IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI SC21/2022

BETWEEN	ALAN RUSSELL HALL
	Appellant
AND	THE QUEEN
	Respondent

RESPONDENT'S SUBMISSIONS

31 May 2022

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

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Introduction

1. Mr Hall has been granted leave to appeal his 1986 conviction for murder and intentional wounding. The approved question is whether the Court of Appeal was correct to dismiss his first appeal in 1987.[1]

2. As previously intimated, the Crown accepts that Mr Hall's appeal should be allowed, and his convictions quashed. As such, the Crown's position is that this Court should answer the approved question in the negative, whilst noting that there is material before this Court which was not known at the time the Court of Appeal dismissed Mr Hall's first appeal in 1987.

3. Succinctly put, the Crown accepts that justice substantially miscarried in Mr Hall's case. An unusual facet of this appeal is that it is not a case where the identification of miscarriage, many years after the fact, relies on fresh evidence. Rather, the Crown acknowledges the unacceptable truth that an unanswerable cause of miscarriage here, and of unfair trial, was deliberate failure by those responsible for the prosecution to disclose material that would have plainly been important in Mr Hall's defence.

4. The Crown has tested the approach it takes to this appeal against tikanga principles which the kaumatua spoke of in this Court in the *Ellis* proceeding, and considers that its approach resonates with those values.

Factual Summary

5. Mr Arthur Easton and his two teenage sons were confronted by an armed intruder in their Papakura home on the evening of 13 October 1985. In the course of the frenzied scuffle that ensued, the intruder stabbed Mr Easton and one of his sons before fleeing on foot, leaving behind his weapon, a bayonet, and the woollen hat he had used to obscure his face. Mr Easton died at the scene; one of the stab wounds having pierced his liver.

6. What occurred at the Easton home on 13 October 1985 was relatively clear. Who was responsible was not.

7. Mr Hall, then aged 23, came to police attention two months after Mr Easton's murder due to his ownership of both a bayonet and a woollen

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[1] *Hall v R* [2022] NZSC 51.

hat. He was interviewed by police and admitted that both items left at the murder scene were his. He consistently denied ever entering the property, but gave conflicting accounts of when he had last seen these items and what had happened to them. He further accepted that he had been out walking near the Easton house on the night of the murder.

8. Mr Hall was charged with murdering Arthur Easton and intentionally wounding Brendon Easton. Following trial by jury, in September 1986, he was convicted of both charges.

9. Mr Hall's first appeal against conviction was dismissed by the Court of Appeal in 1987.[2] Three unsuccesful applications for a Prerogative of Mercy followed.[3]

This application

10. This is Mr Hall's second appeal against conviction.[4] In the particular circumstances of this case, leave was not opposed by the Crown, and no objection taken to the significant lapse in time since Mr Hall's first appeal.

11. This appeal is to be determined under s 385(1) of the Crimes Act 1961. The Supreme Court must allow the appeal if it is of opinion that there was a "substantial miscarriage of justice."[5]

12. If the Court allows the appeal, it must quash the convictions and has discretion to direct a judgment and verdict of acquittal to be entered, or direct a new trial, or make such other order as justice requires.[6]

13. Three grounds are advanced on Mr Hall's behalf in support of the contention that justice substantially miscarried. To the extent set out in these submissions, the Crown raises no substantive opposition to the arguments advanced. The Crown accepts that Mr Hall's appeal should be allowed, and verdicts of acquittal entered.

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2 *R v Hall* [1987] 1 NZLR 616.
3 In 1987, 1988, and 1993.
4 Criminal Procedure Act 2011, s 397: These proceedings having commenced before the commencement date of the Criminal Procedure Act 2011, this appeal falls to be determined under Part 13 of the Crimes Act 1961. Specifically, it is an appeal against the decision of the Court of Appeal on an appeal against conviction pursuant to s 383A of the Crimes Act 1961. Leave of the Court is required.
5 Crimes Act 1961, s 385(1).
6 Crimes Act 1961, s 385(2).

Mr Turner's evidence

14. Mr Ronald Turner's evidence was read to the jury in the course of Mr Hall's trial.[7] He was in the area on the night of the murder and, at the relevant time, saw a man running from the general direction of the Easton house.

15. The clear inference was that Mr Turner had seen the murderer fleeing the scene, and his description of that man inevitably assumed significance at trial.[8]

16. In his evidence, Mr Turner described the man he had seen. He estimated his height, his build, his age, and what he recollected of the man's clothing. Mr Turner said he did not see the man's facial features and that he would not recognise him again.[9] His evidence was entirely silent as to the man's ethnicity or race.

17. It is now known that Mr Turner's statement, as read to the jury and as disclosed to the defence, was incomplete.

18. Mr Turner rang police on the night of the murder.[10] Thereafter he was interviewed by police on two occasions: the day after the murder on 14 October 1985, and four months later on 19 February 1986.[11] He signed a written statement for the purposes of the depositions hearing on or about 24 June 1986.[12]

19. Both when Mr Turner telephoned police on the night of Mr Easton's murder, and the following day when he was interviewed by police, he described the man he saw as a "male Māori."[13] He elaborated in his statement on 14 October 1985, describing the man as "definitely dark-skinned, he was not white."[14] After Mr Hall, a pakeha male, became the focus of police

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7 Notes of evidence (Appellant's bundle, p 123.) Defence counsel consented to Mr Turner's evidence being read at depositions and trial, based on the disclosure available to the defence about Mr Turner's statement.

8 His evidence was referred to by counsel in closing addresses and was read to the jury in full by the trial Judge in the course of his summing up. The Judge characterised the evidence as "an important piece of evidence. I think I should read it to you because, it has quite a bearing here." (Appellant's bundle, p 64-5.)

9 A copy of the statement is at Appellant's bundle, p 780-2.

10 Police Jobsheet dated 13 October 1985 at 9.45 pm, attached as exhibit A to Ms Shirley Hall's affidavit dated 8 November 1991, prepared for the purposes of Mr Hall's third application for the Prerogative of Mercy.

11 He also undertook a time trial of his drive that night with police on 20 October 1985: see police evidence to this effect: NOE 41: Appellant's bundle p 123.

12 Mr Turner's affidavit dated 22 August 1988 at [6]: Appellant's bundle p 793.

13 Police Jobsheet dated 13 October 1985 at 9.45 pm, attached as exhibit A to Ms Shirley Hall's affidavit dated 8 November 1991, prepared for the purposes of Mr Hall's third application for the Prerogative of Mercy; and Police statement from Mr Turner dated 14 October 1985: Appellant's bundle, p 563-5.

14 Police statement from Mr Turner dated 14 October 1985: Appellant's bundle, p 563-5.

attention, Mr Turner was reinterviewed by police about this aspect of his description. He reiterated his view that the man he saw that night was Māori: "I am 100% sure he was a Māori. That was my immediate impression, I do not feel he was a pakeha, not even a dark skinned one."[15]

20. When Mr Turner signed his witness statement for the depositions hearing held on 24 June 1986,[16] he did not notice that his description of the man he saw "as being of Māori race...had been omitted."[17] It was this statement that was provided to both the Court and Mr Hall's defence counsel.

21. Mr Turner's police statements were not disclosed to the defence until March 1988, some seven months after his appeal.[18] This meant that Mr Hall's trial, his appeal to the Court of Appeal (July 1987), and his first application for the Prerogative of Mercy (1987), were all conducted without defence counsel being aware that Mr Turner had described a man fleeing the general vicinity whose description differed materially from that of Mr Hall, a Pakeha male.

22. Unsurprisingly, this omission from Mr Turner's evidence, and the associated non-disclosure of his police statements, both featured heavily in Mr Hall's two subsequent applications for the Prerogative of Mercy. Both applications were declined.[19] As previously acknowledged,[20] to the extent that those decisions indicated some doubt or ambivalence about the prosecution's disclosure obligations, or an assessment that the inconsistencies between Mr Turner's evidence and his police statements lacked materiality, the Crown considers those decisions were wrong.

23. The Crown accepts the following:

    23.1 Mr Turner's statement should have included the entirety of the description he gave of the man he saw that night, including his view of the man's ethnicity. There was no basis for removing the word "Māori" from his statement, and a witness statement distilled in this

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15 Police statement from Mr Turner dated 19 February 1986: Appellant's bundle p 572-573.

16 Affidavit of Mr Arapeta Orme dated 24 July 1990 at [6], junior counsel at Mr Hall's 1986 Depositions hearing and 1987 trial: affidavit prepared for the purposes of the third application for the Prerogative of Mercy.

17 Affidavit of Ronald Turner dated 22 August 1988 at [9]: Appellant's bundle p 793.

18 After Mr Hall's mother obtained them from the police on 3 March 1988 pursuant to an Official Information Act request: Affidavit of Shirley Hall dated at [7] (prepared for the purposes of the third application for the Prerogative of Mercy.)

19 The second application was declined in 1988; the third in 1993.

20 In the Crown's leave submissions.

way should not have been read to the jury.

23.2 Mr Turner's statement should not have referred to Exhibit 31 (being the sweatshirt recovered from Mr Hall's house)[21] when describing the "dark blue sweatshirt with a hood" that the man was wearing.[22] There is no record of Mr Turner ever being shown that sweatshirt or purporting to identify it as similar to the one he had seen that night.[23] His statement as read to the Court should not have suggested otherwise.

23.3 Mr Turner's statements to police should have been disclosed to the defence. That Mr Hall's trial predates the enactment of the Criminal Disclosure Act 2008 does not obscure the Crown's disclosure obligations. Then, as now, the Crown accepts it was required to disclose Mr Turner's statements.

24. The Crown acknowledges that Mr Turner's statement was key evidence at Mr Hall's trial; that it was unjustifiably altered in a material way; and that fundamental disclosure obligations were not met. This resulted in relevant evidence being concealed from Mr Hall, his defence team, and from the jury.

25. At Mr Hall's trial, the jury heard evidence that a man, who could have been Mr Hall, was seen fleeing the direction of the murder at the relevant time. Had Mr Turner been called to give evidence, all the indications are that he would have given evidence consistent with his police statements.[24] As a result, the jury would have heard evidence that a man, who on Mr Turner's description could not have been Mr Hall, was seen fleeing the direction of the murder at the relevant time.

26. Inevitably this bears heavily upon the safety of Mr Hall's conviction. The Crown does not seek to argue otherwise.

27. It is usually for the Crown in the adversarial criminal appeal process to assist the Court by identifying if there are countervailing factors relevant to the

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[21] Copy of Mr Turner's statement as read to the Court, p 2: Appellant's bundle p 782.
[22] Police statement from Mr Turner dated 14 October 1985: Appellant's bundle, p 564.
[23] Mr Turner's affidavit dated 22 August 1988 at [15]: Appellant's bundle p 794.
[24] Mr Turner's affidavit dated 22 August 1988 at [11]: "I still believe that the person I saw that night was a Māori person and that would have been evidence if called to Court (sic), and the Police certainly knew that I was definite in that identification." Appellant's bundle p 794.

safety of a conviction which the Court should weigh. For completeness sake, the Crown submits that the concern a substantial miscarriage of justice occurred on this ground subsists, notwithstanding that:

27.1 There was some other evidence to support the prosecution of Mr Hall, in particular Mr Hall's identification of the hat and bayonet as being his and his statement that he was in the area at the time;

27.2 Mr Turner's sighting of the man was fleeting and in poor light at night;

27.3 The possibility that the murderer was Māori, and also substantially taller than the appellant, was before the jury in the matrix of other evidence.[25]

28. The appellant suggests that a similar passage in the Crown's leave submissions might be a "faint suggestion...that the alteration [to Mr Turner's statement] did not necessarily pose a real risk to the outcome of the trial."[26] The Crown contends no such thing. It accepts unequivocally the impact of this omission and the associated non-disclosure. Indeed, as made clear from the outset, it is this ground which has principally informed the Crown's overarching response to this appeal. A substantial miscarriage is conceded. These other factors are noted only to ensure the omission from Mr Turner's statement is appropriately contextualised: this omission could not be remedied by any other evidence in the case or resort to a proviso argument.

Non-disclosure

29. Multiple disclosure failures by the prosecution are alleged in these proceedings.[27]

30. While non-disclosure was one of the grounds unsuccessfully pursued in Mr Hall's first conviction appeal, the Crown acknowledges that information is now known which was not before the Court of Appeal at that time.

31. The Crown accepts that the following material was not disclosed to Mr Hall

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[25] Judge's summing up p 46-7 (Appellant's bundle p 60-61); this was also referenced in the Court of Appeal decision: *R v Hall* [1987] 1 NZLR 616 at 619 (Appellant's bundle p 5.)

[26] Appellant's submissions at [47].

[27] This was also a focus of Mr Hall's first appeal to the Court of Appeal.

that should have been:

31.1 Mr Turner's statements and associated documentation (being material relating to the police "sighting experiment".)

31.2 Some statements made by the two Easton boys to police.[28] (Oddly, perhaps, while it appears that all statements made by the Easton boys were not disclosed in advance of trial, the fact of these statements was openly referred to during the trial.[29])

31.3 A statement made by an attending ambulance officer who spoke with the Easton boys on the night of the murder and "definitely" heard them describe their attacker as "black."[30]

31.4 Additional material relating to another suspect who had been investigated by police. As the Court of Appeal acknowledged, the existence of this suspect had been made known to the defence, as had the fact that police were satisfied with his alibi and he was no longer suspected.[31] For the purposes of Mr Hall's first appeal, the Court of Appeal considered the Crown had fulfilled its disclosure obligations in respect of this suspect. However, the Court of Appeal proceeded at that time on the basis that this suspect had been definitively excluded from involvement in this offending.[32] On the basis of what is now known, the Crown accepts this oversimplified and overstated the position, and that more information could, and should, have been disclosed.

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28 In particular the statements made by both Easton sons to police the day following the murder on 14 October 1985. It is clear from the second application for the Prerogative of Mercy that these statements had been freshly sighted by Mr Hall's defence team. These were attached as exhibits B and D to Ms Shirley Hall's affidavit dated 8 November 1991, prepared for the purposes of Mr Hall's third application for the Prerogative of Mercy. These statements were referred to by Mrs Hall as "just received from police" in her letter to the Minister of Justice dated 8 March 1988 as part of the first application for the Prerogative of Mercy.

29 Evidence of DSS McMinn: "either one or two days after the incident, the 2 Easton boys were interviewed by police at length": NOE 131.

30 Statement of Mr Holt dated 15 October 1985, p 4: Appellant's bundle p 588.

31 *Hall v R* [1987] NZCA 616 at 627, lines 36-38.

32 The Court of Appeal referred to a letter from the prosecutor to the defence prior to trial, dated 10 September 1986 declining "to supply you with a list of persons suspected at various times by the Police, because as you will be aware, this would cover a vast number of persons whose names have now been absolutely cleared": *Hall v R* [1987] NZCA 616 at 626, line 29-31. The Court of Appeal also cited (albeit disapprovingly) evidence given at trial by a police officer that "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 50 of these persons was inquired into as far as possible. This normally meant interviewing at least two or three alibi witnesses per person; checking these two or three persons' stories as well and then completing each individual matter. I am satisfied that those persons were not involved in this matter": *Hall v R* at 626, lines 47-53, citing from NOE 58, Appellant's bundle p 140.

32. The appellant cites two other tranches of material as undisclosed. The factual position in respect of disclosure of these is less clear:

    32.1 The reconstruction undertaken by police with the Easton boys in late January 1986: while the record suggests information pertaining to this "reconstruction" may not have been disclosed prior to trial, it did feature in evidence given during Mr Hall's trial. One of the police officers involved in the reconstruction referred to it during his evidence,[33] and the Officer in Charge thereafter explained what the reconstruction involved and who was present at the time.[34] The Crown's position is that given the ability of a reconstruction of this type to influence the critical witnesses' evidence, material relating to the reconstruction was subject to the disclosure obligation.

    32.2 The job sheets dated 15 and 16 October 1985 recording police briefing notes: from the record, it is unclear whether these were disclosed. On the appellant's behalf it is inferred they were not because they were not the subject of cross-examination at trial.[35] While the Crown accepts these did not feature during cross-examination, the reasons for this cannot now be stated with any certainty. The Crown accepts that these job sheets were relevant, and disclosable.

33. The relevant principles regarding disclosure are well-settled and are appropriately articulated in the appellant's submissions.[36] Whilst this trial was conducted without the benefit of a codified framework for disclosure such as presently exists, the Crown accepts that the prosecution fell well short of meeting its disclosure obligations in Mr Hall's case. The Court of Appeal's decisions in *R v Wickliffe*[37] affirm that at the time of Mr Hall's case it was settled that if there was any material conflict between the (anticipated) evidence of a Crown witness and any prior statement made by

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33 Evidence of Constable Lamb: NOE 78-80.

34 Evidence of DSS McMinn: NOE 127-129; noting his acceptance that this information was not contained in his depositions evidence, and only came out in Court: NOE 129.

35 See Affidavit of Tim McKinnel at [426] (and Table 1 and fn 10 of his affidavit.)

36 Appellant's submissions at [53] citing *R v Lyttle & Ors* [2022] NZCA 52.

37 *R v Wickliffe* [1986] 1 NZLR 4 at 9; and the subsequent decision [1987] 1 NZLR 55 at 58-59; (1986) 2 CRNZ 310 at 313. The first *Wickliffe* decision was delivered in December 1985, ie prior to Mr Hall's trial; the second in December 1986, in advance of Mr Hall's appeal. The Crown's submission in *Wickliffe* was that a job sheet containing material that was

them and known to the prosecution, that information must be disclosed in advance of trial. It is accepted that the material which was not disclosed in this case deprived "the defence of relevant information that responded to the Crown's case."[38]

Mr Hall's police interviews

34. Mr Hall was interviewed by police on several occasions. His statements to police have appropriately been characterised by counsel for the appellant as of "critical importance" to the Crown case. Mr Hall accepted that the bayonet and the woollen hat left at the murder scene were his, and then gave conflicting accounts of their whereabouts. In summing up the case to the jury, the presiding Judge referred to the "truth or falsity" of those explanations as "an important, if not a crucial issue in this case."[39] Mr Hall also accepted he was walking in proximity to the Easton house on the night of the murder. Undoubtedly these were key planks of the Crown case, sourced from answers Mr Hall gave during his police interviews.

35. The appellant has addressed the interviews at length in his submissions, but also acknowledges that this Court is not required to evaluate the police interviewing techniques, or to determine any issues of fairness, reliability or admissibility relating to the product of those interviews.[40]

36. For the Crown it is accepted that there is, on its face, a reasonable foundation for the proposition that much of the content of Mr Hall's police statements was unfairly obtained. Whilst acknowledging the different standards,[41] practicalities, and methodologies[42] which applied to police interviews in the 1980s, it is apparent from the record that Mr Hall's police interviews were extremely lengthy; were conducted by multiple interviewing

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possibly of help to the defence should have been disclosed: [1986] 1 NZLR 4 at 9.

38 Appellant's submissions at [62].

39 Summing up at p 17: Appellant's bundle p 31.

40 Appellant's submissions at [16].

41 When the applicant was interviewed, the guidelines for acceptable police questioning practice were set out in the Judge's Rules 1912: Adams on Criminal Law- Evidence Archived Commentary (online ed. Thomson Reuters) at [EC5] as noted by Woolford J in *R v Hoggart* [2019] NZHC 927 at [81]; cited with approval in *W(CA226/2019) v R* [2019] NZCA 558 at [58]. Currently, police interviews are subject to the *Practice Note- Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. When the applicant was interviewed, police were prohibited from conducting "excessive or oppressive cross-examination of persons in custody" (Judges Rules 1912, r 3), whereas current standards prohibit "any cross-examination of persons in custody" *(Practice Note- Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, r 3).

42 Interviews were then recorded by hand rather than video: "The Law Commission noted in October 1994 that "[v]ideo recording is becoming more frequent as facilities for it are introduced throughout the country.": Law Commission *Police Questioning* (NZLC R31, 1994) at 75, as cited in *W(CA226/2019) v R* [2019] NZCA 558 at fn 81.

officers; occurred without Mr Hall having a lawyer or support person present; and questions were asked, and comments and statements of opinion offered by interviewing officers which would not be permissible by today's standards.

37. It is unnecessary for the Court to determine the admissibility of the appellant's statements to resolve this appeal. The Crown accepts that there was a point where, more likely than not, the interviews became unfair and oppressive. At the same time the Crown notes that the criticisms levelled at the major part of the Police interviews may not taint everything Mr Hall said to Police. An example of this is Mr Hall's prompt acknowledgement, at the very outset of his interactions with the police and prior to the first interview, of his ownership of both a bayonet and a woollen hat like the ones left at the scene.[43]

38. Finally, the Crown accepts and considers it relevant that Mr Hall has an intellectual disability. This was apparent during Mr Hall's trial, and was also referenced in his first appeal, with varying descriptions of him as "backward intellectually" and "an intellectually deprived person."[44] More recently, it is acknowledged that Mr Hall received a diagnosis of autism spectrum disorder on 24 February 2019.[45] No further steps have been taken by the Crown regarding the implications of this diagnosis for the issues in this case given its position on the appeal overall, and in the light of the Crown's clear and continued acceptance (from trial till now)[46] that Mr Hall has an evident intellectual disability.

Outcome

39. The concerns raised on Mr Hall's behalf are clear and compelling. The approach taken by the Crown has been to identify and focus on the gravest concerns, that are clear on the face of the record, so as to expedite a result. As already intimated, the Crown accepts that the prosecution's treatment of Mr Turner's statement is a ground which on its own would be capable of determining this appeal in the appellant's favour. The Crown accepts that a

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43 Evidence of DS White: NOE 52.
44 *R v Hall* [1987] 1 NZLR 616 at 619 and 621 (Appellant's bundle, p 5 and 7.)
45 Report of Consultant Clinical Psychologist Tanya Breen (Appellant's bundle, p 822-849.)
46 There was no Crown cross-examination of the defence witnesses on this topic.

substantial miscarriage of justice occurred in Mr Hall's case, and that his convictions should be quashed.

40. In the extraordinary circumstances of this case, no order for a retrial is sought. Directed acquittals are invited.

41. Finally, the Crown acknowledges the attempts made by Mr Hall, his family, his advocates and his supporters over a long period of time to get these matters appropriately addressed. The appellant's characterisation of his case as a "trial gone wrong" is lamentably correct. The Crown acknowledges that significant parts of the criminal justice process have failed Mr Hall, and serious hara/harm has been caused. The first step in relation to ea, and redressing the legal wrong, is the public acknowledgment by the Crown in this Court that Mr Hall should be acquitted.

31 May 2022

M Laracy/ E Hoskin
Counsel for the respondent

TO: The Registrar of the Supreme of New Zealand.

AND TO: The appellant.