IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI **SC 116/2021**

BETWEEN	**CHEYMAN LEE MITCHELL**
	Appellant
AND	**NEW ZEALAND POLICE**
	Respondent

RESPONDENT'S SUBMISSIONS

11 April 2022

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Introduction and summary

1. Cheyman Mitchell held a zero alcohol licence but drove after drinking. When breath tested, he was found to have a level of 649 micrograms per litre of breath. He was charged with two offences under the Land Transport Act 1998 (LTA):

   1.1 Driving contrary to a zero alcohol licence (s 32(1)(b)); and

   1.2 Driving with excess breath alcohol (EBA) (exceeding 400 micrograms of alcohol per litre of breath) (s 56(1)).

2. Mr Mitchell intended to plead guilty to both charges. At Judge Neave's invitation, he instead pleaded guilty to the EBA charge and entered a plea of previous conviction to the zero-alcohol charge. Judge O'Driscoll heard further argument and allowed the special plea.[1] There had been different responses to this situation in previous cases and Judge O'Driscoll hoped his decision would be appealed "so that some guidance may be offered to the District".[2]

3. The High Court allowed the Crown's appeal.[3] Applying the interpretation of s 46 in *Rangitonga v Parker*,[4] Osborne J held that the conduct involved different core punishable acts:

> [84] A key element which established Mr Mitchell's excess breath alcohol offence was that his alcohol level was excessive.
>
> [85] Similarly, a key element which made his driving punishable on the second charge was that the driving was in breach of his zero-alcohol licence. But for Mr Mitchell possessing only a zero alcohol licence, the act of driving on the road with some level of breath alcohol would not have been punishable.

4. This was not a "fine-grained comparison of each element of the charges",[5] which the *Rangitonga* court had discouraged. It was an assessment of what lay at the core of the charges. The two offences had "an appreciably different focus":[6] one concerned the prohibition of driving with excess breath or blood alcohol and the other addressed the duty to drive within the requirements of a licence. The identification of a fact common to both offences - driving with

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1 *New Zealand Police v Mitchell* [2020] NZDC 1999 ["DC judgment"].
2 At [5].
3 *New Zealand Police v Mitchell* [2020] NZHC 1143 ["HC judgment"].
4 *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796 ["*Rangitonga* CA"].
5 At [41].

some alcohol – did not mean the offences arose from the same facts, or that the core punishable acts were the same.

5. The Court of Appeal employed a similar analysis.[7] It endorsed the observation in *R v Arnold* that "[t]here is a difference (and sometimes a great deal of difference) between (i) two charges being founded on the same facts and (ii) two charges sharing some facts in common."[8] The function of the breath test was to prove different things under the two offences and did not make the core punishable acts the same.

6. Before this Court, Mr Mitchell submits that this analysis is wrong. He now emphasises s 46(1)(b) of the Criminal Procedure Act 2011 (CPA). In effect, he argues that the elements of the first offence encircle a set of facts. Conviction on that offence bars conviction on "any other offence" that relies on a fact so delineated, as these would arise "from the same facts". This implies that any degree of factual overlap will found the special plea. It involves rejecting the long-held view that a single "incident" may result in multiple offences, which can be properly tried together.[9] Mr Mitchell's guilty plea on one charge buys him immunity on the other. He contends that this is the effect of the CPA formula, which asks in s 46(1)(b) whether the facts, not the offences, are the same. Here, the breath test reading founded both offences and the Court of Appeal's reasoning would punish Mr Mitchell twice for his "acts" of driving with a breath alcohol level of 649 micrograms/L.[10] That fact could not be used twice: to prove a level above 400 micrograms for a breath alcohol offence, and to prove the presence of some alcohol for a licence offence.

7. The respondent submits that the Court of Appeal correctly assessed the role of s 46 in a case of this nature. There was an additional fact in play under the s 32 offence – Mr Mitchell was also subject to a zero alcohol licence when he drove, therefore the two offences did not arise from the same facts. This was not the dissection of what was, in substance, a single act, but recognition that

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6 HC judgment, at [88].
7 *Mitchell v New Zealand Police* [2021] NZCA 417 ["CA judgment"].
8 At [25], citing *R v Arnold* [2008] EWCA Crim 1034, [2008] 1 WLR 2881 at [37].
9 For example, *R v Witika* [1993] 2 NZLR 424 (CA) at 437.

the conduct involved two distinct punishable acts. The breath result did not absorb one punishable act into the other but had the evidential function of proving different things: (i) the presence of some alcohol; and (ii) a particular reading above 400 micrograms/L.

8. Historically, the special pleas were focused on the oppression of successive trials. That is not the situation here. On this occasion, the division between a "previous conviction" and an "offence currently charged" was artificial. The case might have been resolved by asking whether the charges must be expressed as alternatives, to prevent multiple convictions. The statutory scheme yields the clear answer that the two offences concern distinct wrongs and rest on different facts, and dual convictions were appropriate. The unusual context of the appeal does not expose the full range of issues that may arise in other double jeopardy settings.

Interpreting s 46 of the Criminal Procedure Act 2011

9. Section 46(1) provides:

> (1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under s 147 if the court is satisfied that the defendant has been convicted of –
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> (a) The same offence as the offence currently charged, arising from the same facts: or
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> (b) Any other offence arising from those facts.

10. Section 47 is similarly phrased and addresses a previous acquittal.

11. Like its predecessor, s 358 of the Crimes Act 1961, s 46 is the statutory expression of the common law special plea, autrefois convict. It is most obviously concerned with the problem of successive prosecutions for the same conduct, and so reflects the general rationale for the rule against double jeopardy. The phrase "offence currently charged" implies a temporal gap between the "previous conviction" and a subsequent charge.[11] That gap may arise in a range of situations.[12] Here it was somewhat contrived because the

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10 Appellant's Submissions, at [72] and [97].

11 The situation of simultaneous convictions for the same act of driving was not seen as falling within the scope of s 358 of the Crimes Act. See *R v Clarke* [1982] 1 NZLR 654 (CA) at 655.

12 For example, when a group of charges, filed together and arising from a single incident, are tried separately. Richard Mahoney "From 'The Same Offence' to 'The Same Facts' – The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal" [2013] NZ L Rev 171 at 190 – 191.

charges were laid contemporaneously.

12. The common law special pleas left no room for judicial discretion. (Section 46 likewise provides: "… the court *must* dismiss the charge.") The mandatory effect of finding the pleas made out explains the narrow construction they received, in both their common law and statutory forms. The special pleas applied to a crime which was "the same in fact and law".[13] That question turned on whether the offences involved the same elements.[14]

13. In *Connelly v Director of Public Prosecutions*, the House of Lords "identified a narrow principle of autrefois, applicable only where the same offence was alleged in the second indictment".[15] The learned authors of *Abuse of Process in Criminal Proceedings* remark:[16]

> Whilst *Connelly* did not go so far as to hold that [autrefois acquit] and [autrefois convict] were otiose legal concepts the House obviously intended to relegate them and the concept of pleas in bar to a subsidiary role. Where a situation of double jeopardy was alleged unless the situation came clearly within [autrefois acquit] and [autrefois convict] the abuse of process jurisdiction, one based in discretion, was always to be preferred.

14. The counterweight to the strict limits of the pleas is therefore the "wider principle that a second trial involving the same or similar facts may in

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13 *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1338 (per Lord Devlin). Lord Devlin continued:

> My noble and learned friend [Lord Morris] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based… I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I felt that the doctrine of autrefois was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise.

See also David Ormerod, David Perry and Peter Murphy (eds) (2021 ed) *Blackstone's Criminal Practice (*Oxford University Press, Oxford, 2020) at D12.22-D12.24.

14 *R v Beedie* [1997] EWCA Crim 714, [1998] QB 356 at 360 G:

> Lord Devlin said, at 1339-1340: "For the doctrine to apply it must be the same offence both in fact and in law," and he went on, having rejected the idea that an offence may be substantially, rather than precisely, the same as another in its legal characteristics, to reject the suggestion that autrefois applies in favour of an accused who has been prosecuted on substantially the same facts.

See also, *Rangitonga* CA*,* above n 4, at [29]:

> Despite the adoption of the "same or substantially the same" formula, it must be accepted that the New Zealand courts have generally taken a narrow view of the availability of the special pleas. The focus has been very much on comparing all the legal elements of the previous and new charges.

See Mahoney, "From 'The Same Offence' to 'The Same Facts'", above n 12, at 176:

> The overwhelming weight of New Zealand authority followed the line taken internationally and proclaimed that this prerequisite [in s 358(1) of the Crimes Act – the matter must be "the same in whole or in part"] required that the *legal elements* of the original charge and the current charge must be the same.

15 *Beedie,* at 360F.

16 David Young, Mark Summers QC and David Corker, *Abuse of Process in Criminal Proceedings* (4th ed, Bloomsbury Professional Ltd, West Sussex, 2014) at 245, [7.08].

the discretion of the court be stayed if to proceed would be oppressive or prejudicial and therefore an abuse of the process of the Court."[17] A more "holistic" approach may be taken in such situations.[18] *R v Beedie* is an example.[19] The case of *R v Phipps* shows the discretion applied in a driving situation.[20]

15. Ordinarily, the prosecution will not have a "second bite at the same cherry"[21] and must decide in the first proceeding "what charges it wishes to bring arising out of the same incident."[22] If the Police had prosecuted Mr Mitchell for one of the charged offences and sought, on a later occasion, to prosecute him for the other, he would not lack a remedy if s 46 did not apply. A second prosecution, if vexatious or oppressive, would almost certainly be stayed.

16. The Crimes Act formulation of the previous conviction plea was complicated.[23] Without, it seems, intending any change to the scope of the plea, the drafters of the CPA strove for a clearer and more concise definition. The Explanatory Note stated that the Bill would create a "new test", which differed from the existing law and made the scope of the plea more certain.[24] There was a difference in phraseology, but if an analytical change was intended its exact nature was not obvious.[25] The Court in *Rangitonga* concluded: "[t]he new

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17 *R v Phipps* [2005] EWCA Crim 33.

18 *R v Wangige* [2020] EWCA Crim 1319, [2021] 4 WLR 23, at [64].

19 *R v Beedie,* above n 14.

20 In *Phipps*, the Court of Appeal of England and Wales noted at [16] that two of the principles of *Connelly v DPP* had later been expressed in this way:

> (1) Pleas of autrefois acquit and autrefois convict must relate to a crime which is the same, or in the effect the same, as that originally charged. (2) There is a wider principle that a second trial involving the same or similar facts may in the discretion of the court be stayed if to proceed would be oppressive or prejudicial and therefore an abuse of the process of the Court.

In *Phipps*, the defendant had been initially convicted for driving with excess alcohol and subsequently for dangerous driving. In holding that the second prosecution should have been stayed, the Court of Appeal observed: "[i]t is of course true that the offences are different, but that is always true in this kind of case; otherwise the second proceedings would be determined by a plea of autrefois convict or autrefois acquit, as the case may be." (At [27]). Further, "[b]oth the allegations arose out of the fact that the appellant was driving his car on the A3 at Malden in an unlawful manner." (At [27]). Given that this common fact did not establish a basis for autrefois convict, it must follow that the two charges, if contained in the same indictment, would not have been objectionable.

21 *Wangige,* at [52].

22 *Phipps,* at [21]. The CPA contains some exceptions: ss 46(2), s 151 ff.

23 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 (HC) at [43] ["*Rangitonga* HC"]. It was also the same formula used in the Canadian Criminal Code at that time. See R.W. Moodie, "Autrefois Acquit and Convict in Canada and New Zealand", 17 Crim. L.Q. 72 (1974); R Mahoney, "Previous Acquittal and Previous Conviction in New Zealand: Another Kick at the Cheshire Cat" (1990) 7 Otago LR 222 at 224. In *R v Taylor* [2008] NZCA 558, 24 CRNZ 824, Chambers J observed, at [28], that sections 358 and 359 "bristle with difficulties" and were "well overdue for legislative reform."

24 *Rangitonga* CA, above n 4, at [34].

25 At FN 23, the Court of Appeal observed: "Katz J referred … to Departmental briefings and reports but we do not consider these materials provide material assistance and, in any event, they are of doubtful admissibility." It is questionable that the words of s 46 necessarily confer a controlling role upon the facts, operating independently from the elements.

section focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison of each element of the charges."[26]

17. If the drafters considered that reference to facts rather than the elements of offences would more clearly define the pleas, they differed from the House of Lords in *Connelly v DPP*.[27] They also differed from the conclusions of the High Court of Australia in *Pearce v R,*[28] another case decided under the common law.[29] The High Court acknowledged a strand of authority that the autrefois pleas applied to offences which, although not exactly the same, were "substantially the same".[30] But it held that this did not mean a departure from comparing the elements of the two offences.[31] There were "sound reasons to confine the availability of a plea in bar to cases in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly included in the other."[32] The alternatives were too uncertain. A test could not be based on whether the offences arose from the same conduct, a single event or episode of offending, or whether the evidence would be the same.[33] Nor was it satisfactory to say that the gist or gravamen of the offences was the same - Kirby J remarked that this was "unavoidably ambiguous and therefore inescapably contentious", adding that "[i]n the context of a plea by which an accused person is asserting a *right* to be relieved of a second criminal prosecution or charge, it is essential that the criteria to be applied should be clear."[34] The remedies for alleged double jeopardy were broader and, as in *Connelly*, this made it unnecessary to expand the special pleas.

18. In *Rangitonga,* the Court was faced with what appears to be a doctrinal

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26 *Rangitonga* CA, above n 4, at [41].

27 *Connelly v DPP,* above n 13, at 1308-9 (per Lord Morris).

28 *Pearce v R* [1998] HCA 57, (1998) 194 CLR 610.

29 The appellant had broken into the victim's house and beaten him. He was charged with two offences having overlapping but not identical elements: inflicting grievous bodily harm with intent, and breaking and entering a dwelling and inflicting grievous bodily harm. The High Court held that a plea in bar was not available when the subsequent offence contains elements not included in the first offence.

30 *Pearce,* at 616, [18]; 645, [109] (per Kirby J)

31 At 617, [21].

32 At 618, [24]. Kirby J proposed that "… it is necessary to show that the subject of the second prosecution or charge is the same offence or substantially or practically the same. The last words allow for minor variations in the verbal formulae of offences under comparison" (at 652, [125]).

33 At 616 – 620.

34 At 652, [126].

anomaly. Continuity with the existing scope of the pleas had been signalled in the Parliamentary materials.[35] Yet, in the name of simplicity and certainty, the statutory test would now depend on whether the two offences engaged the "same facts" (or, to use the Court's gloss, whether the facts were "in substance" the same). This was the kind of test rejected in *Connelly* and *Pearce*.

19. The Court of Appeal addressed this difficulty by holding that the section applied when "there is a common punishable act central to both the previous and new charge."[36] Further, "[i]n most cases it ought to be straightforward to identify the central punishable acts or omissions by reference to the essential elements of the offences".[37]

20. So stated, the inquiry into "central punishable acts" does not move far from the previous reliance on elements as the determinant of special pleas. Nor could it logically do so. The similarity of two offences requires inquiry into the elements; the question of whether two offences arise from the same facts depends upon the facts *engaged by* those offences, which also looks to the elements.[38] (The appellant' proposed test appears to rest on the same

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35 *Rangitonga* CA, above n 4, at [43](a), [46]. *Rangitonga* HC, above n 23, at [54].

36 *Rangitonga* CA, above n 4, at [41].

37 At [43(b)]. In *Filitonga* v *R* [2017] NZCA 492, the *Rangitonga* test was applied in a s 46 context. The facts were unusual. The Crown alleged that Mr Filitonga, who was HIV-positive, had transmitted the virus to the complainant. Two charges were filed: causing grievous bodily harm with reckless disregard and criminal nuisance. A jury found him guilty of both. The Court of Appeal quashed both convictions. It did so partly because of the operation of s 46 of the CPA. The Court noted that the focus was the "facts giving rise to the charges" rather than "a close comparison between the elements of the charges" (at [15]). At [17], it held:

> …If the jury had concluded that both charges arose out of the same act of unprotected sex between Mr Filitonga and the complainant, it would not have been open for the Court to enter convictions on both charges without infringing the rule against double jeopardy. In those circumstances, both offences would have arisen from the same facts. Applying the formulation in *Rangitonga*, a common punishable act was central to both charges. The common punishable act is having unprotected sex, while knowingly HIV-positive, being reckless as to the consequences. This common act founds both the grievous bodily harm charge (where, additionally, HIV is transmitted) and the criminal nuisance charge (where the transmission of HIV is the danger). It follows that a conviction on one of these offences would preclude the proper entry of a conviction on the other.

Although *Filitonga* used the language of double jeopardy, it is better understood as a case where dual convictions were not possible on the Crown case and should have been charged as alternatives. It was possible – though unprovable either way – that the complainant was been infected with HIV on the first occasion of unprotected sex with the defendant. Assuming that infecting someone with HIV was an act of grievous bodily harm, the hypothesis of first-time infection would mean that the two charges depended on exactly the same act. The Court held the jury could not convict on both criminal nuisance (causing the risk of infection) and grievous bodily harm (the actual infliction of harm), in relation to the same act. This was explained at [3]. Without the judicial direction that infecting a person with HIV was grievous bodily harm, it was possible the jury would have concluded it was not. Establishing who caused the infection was another issue. If the jury accepted that HIV had been transmitted, it may not have been sure that Mr Filitonga had been responsible. Despite that uncertainty, it might have concluded that his conduct created the danger of infection and therefore made out the criminal nuisance charge. The nuisance charge was therefore appropriate, but the guidance on how the two charges should be considered had been problematic.

38 *Connelly v DPP,* above n 13, at 1339 (per Lord Devlin): "The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence." See also *Kingswell v R* [1985] HCA 72, (1985) 159 CLR 264 at 276: "The word "offence" has no fixed meaning in the law… it is the legal definition of the offence which indicates which are its factual ingredients." And at 292: "What is a criminal offence? A criminal offence can be

point.)[39]

21. In defining a test that relaxes the insistence on identical elements, while retaining elements as the gauge, *Rangitonga* resembles the Canadian rule against multiple convictions, or the *Kienapple* principle. It is helpful to consider this strand of authority, as it illuminates the appellant's use of elements in this case.

22. In *R v Kienapple*,[40] the Supreme Court of Canada founded the rule on the doctrine of res judicata, which "best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences."[41] Writing for the majority, Laskin J observed that res judicata was a broader expression than autrefois convict: "[t]he relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences."[42] Applying this theory, the Supreme Court held that the defendant was wrongly convicted of both rape and sexual intercourse with a girl under fourteen. There was "an overlap in the sense that one embraces the other".[43] They were alternatives and the jury should have been so directed. In other words, Mr Kienapple had been convicted twice for the same delict.

23. A decade later, in *R v Prince*,[44] the Supreme Court of Canada returned to the rule. Writing for a unanimous Court, Dickson CJ observed that the rule did not prohibit multiple convictions for the same "act" or "transaction".[45] If an accused was guilty of several wrongs, "there is no injustice in his or her record conforming to that reality."[46] *Kienapple* required both a factual nexus (do the two offences involve the same act?) and a legal nexus. To meet the legal nexus, it was not sufficient that two offences shared a common element. Dickson CJ rejected a common element test resting on the proposition that

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identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts."

39 Appellant's submissions, at [96]: "The identification of the defendant's acts and/or omissions which constitute an offence are those which satisfied (s 46) …the elements of the offence." But cf. [69]: "The s 46(1)(b) inquiry is a factual one, rather than an elements based one."

40 *R v Kienapple* [1975] 1 SCR 729.

41 At 748.

42 At 750.

43 At 744.

44 *R v Prince* [1986] 2 SCR 480.

45 At 493-494

"an act which constitutes an element of an offence can only be used to sustain a single conviction. It is thereafter "used up" for the purposes of the criminal law."[47] (This is rather like the appellant's position here – the breath alcohol level is "used up" by the s 56 offence and cannot be used again under s 32.)

24. The presence or absence of additional, *distinguishing* elements was what mattered under the rule, not the presence or absence of a *common* element:[48]

> It has been a consistent theme in the jurisprudence from *Quon*, through *Kienapple* and *Krug* that the rule against multiple convictions in respect of the same cause, matter or delict is subject to an expression of Parliamentary intent that more than one conviction be entered when offences overlap … In *Krug*, La Forest J was careful to explain that the presence of additional, distinguishing elements was in itself an expression of such an intent. No element which Parliament has seen fit to include into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.

25. By reference to four situations (inapplicable to this appeal), the Court explained when an element of a second offence was not additional or distinct. The application of such criteria should not "carry logic so far as to frustrate the intent of Parliament or as to lose sight of the overarching question whether the same cause, matter or delict underlies both charges."[49] Ms Prince had stabbed a pregnant woman, causing the premature birth of her child who lived for nineteen minutes. The issue for the Court was whether the *Kienapple* principle was breached if she was convicted for manslaughter of the child as well as bodily harm to the mother. A single act was involved and the factual nexus was clearly satisfied. But the legal nexus was absent. An essential ingredient of one offence was bodily harm to the mother, while the other offence required proof of the child's death: "I cannot see how either of these elements can be subsumed into the other."[50] The Chief Justice

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46 *R v Prince,* above n 44, at 495.
47 At 496.
48 At 497-498.
49 At 502.
50 At 504.

considered that *R v Logeman* had been correctly decided.[51] In that case, dual convictions for driving while suspended and impaired driving were held to fall outside the principle.

26. In *R v Andrew*,[52] the British Columbia Court of Appeal sat in a division of five judges to resolve the application of *Kienapple* in driving cases. The Court compressed the discussion in *Prince* into two questions:[53]

> A. Look at the facts, in the context of the offences, and ask whether only one wrongful act, in both its physical and mental elements, is involved.
>
> B. Look at the offences, in the context of the facts, and ask whether there is an additional or distinguishing element in one offence that is not contained in the other. If there is, the *Kienapple* principle does not apply unless the additional and distinguishing element is covered by one of the four types of situation enumerated by Chief Justice Dickson.

27. Ms Andrew had driven while intoxicated. Before causing a head-on collision and serious injury to the other driver, she was involved in a minor accident and had caused other cars to drive off the road. Invoking *Kienapple*, she argued that she could not be convicted for two offences in which bodily harm was an ingredient – one concerned driving while impaired and the other alleged criminal negligence. The Court held these were different wrongful acts:[54]

> The reason is that impairment of capacity followed by driving, which is the wrongful act in impaired driving, does not encompass the manner of driving, which in this case formed a part of the sequence of actions which constituted criminal negligence. Nor, in this case, considering the offences in the context of the facts, can the element of driving after becoming impaired be considered merely as a particularization of the element of wanton and reckless conduct underlying criminal negligence.

28. Similar distinctions were drawn by the Court of Appeal for Ontario in *R v Ramage*[55] and the Court of Appeal for Saskatchewan in *R v Galloway*.[56] In *Ramage*, Doherty J.A. observed:

> [64] … An impaired driving charge focuses on an accused's ability to

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51 *R v Logeman* (1978) 5 CR (3d) 219. *Prince,* at 494, 496.
52 *R v Andrew* (1990) 57 CCC (3d) 301 (BCCA).
53 At 306.
54 At 307.
55 *R v Ramage* (2010) 257 CCC (3d) 261 (ONCA).
56 *R v Galloway* (2004) 187 CCC (3d) 305 (SKCA) at [111]ff.

> operate a motor vehicle or, more specifically, on whether that ability was impaired by the consumption of alcohol or some other drug. A dangerous driving charge focuses on the manner in which the accused drove and, in particular, whether it presented a danger to the public having regard to the relevant circumstances identified in s 249 of the *Criminal Code*. The driver's impairment may explain why he or she drove the vehicle in a dangerous manner, but impairment is not an element of the offence. Both impaired driving and dangerous driving address road safety, a pressing societal concern. They do so, however, by focussing on different dangers posed to road safety. Impaired driving looks to the driver's ability to operate the vehicle, while dangerous driving looks to the manner in which the driver actually operated the vehicle.
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> [65] In *Andrew*, the court acknowledged that *Kienapple* had been applied in cases where there was no evidence of the manner of driving apart from the accident that produced the injuries or death. The court… expressed some doubt as to the correctness of those decisions. I, too, doubt their correctness. I do not regard an allegation that the accused's ability to drive was impaired by alcohol or some other drug as merely a particularization of the allegation that he or she drove dangerously. As I have tried to explain, the two allegations address different issues.

29. The law of the United Kingdom would likewise permit combined drink driving and dangerous driving charges.[57]

30. From the perspective of *Kienapple*, Mr Mitchell's conduct involved two "delicts against society" – or, in *Rangitonga* terms, different central punishable acts. One of those acts made out the elements of a licensing offence, while the other met a drink driving offence created under another part of the LTA. The zero alcohol licence offence contains a distinguishing element, illuminating different facts in his conduct, i.e. he was driving with some alcohol in his system when his licence terms prohibited him from doing so.

31. It cannot be said, therefore, that the two offences arise from the same facts. A person who simply drove with alcohol in their system does not commit an offence. But they do commit an offence if they did so while subject to a zero alcohol licence.

32. A person who drives after drinking likewise does not commit an offence for that reason alone. But they do commit an offence if their breath alcohol level

[57] *R v Arnold,* above n 8. *R v Hartnett* [2003] EWCA Crim 345, [2003] Crim LR 719.

is over 400 micrograms/L.

33. Clearly a person can commit one offence but not the other. The elements of one offence, and the facts they identify, are not subsumed by the other. The plea of autrefois convict is not available in this situation.[58] The defence of res judicata could not be raised after a conviction on one of these offences. On either approach, the presence of distinguishing, additional elements necessarily means that different offences are in play and they do not arise from the same facts.

34. The same facts must be those that were essential to the conviction pleaded. The circumstance that the appellant had a zero alcohol licence was a fact. It was not material to the EBA charge. It was part of the actus reus of the s 32 charge.[59]

35. The overlapping fact in Mr Mitchell's case was his act of driving. The breath test could prove his alcohol level for the s 56 offence. It could also have been led as evidence to prove a different thing for the s 32 offence – that his breath merely contained *some* alcohol.[60] The "sameness" of the evidence that may be given is not the test of whether the offences are the same, or whether the delict or core punishable acts are the same.[61]

36. The problem with Mr Mitchell's interpretation is further exposed if one

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58 *Connelly v DPP,* above n 13, at 1308-1309 (per Lord Morris).

59 In *H (CA319/2015) v R* [2015] NZCA 400, the appellant faced charges of assault and breaching a protection order, all stemming from a series of attacks on the complainant. The Court of Appeal held it was not an abuse to charge breaches of the order together with the assaults: "[w]hile the facts that support each charge may be the same, the acts that establish the elements of the offences are neither the same nor substantially the same. For instance, it is irrelevant to establishing the elements of the assault charges that there was a protection order in place. We do not consider therefore that there is any barrier to the laying of the charges in this way." (At [42]). On the analysis offered here, there was necessarily a difference in the facts, which followed from the allegation of substantially distinct acts. It was a question of fact whether H was subject to a protection order and that fact was irrelevant to proof of the assaults. Contrast *Police v Denovan* [2018] NZDC 5550, where the defendant pleaded guilty to breaching a protection order and successfully pleaded prior conviction to an assault charge.

60 *It* cannot even be said that a breath test is essential for proving the zero licence offence. Section 32(1)(b) could be charged in combination with an offence against s 58(1)(a). The latter can be proved without a breath or blood test (e.g. by the evidence of a doctor or experienced officer) and proof of that offence would inevitably mean the defendant had alcohol in their breath or blood for the purposes of s 32(1)(b). The s 57AA offence, however, would require a breath or blood test.

61 *Connelly,* at 1308; *Pearce v R,* above n 28, at 616, [19]-[20]; and *R v Ramage,* above n 55, at [65]. See also *Connelly*, at 1322-4 (per Lord Morris):

> In *Rex v Kupferberg*… A. T. Lawrence J said: 'For a plea of autrefois acquit to be maintainable, the offence of which the accused has been acquitted must have the same essential ingredients. The facts which constitute one must be sufficient to justify a conviction for the other. The phrases 'the same essential ingredients' and 'the facts which constitute' are to be noted. They denote and, in my view, correctly denote an entirely different situation from that which merely involves that the same facts may be relevant in respect of two charges, or that some evidence which is given in one case may again be given as being relevant in another… it would be wrong to suppose that the maxim nemo debet bis vexari pro eadem causa means that the same incident or event or story may not be under investigation in more than one trial or that evidence once given

imagines him socialising, drink for drink, with another driver, who has an unrestricted licence. If both were detained at the same checkpoint and both returned the same breath alcohol reading, legally and factually they are not in the same position. On the appellant's theory, Mr Mitchell would gain an unmerited windfall by committing the zero alcohol licence offence, yet escaping conviction for it. His companion, of course, could not have committed that offence.

37. The appellant submits that s 46(1)(a) must apply to previous and current offences with exactly the same elements ("the *same* offence… arising from the same facts"). Section 46(1)(b), on the other hand, bars a later conviction on the same facts when the offence has different elements ("any *other* offence arising from those facts").[62] If the same facts are involved, it does not matter that the two offences engage them in different ways.

38. But s 46(1) may be straightforwardly read in this manner:

    38.1 Subsection (1)(a) is the narrow, uncontroversial situation in which a special plea has always been available (and which is unlikely to arise in practice);

    38.2 Subsection (1)(b) is the more common situation where different offences are charged but they are, in effect, the same offence, or one offence is included in the other.[63]

39. Subsection 1(b) does not suggest any marked departure from the existing scope of the previous conviction plea.[64] The background policy papers and

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at one trial may not again be given at a later trial.

62 Appellant's submissions, at [5], [94]-[96].

63 The appellant relies on two cases in this category, both decided on the plea of autrefois convict. The appellants in *Jones v Police* [2019] SASC 36 and *Arthur v Police* [2008] SASC 213, had been convicted of an aggravated offence and separate offences whose elements were wholly included as aggravating factors in the compound offence. See *Jones* at [18] and [48] and *Arthur* at [42] and [48]. Another Australian case, *Andalong v O'Neill* [2017] NTSC 77, (2017) 328 FLR 340, concerned a statutory defence preventing conviction on a "similar offence" – defined as an "offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar". The appellant was convicted of driving an unregistered vehicle and driving while uninsured. (The vehicle could not be registered if uninsured). The two offences exhibited common features. Both were constituted by the appellant driving a motor vehicle with particular attributes on a public street. The offences nevertheless remain distinct and addressed discrete obligations imposed under traffic laws for the protection of the community: see [54].

64 A broader reading – that the two offences must embrace substantially the same facts – would be similar to asking whether they concern the same punishable act or delict. *Prince* discussed situations in which different offences may lack the distinct, additional element that avoids the application of *Kienapple* – for instance when an element of the later offence merely particularises an element of the first offence (e.g. using as opposed to pointing a gun), or when offences are different ways of proving the same "delict" (perjury in one offence and, under another offence, giving

departmental report are an insubstantial basis for inferring change to a fact-driven approach – something which has always been regarded as too imprecise and therefore at odds with the goals of clarity and certainty. In any event, the dichotomy between elements and facts may be overstated.

40. The premise of the appellant's argument must be that the prior conviction delineates certain facts needed to prove the first offence. Thereafter, no degree of factual overlap with another offence can be permitted.

41. The authorities considered above indicate the flaw in this analysis. If a contemporaneous or subsequent charge alleges an offence that has additional distinguishing elements, it must arise from facts not material to the prior conviction. The second charge requires proof of a matter that the first did not. There may be some factual overlap but that does not mean that the two offences engage the "same facts".

The Land Transport Act 1998 – the statutory rationale for simultaneous licence and EBA convictions

42. The issues under this heading were fully covered in the reasons of the Court of Appeal and do not need detailed treatment here.

43. The LTA contemplates multiple convictions arising from the same episode of driving. The s 2(1) definition of "concurrent offence" is one indication of this. A further indication is that the proper functioning of the sentence regime for "third and subsequent offences", which applies to both s 32 and s 56, depends on convictions for both kinds of offence when these have been committed concurrently.

44. Section 57AA now creates a combined offence that includes an alcohol-restricted licence breach and driving with breath alcohol (i) up to, or (ii) above, 250 micrograms/L. While this creates another charging option, there remain sound reasons for seeking separate convictions under sections 32 and 56. These relate to the sentences available under those provisions, both at the time of conviction or in future.[65] In *Ashworth v Police*,[66] the appellant's

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evidence contrary to one's previous evidence.) In situations such as these it may also be sensible to talk of different offences arising from the same facts. *R v Prince,* above n 44, at 500-501.

65 CA judgment, above n 7, at [45]-[46].

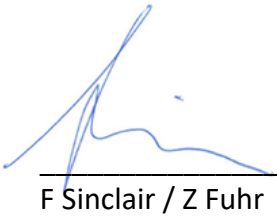
66 *Ashworth v Police* [2020] NZHC 1587.

breath alcohol level was 600 micrograms/L. Charges were laid under both s 57AA and s 56(1) [third offence]. The more logical course would have been to charge the aggravated offence under s 56 and the licence breach under s 32. The aggravating feature of driving over 250 micrograms/L under s 57AA was covered again under s 56 (over 400 micrograms/L). Although this was described as a problem of double jeopardy, it is better viewed as an unnecessary multiplication of charges.

Suppression

45. To the best of counsels' knowledge, these submissions do not contain any suppressed material.

11 April 2022



F Sinclair / Z Fuhr
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The appellant.