appellant's original bundle.**
[30] The statement read to the jury is exhibit BS13 to Mr Stainton's affidavit**. A further copy is at Tab 1 of the appellant's supplementary bundle.**
[31] Which are exhibits TM15 and TM16 to Mr McKinnel's affidavit**. Further copies of each are at Tab 2 of the appellant's supplementary bundle.**

night was a Maori person and that would have been [sic] evidence if called to Court, and the Police certainly knew that I was definite in that identification".

ii. Mr Turner deposed that he was not ever shown Exhibit 31, which was Mr Hall's blue jumper seized by police. This fatally undercuts the way in which the prosecution linked Mr Hall to the offence.

(b) The affidavit of Timothy McKinnel, private investigator, which outlines the enquiries that he and Katya Paquin made on Mr Hall's behalf.[32] His affidavit sets out the investigative and procedural chronology; the findings, having reviewed police's file, that relevant information was not disclosed; the analysis of the way in which police identified Mr Hall as the offender; Mr Hall's dealings with police; the "experiments" undertaken by police that preceded Mr Turner's statement being altered to omit the reference to the man being Māori; and the review of the information that is on police's file regarding the adequacy of the enquiries made to determine whether Suspect A was the offender, and to exclude him as a suspect.

(c) The affidavit of Bruce Stainton, solicitor, who was Mr Hall's lawyer from 8 January 1987, and who, along with Mr Hall's trial counsel, Peter Williams QC, represented Mr Hall in the Court of Appeal.[33] Mr Stainton assisted with the third of Mr Hall's three unsuccessful petitions for exercise of the Royal prerogative of mercy. Mr Stainton sets out the disclosure requests made by the defence pre and post-trial, and the responses received from the Crown. His evidence establishes that:

i. Mr Turner's statements dated 14 October 1985 and 19 February 1986 were only disclosed in March 1988, which was when Mr Hall's defence counsel first became aware that the witness had described the man he saw as Māori. Mr Stainton was responsible for taking the affidavit from Mr Turner.

ii. The Police and Crown withheld relevant descriptions of the offender. They also withheld relevant information pertaining to police's primary suspect prior to Mr Hall, Suspect A.

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32 Tab 5 in appellant's original bundle.
33 Tab 6 in appellant's original bundle.

(d) The affidavit of Michael Wesley-Smith, solicitor, formerly journalist. Mr Wesley-Smith describes the enquiries he undertook when preparing the "Grove Road" podcast.[34] Amongst others, he wrote to retired Detective Senior Sergeant Kelvin McMinn on 5 February 2018 and asked how it came to be that Mr Turner's "evidence" read to the jury, was at odds with what he said in the earlier statements that were not disclosed to Mr Hall's defence counsel until 1988. Mr McMinn responded in a six page letter on 27 February 2018, which is annexed to Mr Wesley-Smith's affidavit. Mr McMinn candidly admitted altering Mr Turner's statement. He asserted that he was instructed by the Crown prosecutor to alter Mr Turner's statement.

The first ground of appeal: Both the jury and Mr Hall were deceived

40 Some further context is required. Mr McMinn's discussion in his 2018 letter of a "sighting experiment" accords with what was established through Mr McKinnel's review of police's file. In brief, police conducted a "suspect sighting experiment", which is described in a jobsheet prepared by Detective Inspector Ryan dated 19 June 1986.[35] That establishes that the "experiment" was completed about five days before Mr Turner's statement, as read to the jury, was secured. The purpose of the "experiment" was to purportedly test the reliability of Mr Turner's unyielding opinion that the man he saw was Māori. The way in which the "experiment" was conducted using five officers was described in a second jobsheet located by Mr McKinnel. Oddly, the preparation date of that jobsheet, 2 October 1986, post-dated the trial.[36]

41 It cannot be seriously disputed that police's "experiment" was the genesis of the decision to unilaterally alter Mr Turner's statement. To recapitulate, Mr Turner was not apprised of that decision. It follows that he cannot have been told about the "experiment" itself, and why police had reached the conclusion that on this crucial fact – and this fact alone – he was an unreliable narrator.

42 As will be apparent to the Court, the fact that the "sighting experiment" was conducted by police was not disclosed to Mr Hall's counsel. Indeed, whilst by no means certain, and not something that this Court is required to resolve, it is

[34] Tab 8 in appellant's original bundle.
[35] See Mr McKinnel's affidavit at paragraphs [232] to [243]. The relevant jobsheet is TM 34.
[36] Exhibit TM35 in Mr McKinnel's affidavit.

tolerably clear that the jobsheets on police's file only came to light as a result of Mr McKinnel's review of police's file.

43 It is incontestable that Mr Turner's visual description of the man he saw on 13 October 1985 was intentionally altered by the prosecution. It is a compelling inference that the single purpose of the exercise that led to the statement dated 19 February 1986 was to persuade Mr Turner that he may have been mistaken about the ethnicity of the man he saw. Mr Turner's adherence to the fact he was sure that the man he saw was a "male Māori", and "definitely dark-skinned, he was not white", clearly frustrated the intent behind police's challenge to the reliability of that aspect of his statement. That led to the statement of 19 June 1986, the creation of which deceitfully overrode Mr Turner's refusal to resile from what he had previously said. In doing so, the prosecution substituted its opinion for that of the eyewitness. Its deceit was masked by what can only have been the intentional decision to withhold Mr Turner's statements of 14 October 1985 and 19 February 1986, which, as the Crown properly accepts, the prosecution was obliged to disclose.[37]

44 It is submitted that the inescapable inference, and that which should be reached by this Court, is that the prosecution adopted a deliberate strategy to deceive Mr Hall and his trial counsel. That constitutes grave misconduct.

45 Mr Stainton addresses in his affidavit why the defence ultimately made the tactical decision that Mr Turner's "evidence" be read at trial. That does not detract from the materiality of the evidence, which is not something that the Crown disputes.[38] Prichard J told the jury that Mr Turner's statement, "is an important piece of evidence". The Judge chose to read the statement to the jury in full because, "it has quite a bearing here".[39]

46 The ultimate issue is whether alteration of Mr Turner's statement caused a miscarriage of justice in terms of the test in s 385 of the Crimes Act 1961.[40] That is clearly the case, which the Crown's concession reflects. In ordinary terms, this was an "error, irregularity or occurrence in or in relation to or affecting [the] trial

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[37] Crown's leave submissions at [19].
[38] Crown's leave submissions at [19].
[39] Summing up at p 49-51.
[40] It is acknowledged that the appeal falls to be considered under s 385: per s 397 of the Criminal Procedure Act 2011, which was discussed by this Court in *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1, (2019) 29 CRNZ 492 at [23]: Not included.

has created a real risk the outcome was affected".[41] In other words, there is a real possibility that more favourable verdict would have eventuated, had the jury known that Mr Turner had steadfastly maintained that the man he saw was Māori, and that he was never shown Exhibit 31 by police.

47 For the sake of clarity, counsel will address the Crown's faint suggestion in its leave submissions that the alteration of Mr Turner's statement did not necessarily pose a real risk to the outcome of the trial.[42] That approaches the issue from the perspective of whether what happened satisfies the test for what constitutes an "ordinary" miscarriage of justice. The appellant's counterargument is that his trial was rendered unfair as result of misconduct by the prosecution. Accordingly, there is no requirement to make any further inquiry into whether what occurred affected the result at trial. This Court's recent decision in *Haunui v R* is apposite.[43] It held that the prosecution's decision to present its case on a basis that was "questionable on the evidence known to the Crown" meant that the jury was "presented with an incomplete picture", which was unfair because "the appellant was prevented from placing before the jury evidence supportive of his defence".[44] This conveniently captures the essence of the unfairness that arose in Mr Hall's case.

48 The issue can be viewed from a slightly different direction. While not something that this Court must ultimately decide, it is submitted that the decision by the prosecution to alter Mr Turner's statement constitutes an abuse of process, and one that this Court cannot countenance. While the analysis regarding whether to

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[41] There is no material difference in the approach between s 385 and s 232 of the Criminal Procedure Act 2011, as this Court recently affirmed in *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [63]. It said that the approach under s 385, which continues to apply, was captured in a series of appellate decisions: *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730; *Condon* , above n 46; *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300; *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37; *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315: Not included.

[42] Crown's leave submissions at [22], where it records that "there was other evidence to support the prosecution of Mr Hall, "Mr Turner's sighting of the man was fleeting and in poor light at night", and "The possibility that the murder was Māori, and also substantially taller than the [appellant], was before the jury in the matrix of evidence. An early statement from the Easton brothers to this effect was squarely addressed in the summing up".

[43] Which this Court recently reinforced in *Haunui* at [51]. While there was no specific reference to the unfair trial ground in s 385(1) of the Crimes Act 1961, this Court in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 described the right to a fair trial as absolute. It follows that a breach of that right means that the conviction must be quashed.

[44] At [77].

order a stay on the basis that there has been an abuse of process is forward-looking, rather than retrospective, it is clear that the prosecution's misconduct:[45]

(a) Prejudiced the fairness of Mr Hall's trial; and

(b) As a corollary, it inevitably undermines public confidence in the integrity of the judicial process.

49 The Crown submits that the trial Judge "squarely" addressed the relevance of the possibility that the intruder was Māori. That is challenged. There is one aspect to the Judge's summing up that compels emphasis. The appellant maintains his position that the trial Judge erred in the way he directed the jury about the risks associated with visual identification. This is because Prichard J emphasised the inherent unreliability of identification evidence in a way that downplayed the relevance of the stark differences in height, weight, strength, handedness and ethnicity between the man described by the Eastons vis-à-vis Mr Hall. The Judge told the jury that the eyewitnesses were "of no real assistance" in establishing the identity of the offender.[46] In the context of a case that entirely hinged on whether the Crown had proved beyond reasonable doubt that Mr Hall was the offender, the real possibility that he was deprived of an acquittal as a consequence of the Judge's approach is plain to see.[47]

50 It is submitted that Mr Hall's trial was unfair. His appeal must therefore be allowed.

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[45] Applying the two categories described by this Court in *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40]: Not included.

[46] Summing up at p 9.

[47] It is submitted that this was but one of a series of directions that tilted the case in favour of the Crown. Equally egregious was the way in which Prichard J dealt with the defence submission that it would have been "incredible" had Mr Hall gotten the better of the three Easton men. The Judge stated, "But of course you will also have to remember that although *he* was by himself and may not be much of a physical specimen, *he* was armed with this bayonet which is a frightful weapon really, a bayonet. So *he* had one advantage in this contest": 54 of the summing up. The way the Judge personalised this direction resulted in the need for a supplementary direction. Unhappily, the Judge repeated the proposition that the fact the offender was armed explained why the strength variance was not critical.

The second ground: The width of the disclosure failings and the impact that had on the fairness of Mr Hall's trial

The information that was not disclosed

51 There are six tranches of information the Crown is unlikely to dispute were not disclosed by the prosecution prior to Mr Hall's trial and appeal.[48] These are:

(a) Mr Turner's statements, which were not disclosed until 1988.

(b) The "reconstruction" undertaken by police with Brendon and Kim Easton in their home in late January 1986, which explains the way in which at trial each modified downwards his estimate of the intruder's height (and how the possibility the intruder was lefthanded was introduced). Then there is the "sighting experiment" in June 1986 that police used to justify the decision to unilaterally alter Mr Turner's evidence.

(c) Various statements taken from Brendon and Kim Easton describing the offender, including those which were the most detailed; some of which were made in close proximity to the murder (on 14 October 1985).[49]

(d) Job sheets prepared on 15 and 16 October recording Brendon Easton's statement that he was certain the offender was righthanded.[50]

(e) The statements of the ambulance officer, Hugo Holt, who attended the Eastons' home on 13 October 1985, and who spoke to Brendon and Kim Easton. The statement was taken on 15 October 1985 and not disclosed until 1988.[51] In it, Mr Holt stated that both Eastons said the intruder was six feet tall and "a black bastard".[52]

(f) The statements taken by police when Suspect A was police's primary suspect, as well as information about the items of clothing seized from him, and the (limited) forensic testing that was completed before the focus

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[48] Mr Hall's case can be contrasted with *Oketopa v R* [2020] NZSC 75, where the Crown asserted that it was "likely" that the material the applicant said had not been disclosed, had been.
[49] Mr McKinnel comprehensively addresses the various statements made by Brendon and Kim Easton at paragraphs [45] to [96] of his affidavit, and the basis for his opinion regarding what was, and what was not, disclosed to Mr Hall's trial counsel. The relevant statements are annexures **TM3, TM8, TM11, TM13 and TM14**. See, too, Mr Stainton's affidavit at [47]-[49].
[50] See Mr McKinnel's affidavit at [58] to [62], and annexures **TM5 and 6**.
[51] See the affidavit of Mr Stainton at [42].
[52] Which is addressed at paragraphs [125] to [129] of Mr McKinnel's affidavit. Mr Holt's statement is annexure **TM18**.

turned to Mr Hall.[53] Mr Stainton outlines the persistence of defence counsel, both before and after the trial, to secure copies of all relevant information. See, too, the Court of Appeal's summary of the disclosure requests made by Mr Hall's legal counsel.[54] Counsel interpolates that the approach taken by the prosecution to repeated and persistent requests for information pertaining to, inter alia, alternate suspects can only be described as obstructive and misleading.[55]

52 As Mr McKinnel states in his affidavit, it appears very likely that the prosecution's failure to meet its disclosure obligation was not limited to the six categories of information distilled above.[56] Mr McKinnel has provided a helpful table of information exculpating Mr Hall that, in all likelihood, was withheld by police.[57]

The relevant principles regarding the duty to make full disclosure and the Crown's concession

53 The relevant principles can be briefly stated. The purpose of full disclosure is to promote the right to a fair trial, with closely connected rationales that include the equality of arms, the right to make full answer and defence, avoidance of trial by ambush, and promoting ascertainment of the truth. As the Court of Appeal recently said in *R v Lyttle & Ors*:[58]

> Without prosecuting authorities adequately disclosing information in their possession, defendants are denied the opportunity to test the allegations against them. This in turn leads to miscarriages of justice and wrongful imprisonment. As stated by the House of Lords:[59]
>
> > [14] Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur

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[53] Comprehensively addressed in Mr McKinnel's affidavit at paragraphs [144]-[174] and [320]-[421].
[54] CA judgment at 626.
[55] See, in particular Mr Stainton's affidavit at [23], [25], [27]-[35].
[56] See "Disclosure analysis" at [422]-[428].
[57] See [22] and the summary at [428].
[58] *R v Lyttle* [2022] NZCA 52, 17 March 2022: **Tab 3**. The Court observed at [32] that, "There is compelling evidence that non-compliance with disclosure obligations is a leading source of miscarriages of justice in the United Kingdom. For example, the Crown Prosecution Service Inspectorate observed in its 2017 report that the Criminal Cases Review Commission had witnessed a steady stream of miscarriages of justice caused by failure to disclose information that would have assisted defendants". The Court at [34] accepted there is anecdotal evidence of similar failures in New Zealand, "[we] have not had access to sufficient information to draw any meaningful conclusions about whether non-disclosure is a widespread problem in the New Zealand criminal justice system".
[59] *R v H* [2004] UKHL 3, [2004] 2 AC 134: **Tab 4**. See, too, the High Court of Australia's decision in *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 at **Tab 5**.

> where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

54 While the Court of Appeal's judgment in Mr Hall's case predates delivery of *Commissioner of Police v Ombudsman*,[60] the Crown properly acknowledges that, "… the Crown, in 1986, just as now, was obliged to disclose any material conflict between the prosecution case and Mr Turner's initial (and consistent) statement that the man he saw was Māori/dark skinned".[61] This addresses the first category of information withheld and undercuts the Court of Appeal's conclusion that, "This is not a case in which the Crown has not disclosed to the defence that a witness has said something in conflict with evidence given at the trial (see *R v Wickliffe* [1986] 1 NZLR 4 as regards allegation of that kind)".[62]

55 Critically, the Crown goes further and accepts that:[63]

> While the [appellant's] trial predates the enactment of the Criminal Disclosure Act 2008 and current practice, it is apparent that the prosecution did not adequately fulfil its disclosure obligations in this case. This is made plain by the non-disclosure of Mr Turner's police statements. Other allegations of non-disclosure were dealt with by the Court of Appeal which did not find the particular undisclosed material could have led to a miscarriage. With the benefit of what is known now, the Crown considers that the material in question would also likely be viewed through a tainted lens as a consequence of the failing with respect to Mr Turner.

56 The Crown commendably states that:[64]

> [It] accepts that some material was not disclosed to the applicant that, at least under current legislation and practice, should have been. Examined solely from the perspective of fairness the Crown accepts this impacted on Mr Hall's opportunity to fully test the allegations against him.

57 Specifically, the Crown refers to "the material relating to Suspect A; some statements given by the Easton brothers; and attending ambulance officer, Mr Holt's, statement".[65]

Submissions

58 What is now known undermines the Court of Appeal's conclusion in 1987 that:[66]

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[60] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, also reported as *Pearce v Thompson* (1988) 3 CRNZ 268 (CA).
[61] Crown's leave submissions at [19].
[62] CA judgment at 627.
[63] Crown's leave submissions at [33].
[64] Crown's leave submissions at [34].
[65] Crown's leave submissions, fn 26.
[66] CA judgment at 628.

> We do not consider that the Crown in this case to have fallen short in its duty of fairness to the defence nor do we consider that a miscarriage of justice has occurred through the information concerning [Suspect A] not being available to Mr Williams at the trial when there is still no evidence to shake his alibi or to connect him with the offence or with the alleged theft of the bayonet or hat from the appellant's premises.

59 Mr McKinnel's affidavit persuasively establishes, contrary to what was said by the Court of Appeal in 1987, that the prosecution had in its possession information that "shakes" Suspect A's alibi, and which – despite the unsatisfactory way in which police investigated – can be said to connect him with the murder.

60 In summary, the information now available, which was discovered by Mr McKinnel's review of police's file, demonstrates that:

(a) Suspect A was not adequately excluded as a suspect. While concerning gaps remain in the information obtained from police's file, the statements police took from those who were with Suspect A on 13 October 1985, in a house near to where Mr Easton was killed, do not exclude the possibility he could have committed the offence.

(b) Suspect A's height, age and ethnicity broadly match those of the man seen running from the scene by Mr Turner (and Mr Cossey). This was not something that the Court of Appeal was told in 1987.[67]

(c) The forensic information obtained by police in 1985, rather than excluding Suspect A, implicates him in the murder. Police seized a pair of jeans and a blue-grey sweatshirt from Suspect A on 14 November 1985. Police recorded that these items appeared to have blood on them. Unsatisfactorily, it appears that these items were not forensically examined before they were returned to Suspect A. Similarly, blood was found on the seats of a Mini motor vehicle that Suspect A stole on the night of the murder. It was identified as Type-O, which the deceased had, as does Brendon Easton and Suspect A himself.

61 The Court of Appeal, based on the information it was provided, was satisfied that police had robustly excluded Suspect A as a suspect. That explains its conclusion

[67] See Mr McKinnel's affidavit at [146].

that while "such evidence should not have been led by the Crown",[68] no miscarriage of justice arose because Detective Sergeant White told the jury that:[69]

> During this inquiry I was Officer in Charge of suspects. During the course of this inquiry, over 300 persons were interviewed who were either nominated or who we thought could be suspected of this matter. In each case, each one of these persons was inquired into as far as possible. This normally meant interviewing at least 2 or 3 alibi witnesses per person; checking these 2 or 3 persons' storys [sic] as well and then completing each individual matter. I am satisfied that those persons were not involved in this matter.

62 What is now known alters the conclusion reached by the Court of Appeal. Indeed, there is a compelling argument that the Court was misled in 1987 because of the selectiveness of the information made available to it by the Crown. The prosecution's decision to withhold information about Suspect A was an error that permeated both the trial and the earlier appeal. Simply put, the prosecution's suppression of relevant information relating to Mr Turner and Suspect A invites this Court to hold that it approached its disclosure obligations in a way intended to secure Mr Hall's conviction by depriving the defence of relevant information that responded to the Crown's case.

63 The way in which the prosecution approached its disclosure obligations in Mr Hall's case is a paradigmatic example of a blatant and intentional departure from best practice, which meets the high threshold described in *Randall v R*.[70] This was a failure "so gross, or so persistent, or so prejudicial, or so irremediable …" that it undermined Mr Hall's right to a fair trial guaranteed by s 25(a) of the New Zealand Bill of Rights Act 1990.

The third ground: Mr Hall's dealings with police

64 Mr McKinnel has comprehensively reviewed the circumstances in which Mr Hall's two statements made on 11 and 16 December 1985 were elicited.[71]

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[68] CA judgment at 627.
[69] CA judgment at 626. Found in the evidence at NOE 58. Also, DS White produced a schedule of burglaries in the Papakura East area between August and December 1985 and said, "As a result of making up this schedule, I could find no burglaries similar to the one complained of by the accused": NOE 58. However, in cross-examination he conceded that his analysis only addressed reported burglaries, at NOE 60.
[70] *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237, at [28], approved by this Court in *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [32].
[71] In his affidavit at [190]-[215].

The contents of the statements

The first three-page typewritten statement made on 11 December 1985[72]

65 Detective Smith took the statement. Mr Hall said he grew up in Papakura, and outlined his schooling and employment history, including the fact that he was working as a drum maker at Sterling Pharmaceuticals.

66 The statement records that Mr Hall was shown a bayonet by Detective Smith that morning. He said that he was sure that it was his because he recognised rust stains on the handle and blade. He said that he purchased it and two other bayonets three years previously, and he stored them in his bedroom, in different places. Mr Hall said he purchased the bayonets for protection, and he placed the Swedish one under his mattress, on top of the base board, to protect against "intruders if someone broke into the house". Everyone in his family knew he had the bayonets. The only people he showed them to from outside his family were some of his brother Geoff's friends, who he did not know. He would take the bayonet out "every three months or so" to look at it, "just to make sure it was still there".

67 On the Saturday before his father died,[73] Mr Hall went into his bedroom and saw that his bed was "out of shape". He looked for the bayonet but could not find it. A $50 note that had been under the mattress was also missing. Some days later, Mr Hall noticed that a pair of jeans and some tee-shirts were missing.

68 After Mr Hall's father died, he was looking through his drawers for clothes to wear to the funeral and realised that a brown hat that he had borrowed from his brother was missing. The statement records, "I have been shown a brown hat today by Detective Smith. It looks exactly like the one I borrowed from Greg and the one that was taken from the house".

69 Mr Hall did not tell anyone that the items were missing because he was afraid of retaliation by the person who committed the crime if he came forward.

70 Mr Hall had no idea who might have taken the items, although he suspected his brother's friends. The key to the shed in which Mr Hall slept was left in the door or, if not there, on the bench in the kitchen. His stereo unit and cameras were not taken.

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[72] It is annexed to Mr McKinnel's affidavit as TM29. A further copy is at **Tab 6 of the appellant's supplementary bundle**.
[73] Mr Hall died on Wednesday 18 September 1985. His funeral was on Friday 20 September 1985.

71 Mr Hall described his movements on 13 October 1985. He said he was at home and it was raining. He went for a walk after it stopped raining. He said he did not note the time, but it was after 6pm because "Benson" had just started. He had on a red sweatshirt, brown pants and blue shoes, which had belonged to his father. He described the route he took, and the fact he did not see anyone, and that he was still in shock because of his father's death, and, "I just wanted to walk to think about things". He said that he was out for about 30 to 45 minutes, and did not know when he arrived home. He listened to his radio in his bedroom and went to bed.

72 Mr Hall also said that he went for a bike ride on the day that Mr Easton was killed. He did not say when this was. He rode up Grove Road and "through the alley way by where that man was killed, by his house". From there, he went to the high school. Mr Hall said that he rode his bike every Saturday and Sunday, whenever he was bored.

The second handwritten statement made on 16 December 1985[74]

73 The statement was taken by DSS Rickitt.

74 The statement says that Mr Hall was shown a woollen hat by the Detective and that it "looks a lot like the one my brother Greg owned". Mr Hall said he borrowed it for a ski trip in July 1985. Mr Hall said that his brother was staying with him in the "bedroom at the back of the shed at the time". He said that, "I am fairly certain that is the one I borrowed". He put it in a drawer after he returned form the ski trip.

75 Mr Hall affirmed that the bayonet he was shown (again) by the DSS was his. He provided further information about when it was purchased. He said he did not know it was Swedish when he bought it, but he recognised it as "exactly the same to the one shown on television".

76 Mr Hall repeated that he had purchased the bayonets for protection in case someone broke into the house, but "nobody ever broke in". He was living in the house at the time they were purchased, "and later I moved out into the room at the back of the shed sometime later", where his brother Greg was staying.

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[74] Which is annexed to Mr McKinnel's affidavit as TM32. A typewritten copy was also created, but not signed. A further copy is at **Tab 7 of the appellant's supplementary bundle**.

77 Mr Hall could not recall where he kept the bayonets in the house. In the sleepout, he initially kept all three under the bed. He thought his mother might have picked the bayonets up and put them in a glory box. He got the Swedish one out the of glory box and put it under his mattress. He kept it there in case he needed to grab it in a hurry.

78 On the Saturday before his father died, Mr Hall noticed that the bayonet was missing. His mattress was at a funny angle. $50 in $10 notes was also missing, which he had saved to buy Christmas presents. Two tee-shirts and a pair of jeans were also stolen. These went missing at the same that as the bayonet and money. "About the same time" he discovered the clothing missing, Mr Hall noticed that the hat was not in the drawer. He was looking for funeral clothes.

79 Mr Hall said he told his mother that the clothing and money was missing, but then told her that he had used the money to pay his video subscription "so I wouldn't worry her". He did not tell anyone about the missing bayonet because "it slipped my mind at the time, because it was a trivial thing you see". Mr Hall said that the shed was quite secure with locks on the windows and doors, but the key is sometimes left in the door when we are not in the room". He also said that the family had a Doberman dog that was chained to its kennel, "right by the door".

80 Mr Hall said that he remembered the day, and "I can't get it out of my mind because of the knife and murder. I suspected it was my knife and I saw it on TV on the Monday after the murder. I also saw some photos of the knife and the hat in the paper". Mr Hall said he immediately recognised each as resembling those that he had possessed. This shocked him and he "tried to figure out who might have taken the hat and bayonet". He wanted to report it to police but he was too scared to come forward because he was "worried that the person who did it might decide to come after me or a member of the family" because that person knew where he lived.

81 Mr Hall took his other two bayonets from the glory box, wrapped them in newspaper and pushed them down into the rubbish bag. He thought he had better tell someone, so he told his mother he was going to get rid of them of them on the Monday, "straight after the murder".

82 Mr Hall described his movements on Sunday 13 October in more detail. He said that he watched television first and then had lunch, and went for a bike ride

"sometime between 2 – 4 pm". He said, "I went to the Grove Road shops and then I went up Grove Road to the alley way next to the murder house". He said he recognised the house on television as the one "next to the alley". He said that seeing the house shocked him because he rode there all the time and he did not come forward because "I thought people would start pointing the finger at me". He said he rode along Grove Road every second or third weekend the alleyway was a "regular route that I ride". He was not sure what time he got home.

83 Mr Hall described his clothing in a way consistent with the first statement. He said that he had tea with his family "at about 6.99pm [sic]" and watched television afterwards. He went to the toilet and, afterwards, out for a walk. He could not recall if he went to his room first, or straight out from the house. He did not tell anyone he was going for a walk. He was feeling "depressed about life in general". He said that he was asking himself what the point of life was and he went for a walk "to solve the problem", and "My father's death as well, I just wanted to comprehend". Mr Hall said he had been feeling down for five to six months and "it was mainly in the weekends that it happened because I was not doing any work and I would just get bored with myself". He said that he thought about killing himself and "I held the point of the bayonet to my stomach once. I wanted to do it but I just stopped".

84 Mr Hall described the route he took and said he was out walking for about half an hour. He did not say that he went to Grove Road, or the alleyway. He did not see anyone on his journey. He felt tired and went home, where he listened to "Queen", took a shower and went to bed. He felt "a lot better" after his walk.

85 The statement then segued into Mr Hall describing a 12-month sexual relationship with a "14 year old boy that lives across the road from me". This was not read to the jury.[75]

86 The statement ended with Mr Hall saying that he burnt clothing in the family's incinerator, "the Sunday after my father's funeral". He said he burnt a "grey sweatshirt with a yellow circle and spear on the breast, a pair of brown cord trousers, and an old rag", as well as an old pair of running shoes that were too tight and a pair of dark brown gloves. He said he had a blood nose the previous

[75] See NOE 118.

day, which he wiped clean with the rag. He said he burnt these items because "it wasn't any use to me".

The way in which the first statement was obtained

87 Two police officers, Detective Sergeant White and Detective Sergeant Smith, arrived at the appellant's place of work, Sterling Pharmaceuticals, at 10:25am on 11 December 1985. They arrived unannounced.[76]

88 Mr Hall was not provided with a caution. He was transported to the Papakura Police Station by DS White, who immediately commenced questioning the appellant in the car about the bayonet and hat.[77]

89 Mr Hall was placed in an interview room at 10:37am. DS White commenced the interview by telling Mr Hall that he did not believe his story that he had wrapped the bayonets in newspaper, and asked where they were. It was at this point that Mr Hall said that the bayonet and hat were stolen, and provided the explanation ultimately recorded in his first statement. DS White asked Mr Hall why he had lied, and the appellant said that he was afraid. The DSS interrogated Mr Hall about the fact he had seen a stereo and camera in the sleep-out, and asked why they were not stolen, too. The DSS reassured Mr Hall that there was nothing to be afraid of.

90 DS White left the interview room at 11:10am. He returned at 11:17am, along with DS Smith. The interview recommenced with both officers present. DS White told Mr Hall that he and the appellant "can solve the murder", and that the Easton brothers had lost their father, and "we owe it to those boys to find out who killed their father". Mr Hall said he did not know. DS White said that thought that Mr Hall did know something about it because the bayonet and hat, found at the scene, were his. When Mr Hall repeated that he did not know anything, DS White said, "Well if you don't know them I have to start suspecting you". Mr Hall repeated that he feared retribution and that, "The murderer will get back at them [his family]". DS White told Mr Hall that, "We look after our witnesses Allen. There is no need to worry".[78]

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[76] See **annexure TM27**.
[77] See **annexure TM26,** which is DS White's jobsheet.
[78] DS Smith, in his jobsheet, recorded seven questions and their answers, taken in the course of an hour.

91 At 11:45am, DS White left the interview for a second time, telling Mr Hall to have a think about things before he did so. He returned at 11:55am and continued the interview, and asked whether Mr Hall had thought about things. Mr Hall at this point explained that he went past the Eastons' home and down the alleyway "that day". It was then that he said this was between 2 and 4pm, and he was riding his bike.

92 At 12:10pm, Mr Hall was offered refreshment, which police recorded him declining. He was given a glass of water. DS White left the interview at this point. The interview continued with DS Smith. However, at 2pm, Detective Parker joined.

93 Detective Parker questioned Mr Hall.[79] He asked Mr Hall to sit. He had Mr Hall repeat his explanation that the items were taken from his room. He told Mr Hall he did not believe him and, "He did not come down on the last shower". Mr Hall said that he did not expect the Detective to believe him, and Parker replied, "You're damn right I don't believe you" and, later, "I'm a right shower if you think I'm expected to believe this rubbish". Mr Hall responded, "You're like the others, you don't believe me" and Parker replied, "You're so right". Detective Parker told Mr Hall he did not believe him at least four times.

94 It was at this point that Mr Hall told the officer that something else had happened, but he was really worried about telling police. He then said, "Well I never saw the person but he said that he wanted my money and my knives". Detective Parker told Mr Hall to tell him what had happened, "and I'll tell you if you're in trouble". Mr Hall said that a couple of weeks before the murder, when he was alone at home, he was grabbed around the back of the head, walked him to the door of the sleepout and asked by the assailant, "where I kept my money and my knives and if I had any hats". The man forced Mr Hall to the ground, and took the bayonet out from under the mattress. He said he did not see the man because it was dark. Detective Parker observed, "Well this is a bit different to what you originally said Allan, and I find it equally hard to believe this story as the last one". Detective Parker left the interview at this point.

95 DSS Smith returned to the interview room at 3:37pm. He asked Mr Hall to repeat what he had told Detective Parker. Mr Hall repeated his explanation that he had

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[79] His jobsheet is not annexed to Mr McKinnel's affidavit. For convenience, it is included in **the appellant's supplementary bundle at Tab 8**.

been grabbed from behind by a man, and the hat and bayonet taken. DS White said, "Come on Allen, that's a load of crap and you know it". DS White pointed out it was a "completely different story to what you told me earlier today. That's lies and you know it". Mr Hall responded, "Well you won't believe my other story". DS White responded, "With all these lies, I've got to start taking a hard look at you …". He asked Mr Hall if he had lent the bayonet to someone. When Mr Hall returned to his explanation that it had been stolen from his room, DS White said he thought that the appellant knew who took it. DS White said that, "… I think you know about this homicide. Tell me the truth did things go wrong in the house, what happened in Mr Easton house". Mr Hall said, "I'm not a murderer. I wasn't in the house". DS White responded, "Allen you've told me a few lies why should I believe you? I think you are the offender for this murder". Mr Hall stated he was not. DSS said that he knew Mr Hall was there and asked what went wrong in the house, and that he knew the appellant did not want to hurt anyone.

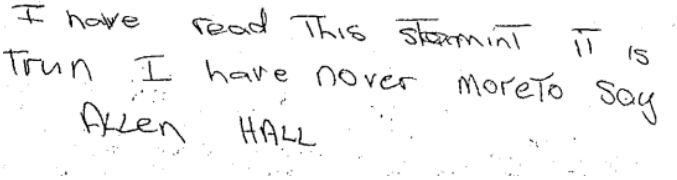
96 Later, DS White accused Mr Hall of peering through people's windows. DS White exhorted Mr Hall to "get it off your chest". Soon after, he told Mr Hall, "Come on Allen, you don't convince me. I think you either did the murder or you know who did it". Mr Hall again responded that he was not the murderer.

97 At 4:25pm, DS White left the interview and spoke to DSS McMinn. At 4:30pm, he returned to the interview room and asked Mr Hall if he had thought about things. He recorded that he advised Mr Hall that "nothing to worry about re offender/fear for family etc".

98 Mr Hall was given a toilet break at 4:50pm.

99 DS Smith took over, and commenced obtaining the statement at 5:27pm. The statement was completed at 6:33pm. DSS Smith recorded that Mr Hall rad a paragraph of the statement and his "reading slow but no difficulty".

100 Mr Hall signed the statement in the following way:



101 DSS Smith underlined his observation that Mr Hall is lefthanded.

102 While it is not tolerably clear precisely when Mr Hall was permitted to leave the police station, it cannot be disputed that he spent over eight hours with police on 11 December.

The way in which the second statement was obtained

103 Police arrived at Mr Hall's place of work at 7am on 16 December 1985. Two officers, DSS Mills and DS Rickitt, spoke to Mr Hall in a conference room at 7:45am. He was transported to the Manurewa Police Station. He was not cautioned until he arrived at the station, at 8:03am.[80]

104 The interview was conducted by DS Rickitt. He told Mr Hall that he wanted to "cover the points about the bayonet and hat and where he was that night". The Detective proceeded to closely examine Mr Hall's explanation in his first statement about the disappearance of the hat and bayonet.

105 The interview continued until 9:47am, when Mr Hall was provided with a coffee break. It recommenced at 10:22am.

106 DS Rickitt briefly asked Mr Hall about the death of his father, and the fact that he was not upset about that. He then returned to the topic of where Mr Hall had stored the bayonets, and why he had purchased them.

107 After having Mr Hall repeat his explanation for the disappearance of the items, the Detective told him, "I don't think the hat and bayonet were stolen at all Alan". Mr Hall responded, "You think it was me who did that murder, don't you? I wouldn't do something like that. I was [sic] brought up that way". The Detective recorded the following accompanying the statement, "No emotion".

108 Next, the Detective scrutinised Mr Hall's account of his movements on the night of the murder, which was a lengthy exchange. He queried what Mr Hall was doing during what "is about a 15 minute walk". He told Mr Hall, "I don't want to get into an argument over it Alan. If you did what you first told me you would have been out for at least one hour and at the most one hour and ten minutes. That's about a fifteen minute walk you told me Alan where were you for the rest of the time?"

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[80] This information is contained in the jobsheet of Detective Rickitt, which is annexure **TM30**.

109 At this point, Mr Hall said, "I don't have to answer your questions any more. I know my rights". The Detective ignored Mr Hall and asked, "Where were you Alan?" When Mr Hall repeated that the Detective had told him that he was not required to answer his questions, the witness said, "You are right Alan. I am just trying to find out what you did. Just settle down and we will try and sort it all out (This is the first time I saw any emotion from Hall) … (Up until this time he had just and stared with no emotion at all. We continually sat and stared at one another)".

110 The Detective asked, "Do you want to try and sort this out Alan?" Mr Hall repeated that he did not do it. When the Detective said that his story was "a bit strange", Mr Hall said that, "I am going to stick to my story. I didn't do it". The officer said that what Mr Hall had said "is very suspicious".

111 At this point DS Rickitt showed Mr Hall a photo of the body of the deceased. Mr Hall enquired whether that was the man who was killed. When the Detective affirmed it was, Mr Hall said, "I hope you get the bastard who did that". The Detective asked Mr Hall if he had seen Mr Easton before. He recorded that when Mr Hall denied he had, he had "no emotion at all". The Detective flicked through the photographs while he continued to question Mr Hall. The Detective recorded that Mr Hall, "started to get nervous and move on his seat". He asked whether the photographs affected Mr Hall, who responded "no".

112 A further break was taken at 12:50. At this point, DSS Mill spoke to Mr Hall until DS Rickitt resumed that duty at 2pm. The only record of what Mr Hall and DSS Mill discussed is a jobsheet that the DSS prepared eight months after the interview, dated 16 August 1986. From that, it is clear that DSS Mill told Mr Hall that there was a need "for us all to trust each other and to cooperate s that the truth will [sic] out". DSS Mill appealed to Mr Hall's conscience and said, "I want you to pay particular attention and tell me the truth". Mr Hall said, "I already have, time and again". DSS Mill asked Mr Hall, "Is there anyone on particular you would talk to if something really has happened?" Mr Hall said there was not, as he had no friends. DSS Mill opined that Mr Hall was lonely and frightened and had been for some time. He invited Mr Hall to "examine his mind and soul and tell me honestly if you were involved in Mr Easton's death".

A different allegation is introduced

113 DS Rickitt then interrogated Mr Hall for about 4½ hours, without a break. When he recommenced at 2pm, the DS questioned Mr Hall about an entirely different allegation of sexual offending, and asked him if he had been "sexually interfering" with a 14 year-old boy. This was done without repetition of Mr Hall's caution.

114 Mr Hall was persistently questioned by DS Rickitt about Exhibit 31, which was the blue top seized by police. He maintained that he had purchased it after the murder happened and said that he was wearing a red top on the night.

115 At 3:45pm, Detective Inspector Rowe entered the room and remained with Mr Hall and DS Rickitt until 4:22pm. There is no record of what was said during these 37 minutes.

The identikit

116 DS Rickitt recommenced interviewing Mr Hall alone at 4:22pm. It is during this phase that the Detective substantially misled Mr Hall about the information police held. Police created an identikit of the man suspected to be the offender, prior to Mr Hall coming to the attention of investigators in December 1985. The description that informed the identikit was provided by William Cossey, whose statement is discussed by Mr McKinnel in his affidavit under the heading "secondary witnesses".[81] He was driving home on 13 October, and at about 8:05 or 8:10pm, he saw a man run across Clevedon Road, near where it intersects with Grove Road. The man disappeared down a driveway. Mr Cossey described a male Māori, about five feet and nine inches in height, of thinnish build, with black straightish hair and, possibly, a moustache. Mr Cossey was not called as a Crown witness, but the identikit was produced as defence Exhibit B during the cross-examination of DS Rickitt.[82]

117 DS Rickitt told Mr Hall:

> I told you about the man who saw the person running across Clevedon Road. He made up an identikit picture. I have had a look at your passport photo. It looks a lot like you. Did you do this murder Alan?

[81] At [111]-[117].
[82] It is included at **Tab 9 of the appellant's supplementary bundle**.

118 Even a cursory comparison of the man depicted in Exhibit B to Mr Hall highlights the extent to which DS Rickitt misrepresented the information received from Mr Cossey.

The interview continues and the statement is taken

119 Mr Hall was asked, "Is it possible you were down there and you don't remember?" Mr Hall said he would remember if he did something like that. This led to the DSS asking why Mr Hall had gone for a walk that night, which precipitated the discussion about Mr Hall's depression and suicidal thoughts. DS Rickitt returned to and persisted with his suggestion that Mr Hall might have committed the murder, but forgotten. He ended by asking Mr Hall if he committed the murder, which Mr Hall denied again. The DS responded, "It looks very much like you did Alan". Mr Hall responded, "I will stick to my story. I didn't do it".

120 Police commenced taking Mr Hall's handwritten statement at 6:37pm, and it was completed at 8:02pm.

121 At 10:30pm, Mr Hall was transported from Manurewa Police Station to Papakura Police Station for fingerprinting.

122 Mr Hall spent at least 15 hours in police custody on 16 December 1985.[83]

The way in which the interviewing officers described their dealings with Mr Hall at trial

123 A general description of the way in which the officers who interviewed Mr Hall gave their testimony at trial will suffice. While the two statements were produced, significant time was spent traversing the discussions that took place between each of the officers and Mr Hall on 11 and 16 December 1985. There was no attempt to sanitise what the jury was told. As such, the Crown's evidence was replete with examples of officers telling Mr Hall that he was a liar;[84] breaking down what he had said;[85] exerting emotional pressure;[86] accusing him of antisocial behaviour without any evidential foundation;[87] describing his apparent lack of emotional

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[83] DS Rickitt accepted at trial it was at least 14 hours: see NOE 120.
[84] See DS White's evidence at NOE 53 and 56; Detective Parker's evidence at NOE 72-73; DS Rickitt's evidence at NOE 112.
[85] DS White's evidence at NOE 54; DS Rickitt's evidence at NOE 114-115.
[86] DS White's evidence at NOE 54, 56, 57.
[87] DS White's question asking, "Do you peep and peer?", NOE 56.

response;[88] the fact he declined the opportunity to clear himself by participating in an identification parade;[89] and expressing their opinion that Mr Hall was the murderer.[90] The jury also heard DSS Rickitt's opinion that the identikit picture resembled Mr Hall.[91]

124 In addition, the Crown led that Mr Hall had been approached by DS Rickitt on 2 April 1986 to make a further statement, and had declined to do so on the basis of legal advice, at which point he was arrested.[92]

125 Mr Williams attempted to have DS Rickitt accept that Mr Hall was "immature" and "of limited ability intellectually". Mr Williams used the way in which Mr Hall endorsed the written statement as an example. The officer responded that the appellant was "physically mature" and initially declined to comment on his intellectual ability.[93] DS Rickitt later said that, "to my way of thinking, the accused is not backward, immature. I am an experienced police detective, yes".[94]

126 DS Rickitt expressly rejected the proposition that police lacked sufficient evidence to charge Mr Hall on 16 December, or that Mr Hall was under arrest during the 15 hours he was at the police station.[95] Moreover, notwithstanding that Mr Hall had expressly asked on 16 December that the interview cease, DS Rickitt rejected the notion that the appellant was in need of the assistance of a solicitor or an adult. He said, "This man is 23 years of age. He is an adult. He did not request a solicitor or anybody else to be with him".[96]

127 DS Rickitt denied he had told Mr Hall any lies to "unsettle" him. He maintained that the identikit picture was a close facsimile of Mr Hall. He denied knowing that the identikit had been created with Mr Cossey's assistance, or that Mr Cossey had described the man he saw as Māori. Nor did he accept that police had described the offender in the news as Māori when trying to ascertain his identity.

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[88] See DS Rickitt's evidence at NOE 115-116.
[89] NOE 116-117.
[90] DS White at NOE 56 and DS Rickitt at NOE 117.
[91] NOE 117.
[92] NOE 118.
[93] NOE 119.
[94] NOE 120.
[95] NOE 120.
[96] NOE 120. In contrast, DS White accepted the proposition that Mr Hall "is somewhat immature for his years: NOE 59. However, Detective Parker rejected the suggestion that Mr Hall was "of somewhat limited intelligence": NOE 74.

Finally, he asserted that the reason he did not show Mr Hall the identikit was because he did not have it with him during the interview.[97]

Submissions

128 In *Pora v R*,[98] the Privy Council warned that courts must vigilantly examine the reliability of seemingly straightforward confessional evidence when it comes under later challenge.[99] The potency of such evidence on the deliberations of juries has been underscored. While Mr Hall's statements were not admissions in the strict sense, the Crown relied upon the way in which he answered the questions about what happened to his bayonet and hat, and his movements on 13 October 1985, as indicating a guilty mind. As such, the warning in *Pora* about the need for vigilance remains apposite.

129 Mr Hall did not resile from his protestations of innocence in the face of persistent police pressure on 11 and 16 December 1985, which was reflected in his two formal statements. Nonetheless, what Mr Hall said inculpated him insofar as his acknowledgement, made early and without the benefit of a caution against self-incrimination, that the intruder was armed with, and disguised by, items that had belonged to him. Then there was the way in which Mr Hall described his movements on 13 October 1985, prompted by not so subtle manipulation by DS Rickitt to widen the window of opportunity he had in which to commit the murder.

130 There were manifold breaches by police of the Judges' Rules that applied in 1985 during Mr Hall's sustained interrogations by a series of officers. The gravamen of the complaint about the fairness of the process is that the police officers who dealt with Mr Hall in December 1985 (often in tandem) adopted a persistently confrontational approach designed to physically and mentally wear the appellant down during the two significant periods of time he was at the police station.[100]

131 The cumulative impact on Mr Hall is plain on the record. However, one example will suffice. There was a clear nexus between the conduct of police and Mr Hall's

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[97] NOE 121.
[98] *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277: Not included.
[99] At [57].
[100] The two policy principles in tension guiding the use of an inquisitorial approach when interviewing suspects were discussed in *R v Ali* CA253/99, 8 December 1999 at [43]: **Tab 10.** These are, on one hand, the requirement to protect accused persons from inquisitorial attack and, on the other, the need to allow investigating officers a proper degree of freedom in pursuing their investigations. The reasoning in *Ali* was endorsed by this Court in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [27]: **Tab 11**.

temporary alteration of his explanation about the disappearance of the bayonet and hat, which resulted because of the persistent way in which a series of officers emphasised to the appellant their opinion that he was lying.[101] Indeed, the trial Judge observed that this constituted, "really quite a ridiculous story …".[102] Evidence of the emotional pressure exerted by police, and what Mr Hall said in response, was a central plank in the Crown case. At trial, the prosecution's focus was not so much on what Mr Hall said, but rather the way in which he responded under inquisitorial attack.

132 In summary, the Crown exploited Mr Hall's plain vulnerability by having the interviewing officers depict him as someone prone to lying; as a man with something to hide, who was withholding the truth and who had foregone opportunities to be candid with police; and as a person who did not exhibit an "ordinary" emotional response to upsetting information, which showed indifference to the plight of the deceased and his sons. All of these things, the Crown's witnesses opined to the jury, meant that Mr Hall was the murderer.

133 It is submitted that this Court should have a sense of disquiet about the Court of Appeal's conclusion that Prichard J's summing up, "… reminded the jury of the most important aspects of the defence case", notwithstanding the Judge omitted any reference to the centrepiece of Mr Hall's challenge to the Crown's most important evidence, which was that the way in which the appellant performed under interrogation was explained by his intellectual functioning.[103]

134 Moreover, the Court of Appeal's conclusion that any risk of unfairness was adequately mitigated by the Judge's direction to the jury that it, "… must on no account be influenced by the disbelief of the appellant expressed by police officers when interviewing them",[104] loses its rigour when it is remembered that Prichard

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[101] As the Court of Appeal said a p 619, trial counsel submitted that Mr Hall's "… inconsistent statements to the police during the course of lengthy interviews could be accounted for by his being backward intellectually and afraid of reprisals if he assisted the police in tracing the bayonet and hat to the offender". Also, the Court of Appeal said, "… Mr Williams stressed that even though the appellant "… may have succumbed under pressure to giving 'facile explanations approaching even fantasy-like explanations', he in fact never varied from his protestations of innocence …".

[102] CA judgment at 624.

[103] CA judgment at 622 and 625. The argument was described by the Court of Appeal in the following way at 621:

> "He [Mr Williams] said the Judge had put to the jury that the credibility of the appellant's statements to the police concerning the bayonet and hat were the essential and crucial issue in the case but had not reminded the jury that the appellant was an intellectually deprived person who had been subjected to over 20 hours of determined police interrogation and the Judge had omitted to mention to the jury that the appellant had consistently told the police that he was fearful for his safety and his family's safety if he was seen to cooperate with the police to identify the offender."

[104] CA judgment at 623.

J repeated several such opinions when highlighting for the jury "an important, if not a crucial issue in the case"; namely "the truth or falsity of the explanations" given by the appellant to police.[105] The Court of Appeal's conclusion in 1987 on this point does not sit easily with more modern jurisprudence on the issue.[106]

135 This analysis places in context the Crown's acknowledgement that a retrial would not be in the interests of justice.

Conclusion

136 The Crown, at the leave stage, commendably accepted that delay should not be used as a shield to prevent Mr Hall's appeal being heard. The exceptional additional step taken by the Crown – agreeing that Mr Hall's appeal must be allowed – deserves recognition. That decision has expedited the appeal process, and brings with it a degree of closure for Mr Hall.

137 Mr Hall has previously explained the reasons for the delay in the matter reaching this Court, and canvassed the steps he and his supporters have taken in the past four decades to secure the opportunity to challenge his convictions. That included unsuccessfully applying for exercise of the Royal prerogative of mercy on no less than three occasions: twice in 1988 and a final time in 1993. While the first prerogative failed because it simply repeated the grounds of appeal advanced in 1987, the second and third had at their heart the prosecution's failure to disclose Mr Turner's statements, and the way in which the jury was misled as a result. The Crown properly acknowledges that Mr Hall was failed by the prerogative process.[107] However, it is an indictment on the integrity of New Zealand's criminal justice system that the State has, since 1988, known about the profoundly unfair way in which the prosecution dealt with disclosure before Mr Hall's trial, which it misleadingly defended on appeal in 1987. Yet, it did nothing.

138 It is respectfully submitted that this Court should quash Mr Hall's convictions and, in accordance with s 385(2) of the Crimes Act 1961, enter a verdict of acquittal.

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[105] The specific direction is found in the CA judgment at 623-624.
[106] See, for example, *L (CA533/09) v R* [2010] NZCA 131, **Tab 12**, where the Court of Appeal allowed the appeal on the basis of the "confrontational and overbearing" techniques adopted by the interviewing officer, and directed that its judgment be provided to the Commissioner of Police. The jury heard the officer convey his opinion about the credibility of the appellant when the interview was played.
[107] Crown leave submissions at [18].

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