IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 12/2023

IN THE MATTER OF **SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2023) FROM CA636/2021 ([2022] NZCA 504)**
Referrer

SUBMISSIONS OF COUNSEL ASSISTING THE COURT

DATED 1 AUGUST 2023

MONTROSE CHAMBERS
INVERCARGILL

Barrister Acting:
Fiona Guy Kidd KC

First Floor, 42 Don Street
PO Box 1744
INVERCARGILL 9840

Tel 03 929 6622

Email:
fiona.guykidd@montrosechambers.co.nz

BRIDGESIDE CHAMBERS
CHRISTCHURCH

Barrister Acting:
Kerry Cook

Level 6, 77 Hereford Street
PO Box 3180
CHRISTCHURCH 8140

Tel 03 365 3810

Email:
kc@bridgeside.co.nz

Introduction

1. Given that there is no respondent at the hearing of the Reference, the Court is required to appoint counsel to assist the Court pursuant to s318(2)(a) Criminal Procedure Act 2011 ('CPA'). Counsel is appointed to ensure that the Solicitor-General's case is properly tested and that all relevant arguments are fully deployed before the Supreme Court reflecting counsel's own views as to the merits of the argument.

2. In the United Kingdom the Court of Appeal will usually ask the Attorney General to appoint someone called an "advocate to the court." The relevant practice direction states: [1]

> A court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. In those circumstances the Attorney General may decide to appoint an Advocate to the Court.
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> It is important to bear in mind that an Advocate to the Court represents no-one. Their function is to give to the court such assistance as they are able on the relevant law and its application to the facts of the case.

Summary of the submissions

3. Mr Darling suffered a miscarriage of justice. As such, his convictions should have been quashed by the Court of Appeal. The rationale of the Court of Appeal for quashing those convictions is, however, wrong. There can be situations where a co-offender's verdict can be different to another co-offender. This can be due to differences in admissible evidence and myriad other factors. However, there is an overriding ability of an appellate court to quash the convictions if there is a miscarriage of justice. This can include where the co-defendants were tried before separate juries. Such a situation may arise where to allow one conviction to stand would undermine the integrity of the criminal justice system such that a miscarriage of justice has occurred.

4. Mr Darling's guilty pleas and subsequent convictions were miscarriages of justice because his pleas were vitiated by extenuating circumstances. Those extenuating circumstances were the avoidance of a sentence of jail through the promise of EM bail and an electronically monitored sentence if guilty pleas were entered.

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-3g-requests-for-the-appointment-of-an-advocate-to-the-court. Accessed on 30 July 2023.

This incentive must be viewed against a background of [redacted], the uncertainty of his bail, the likelihood of a remand in custody and the potential length time to the unknown trial date.

5. Guilty pleas are not immune from examination. The value of a guilty plea in our system of justice is high but it is not supreme. People can and do plead guilty for various reasons. If an innocent person wishes to plead guilty Counsel is still required to act for that individual, subject to the ethical rules governing counsel's role. However, a guilty plea is presumptively conclusive evidence that the defendant who entered the guilty plea is, in fact, guilty of the offence to which the plea was entered.

6. The overriding test is that contained in s232 Criminal Procedure Act 2011, namely whether an error, irregularity or occurrence has caused a miscarriage of justice. Categories, whilst of assistance, are not the test and an overly rigid focus on categories established by the common law is apt to mislead.

7. The statutory test enables a process to be undertaken by the appellate court which builds in a respect for the importance of a guilty plea and the assumption upon which they are ordinarily entered yet has flexibility to look beyond the mere plea in cases which warrant such an examination. The developed categories are indicative of the type of cases where such an examination will occur but the categories are not closed and courts should be vigilant to ensure that potential miscarriages of justice are identified given the fact that miscarriages of justice transcend the significance of the particular and have the potential to taint the entire justice process and undermine the integrity of our judicial system.

8. The primary focus of a court is to do justice and allowing a court to look behind a guilty plea in certain circumstances is consistent with that primary focus even if it undermines the principle of finality. The principal of finality is not absolute and, whilst relevant, should not be given determinative weight.

The facts

9. The facts relevant to this reference are, of course, wider than the facts of merely Mr Anderson's trial. Mr Anderson's case at trial was not merely that Mr Tatu was the aggressor. It was that whoever caused the stab wounds to Mr Tatu was not Mr Anderson. Indeed, Mr Anderson posited, in response to robust cross-

examination, that it may have even been Ms Danielle Horsfall (Mr Tatu's girlfriend). The Crown suggest that Mr Anderson's evidence was fluid and farcical[2] but that is, with respect, rather unfair to Mr Anderson.

10. Counsel would have been more sanguine than the Crown regarding Mr Anderson's chances at trial. It should be noted that an independent witness who is a doctor, Ms Lizi Edmonds, corroborates aspects of Mr Anderson's evidence. This evidence was significantly problematic for the Crown. When Mr Zintl, counsel for Mr Darling, was being questioned in the Court of Appeal he said that he would have told Mr Darling that "the jury would probably place a lot of weight on that witness's evidence because they are an independent witness as opposed to someone with an interest in the outcome or one of the parties."[3] The evidence of Ms Edmonds also corroborated Mr Darling's instructions to his counsel.[4] Put more simply, Ms Edmonds' evidence undermined the Crown case in a significant manner. This theory is also consistent with Mr Anderson's immediate statement made to the Police where he said Mr Tatu had come into the vehicle and began to attack the driver of the vehicle with a weapon.[5]

11. The defence had opened on a basis consistent with the eventual evidence of Mr Anderson.[6] It is the defence case, for Mr Anderson, that Mr Tatu is the aggressor who produces the knife. The defence also opened relying upon Ms Edmonds and said that she "describe[d] the man entering the vehicle attacking the driver."[7] The cross-examination of Mr Tatu was, once again, consistent with the defence case.[8] It was put to Mr Tatu that Ms Horsfall attacked Mr Tatu too.[9] In the cross-examination of Ms Horsfall the evidence of Ms Edmonds was also put to her to the effect that it was Mr Tatu who was the aggressor, essentially undermining the Crown case. It was also put to Ms Horsfall that she was the person who hit and punched Mr Tatu.[10]

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[2] See [27.5] of the Solicitor-General's submissions.
[3] See NOE from the Court of Appeal at 22/10 – 14.
[4] See Affidavit of Mr Zintl at [17].
[5] See Evidence at 161/12 -13.
[6] See COA 58.
[7] See COA 58.
[8] See Evidence 50 et seq.
[9] See Evidence 54/30 – 32.
[10] See Evidence 98/18 – 22, Evidence 100/12 – 20.

12. The Crown, in its closing, was required to undermine Ms Edmonds and that culminated in the Crown saying "that's got to be wrong": this related to the person in the rear passenger side punching Mr Tatu once he was back in the vehicle potentially being Ms Horsfall, consistent with the defence evidence.[11]

13. The defence highlighted that Mr Tatu and Ms Horsfall were self-confessed liars[12] and that the evidence of Ms Edmonds was consistent with the account given by Mr Anderson. Far from being a surprise, when the burden and standard of proof are considered against this factual matrix a not guilty verdict was a readily understandable outcome and not related to witnesses not coming up to brief or having forgotten but, rather, not having their evidence accepted.

14. The facts surrounding Mr Darling's guilty plea are also relevant. The context is important. Mr Darling was onto his third lawyer appointed by Legal Aid. Mr Darling's movement towards trial had not been entirely linear, although that is not an unusual experience. As can be divined from the record provided, Mr Darling was remanded in custody having been represented by the duty lawyer on 16 November 2018 (the day of the alleged offending). He was 21 years old.[13] An application for legal aid was made.[14] On 19 November 2018 he was remanded in custody with no bail application having been made. It is not recorded if he had been assigned counsel by Legal Aid at that point.[15] On 3 December 2018, Mr Darling was represented by Mr Dollimore and not guilty pleas were entered. Mr Darling was remanded to 30 January 2019 at 11:45 for a case review hearing. It was noted that there was likely to be an EM Bail hearing.[16] On 21 January 2019 there was a further remand in custody to 23 March 2019 for a sentence indication.[17] On 7 February 2019 an EM Bail application was withdrawn. On 18 March 2019 a new EM Bail application had obviously been filed. EM Bail was considered and granted from 20 March 2019 with the remand to 18 April 2019 for a sentence indication hearing. On 18 April 2019 a sentence indication seems to have been given and the remand was on EM Bail to 29 April

[11] See COA 82.
[12] See COA 85.
[13] Date of Birth: 18 June 1997.
[14] See COA 11.
[15] See COA 11.
[16] See COA 11.
[17] See COA 12.

2019.[18] On 29 April 2019 Mr Darling was remanded on EM Bail to 16 May 2019 for a jury trial callover but there is a note from the Judge that seems to state that "he wishes to accept [sentencing indication] but Anderson has declined it."[19] Mr Darling was given another sentence indication on 3 December 2019 before HHJ Ruth.[20] By that stage it appears he was back in custody on remand. The guilty plea of Mr Darling to the aggravated robbery was entered on 3 December 2019 – the same day as the sentence indication was given.[21] Mr Darling was sentenced on 18 February 2020 to four months community detention and nine months supervision.[22]

15. Importantly, counsel for Mr Darling, Mr Zintl, stated in his affidavit that HHJ Ruth said "that if the sentence indication were accepted then Mr Darling would be granted EM bail pending sentencing (i.e. there would be no need to argue the EM bail application)."[23] This is corroborated by the contemporaneous record that Mr Zintl had transcribed which says "[t]he Judge has also indicated that if [Mr Darling] accepted [the sentence indication] then he would grant [Mr Darling] EM bail to his mother's address."[24] Mr Zintl thinks he potentially said that his chances for EM bail would have been greater if he accepted the sentencing indication.[25] It is also corroborated by the fact that the sentence indication was accepted the same day that it was given enabling Mr Darling to walk out of Court on EM bail as opposed to the ordinary five days given to accept or decline the sentence indication.

16. Mr Zintl also stated in that affidavit that "Mr Darling's version of events was exculpatory."[26] Mr Darling is noted in the pre-sentence report, also called a "provision of advice to courts", as disagreeing with much of the content of the summary of facts.[27] Mr Zintl accepted that an aspect of the evidence of Ms Edmonds was consistent with what Mr Darling was instructing him.[28] It was

[18] See COA 12. Counsel has not seen the record of that sentence indication or the basis upon which it was given.
[19] See COA 13.
[20] See COA 121.
[21] See COA 21 (notation on the Crown Charge Notice) and 23.
[22] See COA 128.
[23] See Affidavit of Mr Zintl at [33].
[24] See Affidavit of Mr Zintl Exh G.
[25] See NOE from the Court of Appeal at 19/25 – 31.
[26] See Affidavit of Mr Zintl at [17].
[27] See NOE from the Court of Appeal at 14/29 – 32.
[28] See NOE from the Court of Appeal at 21/4 – 32.

accepted by all that there were inconsistencies between the evidence of the complainants themselves.[29] Mr Darling also asserted, in the Court of Appeal, that he had not seen the statement of Ms Edmonds prior to his appeal.[30] The Crown did not challenge this assertion. Mr Zintl agreed that he didn't discuss the evidence of Lizzie Edmonds with Mr Darling on the day the sentence indication was given and accepted. He accepted that his comment to Mr Darling (after the sentence indication was given but before it was accepted) about the Crown case was limited to the inconsistencies as between the statements of the two complainants.[31]

17. Mr Darling also gave [redacted][33] When it was put to him in cross-examination by Crown counsel that "the option of proceeding to trial was still a possibility wasn't it?" Mr Darling replied: "No [redacted][34] Mr Darling highlighted his difficulties on EM bail.[35] Mr Zintl also gave evidence that he was concerned that Mr Darling's time spent in custody and EM bail may well have exceeded any sentence he would have otherwise received.[36]

18. Mr Darling was 21 years old at the time of the events at Nelson and 22 years old by the time of his entry of guilty pleas immediately following receipt of the sentence indication. It is known that neurological development may not be complete until the age of 25[37] and that: [38]

> The abilities to plan, consider, control impulses and make wise judgments are the last parts of the brain to develop, and that young peoples' brains are built to take more risks.

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[29] See NOE from the Court of Appeal at 26/ 31 – 34.
[30] See NOE from the Court of Appeal at 15/31 – 33 and 16/1 – 5.
[31] See NOE from the Court of Appeal at 26/22 – 34.
[32] See NOE from the Court of Appeal hearing at 7/2 - 3 and 11/13 - 14 and Mr Darling's affidavit at [7].
[33] As recorded in Mr Zintl's notes of discussion with him on 24/07/2019 – their first meeting. Exhibit "B" to Mr Zintl's affidavit.
[34] See NOE from the Court of Appeal at 13/5 – 9. That evidence was not challenged by the Crown.
[35] See affidavit from Mr Darling at [3] – [5].
[36] See NOE from the Court of Appeal at 20/1 – 9.
[37] *Dickey v R* [2023] NZCA 2 at 86.
[38] The Court of Appeal in *Dickey v R* referring to the dicta of the Court of Appeal in the 2011 decision of *Churchward v R* [2011] NZCA 531.

19. Mr Darling's criminal history at the time of entry of these guilty pleas was two convictions for driving while licence suspended or revoked for which he was fined and disqualified from driving. The timeframe of less than a month between the offence dates in June 2018 and sentence in July 2018 suggest he pleaded guilty immediately to those charges.

20. Mr Darling appears to have been inexperienced in the criminal justice system. The evidence is silent on whether the potential life changing consequences of a conviction for aggravated robbery were brought home to him by his counsel. Mr Zintl did not refer to any written advice given to Mr Darling concerning this or the three strike regime. Comprehension and consideration of consequences falls within the area of neurological weaknesses for young people of his age and outside what could be expected of their general knowledge.

21. Counsel asks this Court to conclude the following from the evidence:

- Mr Darling was young at the time of entry of guilty pleas.
- Mr Darling was under pressure. He had no trial date, no certainty of bail and the real potential that any time in custody would outweigh the actual sentence if he were to be found guilty.
- Jail was disproportionality unpleasant or severe for Mr Darling. [redacted]. It was somewhere he wished to avoid going.
- Mr Darling denied the offending. He believed he was not guilty of offences.
- Certainty of outcome and accommodation was offered to Mr Darling through the sentence indication. He would not go back to jail either via his sentence or through a remand in custody. Essentially, he would walk from the Courtroom if he were to plead guilty.
- These factors operated powerfully to drive Mr Darling towards compromise. Sometimes, not always, compromise can also be a miscarriage of justice. This is despite the compromise being the wishes of the defendant.

The Approved Question of Law

22. The approved question of law as stated in the reference is whether on the facts as set out in the Court of Appeal decision and the relevant documents on which the guilty pleas were entered, did Mr Anderson's acquittal mean that Mr Darling could not, in law, have been convicted of the offence with which he was charged, despite his guilty plea?

23. The wording of the question of law arises from the Court of Appeal decision in *R v Le Page* [2005] 2 NZLR 845 and the second category of three identified in that case relating to the broad situations in which a miscarriage of justice will occur following the entry of a guilty plea. Thus, the question is essentially did the Court of Appeal err in applying the relevant category of *Le Page* – namely where on the admitted facts, the defendant could not, in law, have been convicted of the offence charge?

24. The answer to that question is, with respect, that the Court did err. The category relied upon by the Court of Appeal was that Mr Darling could not have been convicted on the facts he had admitted given the acquittal of Mr Anderson. This category of *Le Page* is largely where on the admitted facts the appellant could not in law have been convicted of the offence charged i.e. there was insufficient evidence to establish an essential ingredient.

25. It is critical here to acknowledge that Mr Darling pleaded guilty to a different "form" of aggravated robbery to Mr Anderson. The elements of the two offences were different. In order for Mr Anderson to be convicted the Crown had to prove that:

    (a) he robbed Danielle Horsfall of her hand bag; and

    (b) at the same time he intentionally or recklessly caused grievous bodily harm to Joshua Tatu.

26. In order for Mr Darling to be convicted, it was not necessary to prove that Mr Anderson caused the wounds to Mr Tatu. Charge 6 in the Crown Charge list, as amended on 3 December and to which a guilty plea was entered, read "That Kane Stuart Darling on 16 November 2018, at Nelson, together with Reuben

Anderson, robbed Danielle Horsfall of her handbag." That charge reflects the wording of Section 235(b) Crimes Act.

27. Mr Anderson may have been found not guilty of aggravated robbery on the basis that the complainant was in fact the aggressor with Mr Anderson's admitted physical actions (punching/holding Mr Tatu) used in self-defence/defence of another. That causation/intention in relation to the wounds on the part of Mr Anderson was in doubt is supported by the not guilty verdict on the alternative charge of wounding with intent to cause grievous bodily harm.

28. Furthermore it is important to note that Mr Darling did not plead guilty to offending on a "party" basis. This was not a situation of a secondary party pleading guilty and then a principal offender being acquitted of the same offence.

29. The facts admitted by Mr Darling were those in the summary of facts.[39] The Summary of Facts does not allege an intention on the part of both men to rob ("the necessary common intention": *R v Feterika* [2007] NZCA 526) however an inference of that mens rea could be drawn from the admitted facts. It would seem that Mr Darling had admitted facts which were sufficient to establish the legal ingredients of the offence of aggravated robbery pursuant to s235(b) Crimes Act 1961. The relevant facts were read out as part of the sentence indication given by Judge Ruth.[40]

30. The situation and response to the question of law may have been different had Mr Anderson been acquitted on the same charge to which Mr Darling pleaded guilty.

31. That response is dispositive of the question of law as stated but given the width of the Crown submissions and the likelihood that the Supreme Court will wish to provide guidance for lower courts the submissions deal with related issues.

Le Page, "Categories" and Miscarriages of Justice

32. The submission of counsel assisting is that over-reliance on categories in *Le Page* has the potential to distract from the central question, which should be whether or not a miscarriage of justice has occurred. That central question is drawn from

[39] Crown's bundle of authorities.
[40] See paras 8 -10 COA 123.

s232 CPA. In this part of the submissions the decision in *Le Page* will be surveyed and a submission made that the categories (or any categories for that matter) are but mere indicators, or useful guides, as to where miscarriages of justice might occur when guilty pleas have been entered.

33. The Crown says that the Court of Appeal erred in "[f]ailing to address the central question in [*Le Page*], namely whether on the admitted facts a conviction is available as a matter of law."[41] The central question is that outlined immediately above: whether or not a miscarriage of justice has occurred?

34. The facts of *Le Page* are that Mr Le Page had been stopped by police officers and following the discovery of a range of narcotics, was charged with the possession of methamphetamine and MDMA for the purpose of supply as well as charges of supplying controlled drugs to persons unknown, using a vehicle for the purposes of the commission of a drug offence, possession of a methamphetamine pipe as well as two charges of possession of offensive weapons. There was a challenge pursuant to the then applicable s 344A Crimes Act 1961 as to the admissibility of the evidence obtained following the initial roadside search. However, following the *Shaheed* balancing exercise the evidence was admitted. Unusually, Mr Page then pleaded guilty to the charges on the belief that he could still challenge the legality of the search and admissibility of the evidence. He did not, for example, reserve a point of law nor seek leave to appeal the pre-trial ruling. The Court of Appeal concluded that it is "only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned."[42] The Court outlined three broad categories "*at least*" in which a miscarriage of justice will be "indicated" following a guilty plea:

- The first being where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge.

- The second being where on the admitted facts the appellant could not in law have been convicted of the offence charged.

[41] See Crown submissions at [4.1].
[42] At [16].

- The third being where it can be shown that the plea was induced by a ruling which embodied a wrong decision on a question of law.

35. However, even in *Le Page* the overriding criteria is noted to be "miscarriage of justice."[43] The three categories are not seen as conclusive. The Court says of the situations where appeals against conviction involving guilty pleas can be entertained involve "*at least* three *broad* situations."[44] This is consistent with subsequent Supreme Court authority which states that the categories in which an appeal of a conviction following a guilty plea may be permissible are not closed.[45]

36. In *Wilson v R* the Supreme Court indicated that an appeal following a guilty plea could be successful where there was some impropriety in the conduct of the proceedings or of the prosecution that warrants a stay.[46]

37. The fact the categories are not closed is consistent with the English and Wales Court of Appeal in *T v R* [2022] EWCA Crim 108 where the Court said: [47]

> the courts have identified various circumstances when, notwithstanding the admission of guilt, an appellant is entitled to submit that his or her conviction is unsafe. Most, if not all, can be seen to fall into three broad categories of case, *albeit we are not suggesting this is necessarily a closed list.* (Counsel's emphasis).

38. A further category identified in New Zealand is where trial counsel provides incorrect advice on the availability of defences or potential outcomes.[48]

39. A number of Court of Appeal decisions have outlined that the overall consideration is whether a miscarriage of justice would go un-remedied if the guilty plea was to stand.[49] Thus, any over-prescriptive adherence to "categories" is myopic and ignores the fundamental enquiry, namely whether a miscarriage of justice has occurred.

40. The position nevertheless remains that the circumstances must be exceptional.[50] The use of the qualifier "exceptional" is a convenient manner of encapsulating

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[43] See [16] and [17].
[44] See [17].
[45] See for example *Wilson v R* [2016] 1 NZLR 705 (SC) at [104] and most recently cited in *Surman v New Zealand Police* [2023] NZHC 933, at [10].
[46] See [104].
[47] See [153].
[48] *Merrilees v R* [2009] NZCA 59, at [34].
[49] For example, *Mills v R* [2020] NZCA 88, at [21] - [23], *Halpin v R* [2018] NZCA 477, at [20] and *Whichman v R* [2018] NZCA 519, at [33] - [41], *T v R* [2013] NZCA 550 at [36] – [37].
[50] See, for example, *Surman v New Zealand Police*, above, at [10].

the policy imperatives which underpin guilty pleas. As the English and Wales Court of Appeal (Criminal Division) said in *R v T* "[w]here there has been a plea of guilty, that is plainly a major, and normally a dominant, part of the facts and circumstances of the case."[51] The Court continued and said "it does not follow that the approach to a conviction grounded on a plea of guilty is identical to the approach to a conviction grounded on a jury verdict after a contested trial."[52] However, immediately prior to that dicta the Court identified that the sole obligation is on the single question of whether the conviction is "unsafe."[53]

Restrictive Crown Approach

41. The Crown state that "[t[he significance of a guilty plea and the principle of finality demand such a restrictive approach. An appeal against conviction following a plea of guilty does not have the wider focus of an appeal against conviction following the verdict of a jury or judge. It is not akin to an 'unreasonable verdict' inquiry." The Crown then cites s232(2)(a) in relation to the unreasonable verdict inquiry. However, the appellate gateway on a conviction appeal where a guilty plea was entered is going to be 232(2)(c), as opposed to "unreasonable verdict. Section 232(2)(a) – (b) are more akin to reviewing the evidence and the decision of the decision maker. Section 232(2)(c) is far broader.

42. The Crown is, with respect, wrong when, relying on an aspect of *Le Page*, it states "[w]here an appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned."[54] The submission of the Crown is not accepted and the focus of an appeal is whether or not there has been a miscarriage of justice.

Miscarriages of Justice

43. Miscarriages of justice have a transcendent importance to the perception of the criminal justice system as a whole. The criminal justice system is the most prominent in the justice system. The integrity of the criminal justice system is extremely important as the system requires the public to respect its

[51] [2022] EWCA Crim 108 at [151].
[52] [151].
[53] "Unsafe" is the phrase used in the United Kingdom equivalent of s232.
[54] See Crown submissions at [35]

determinations. Any occasion where an innocent person is convicted of an offence is an affront to that integrity.

44. It must be the overarching goal of every criminal justice system to render safe convictions. Indeed, Lord Kerr has said that the "law arguably has no function more important than that of ensuring that the fundamental rights of everyone within its scope are protected from any form of illegitimate interference."[55] However, against that overarching goal are competing interests *viz* the prevention of the innocent being convicted against a robust system which effectively punishes the guilty. The tension between those two interests is a matter of significant moment and delicate balance. It has been said that:[56]

> it is uncontroversial that the acquittal of the guilty is of less concern than the conviction of the innocent, a widespread public perception that the guilty are routinely acquitted would have the tendency to destabilise public regard for the criminal justice system. On the other hand, calibrating the criminal justice system to facilitate convicting the guilty carries the risk of also making it too easy to convict the innocent.

45. The Court of Appeal in *Wiley v R* [2016] 3 NZLR 1 has said that s232(5) does not alter pre-Criminal Procedure Act case law which recognised appeals against conviction following a guilty plea. Section 232(5) states that "trial" in s232(4) includes a proceeding in which the appellant pleaded guilty. "Miscarriage of justice" is defined in Section 232(4) as meaning any error, irregularity, or occurrence in or in relation to or affecting the trial that has either created a real risk that the outcome of the trial was affected or has resulted in an unfair trial or a trial that was a nullity.

46. This is an extremely broad wide-ranging phrase which is obviously directed to capturing anything that has gone wrong in the trial or in relation to the trial. As noted by the Court of Appeal in *Whichman v R*, a 'miscarriage of justice' is a "protean concept" which has been given a "modest definition" under the CPA.[57]

47. It seems that the way in which the phrase is worded is that the "error, irregularity or occurrence" can be "in the trial", "in relation to the trial" or "affecting the trial". Thus, it is not limited to a temporal focus. Matters that are "in relation"

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[55] Lord Kerr *Miscarriage of Justice – When should an appellate court quash conviction?,* 10 December 2013
[56] William Young, *The Role of the Courts in Correcting Miscarriages of Justice*, 16 [2010] Canterbury Law Review 256 at 256
[57] *Whichman v R* [2018] NZCA 519, at [36].

to the trial and ones that "affect the trial" are potentially wide and varied. An "occurrence affecting the trial" is also a very wide-ranging phrase.

48. The breadth of these expressions is further evidenced by the powers that the appellate court possesses in relation to gathering material in order to properly determine the appeal: 334 – 336 Criminal Procedure Act 2011. The ability to receive evidence that was not admitted during the trial process illustrates the importance the criminal justice system places on getting the result correct. Thus, the expressions in s232(4) should be broadly interpreted given the underling goal.

49. It is submitted that little is to be gained by trying to define these words exhaustively. The necessary breath of the definition makes such an effort one in which there is little benefit. The limiting aspect of the phrases is not in their definition but in the requirement that the consequence provision be satisfied. It is the necessary consequences which mean that only "true" miscarriages are caught by the provision. Whether the consequence provision is satisfied is, however, a matter of judgment and will require judicial determination. Whether a real risk has been created is a matter of judgment. A judgment which must be made acknowledging the guilty plea, the difficulties inherent in the appellate position and the risk of miscarriages of justice that exists.[58]

50. The second part of the definition is that the error, irregularity, or occurrence has created a real risk that the outcome of the trial was affected. This is the first of the two alternative consequence provisions (although the second is a hybrid and need only require the consequence of an "unfair trial" or that the trial was a "nullity").[59] The consequence provisions are inserted to clearly establish that not

[58] In *R v Pendleton* [2002] 1 WLR 72, Lord Bingham noted that it is important that the Court of Appeal bears very clearly in mind that the question is whether the conviction is safe and not whether the accused is guilty. Lord Bingham then notes the dual benefits of the test enunciated in *Stafford v DPP* [1974] AC 878 which is that it firstly reminds the Court of Appeal that it is not and should never become the primary decision maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict and, save in a clear case, is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard.

[59] This is a very difficult area as shown by the Supreme Court decision of *Guy v R* [2015] 1 NZLR 315 where the Court split 3 – 2 where the deciding judgment was that of O'Regan J who, put colloquially, had a foot in both camps, in that he agreed with the minority on approach but disagreed with the minority on outcome (they wished to dismiss the appeal).

every error, irregularity or occurrence at whatever relevant juncture will result in a miscarriage of justice.[60]

51. As noted above, the Crown's submission, in reliance on *Le Page*, indicates, with respect some slippage. The concept of exceptionality or categories should not become a kind of self-contained precondition diverting the focus from whether or not the outcome of the trial, namely the entry of a conviction and sentence, was affected. The ultimate question is whether justice has miscarried as per s232. Mr Darling's route to a successful appeal was not limited as the Crown opine.[61]

52. The restrictive approach outlined by the Crown is an improper straightjacket. Fidelity to the statutory language is required. As a matter of practice there will be weight afforded to a guilty plea because of the principal of finality and the fact that a guilty plea, absent some countervailing evidence, is taken as an acknowledgement of guilt and that the prosecution have proved (or could prove) the essential elements of the charge. It is a confession to the world at large that the person is guilty of the offence.

53. Although the wording of the definition of miscarriage of justice is slightly awkward when examining conviction appeals following guilty pleas it is workable. The outcome of the trial, namely the guilty plea, was the entry of a conviction and the inevitable sentence that followed.

54. Relevantly, the New Zealand Bill of Rights Act 1990 contains a right of appeal. It is expressed a follows:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> […]
>
> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

55. In *R v Taito*[62] (which also dealt with s25(a)) the Privy Council gave a generous interpretation to s25(h) and in the opinion of Lord Steyn stated:

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[60] As Thomas J made clear in *R v McI* [1998] 1 NZLR 696 at 701 "it is clear Parliament did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome"
[61] See Crown submissions at [4.2]
[62] [2003] 3 NZLR 577

> [w]hat is required is a collective judicial decision on the merits of the appeal by division (three members) of the Court of Appeal, sitting together, and arrived at after the hearing in open court.

56. Lord Steyn continued that the right of appeal contained in s 383 of the Crimes Act is "intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process."[63]

57. In reliance on the above dicta and the statutory context it is submitted that the categories are merely useful guidance for any appeal against conviction where a guilty plea has been entered. The true focus is on whether or not there has been a miscarriage of justice however it occurred. There are no statutory fetters on an appeal against conviction following a guilty plea.

Reasons for Guilty Pleas

58. Given that the entry of guilty pleas will be afforded some weight in this analysis it is important to examine any data or academic examination of the reasons guilty pleas are entered.

59. It is overly simplistic to presume that a guilty plea necessarily connotes the defendant is guilty. There may be a range of factors that incentivise or pressure a defendant into entering pleas. This is recognised in New Zealand and other comparable jurisdictions.[64] In *Hessell v R* the Supreme Court stated:[65]

> The incentive to plead can be strong if the accused is advised by counsel that a plea may avoid a custodial sentence, or substantially reduce the likely term of imprisonment imposed following a trial. The concern is that the pressure this puts on the accused can, potentially, lead to persons charged pleading guilty to offences they may not have committed.

60. Many factors may be considered by a defendant in deciding whether to plead or not, for example the costs, particularly where legal aid is not granted or there is a legal aid debt created, the length of time to trial as well as the trial process itself which may be daunting not only for the victim but for the defendant themselves.

61. In the context of this appeal there were a number of reasons at play including the certainty of no return to jail [redacted] There was also uncertainty of trial dates and suitable EM bail addresses.

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[63] *Taito* at [12]. This has been recently highlighted by the Supreme Court in *Petryszick v R* [2011] 1 NZLR 153.
[64] See, for example, *Hessell v R* [2011] 1 NZLR 607 (SC) at [46]- [48].
[65] At para [48].

62. Not guilty pleas entail a rigorous process in checking the veracity of them, a trial; a guilty plea is not subject to such checks. The rationale presumably being that only guilty people are likely to enter such a plea. However, there is research that would indicate this is not always the case for example, between 2012 - 2018, the Criminal Cases Review Commission in England and Wales referred 128 cases to the Court of Appeal for review of conviction or conviction and sentence. Of these 128 cases, around 50, nearly 40%, involved defendants who had pleaded guilty.[66] Plainly, it is not just the 'guilty' person who may elect to plead guilty.[67]

63. In *R v McIlvride-Lister*[68] the Ontario Superior Court of Justice discussed the rationale for guilty pleas at length. The appellant wanted to strike her guilty plea in relation to one count of sexual assault. A deal had been reached where a number of the counts would be dropped but the facts would remain as aggravating facts. An application to strike the guilty plea was filed which included a range of reasons for the guilty plea. The Court considered that it was arguable whether the guilty plea was equivocal.[69] However, the Court determined that the guilty plea should not stand due to the interests of justice. The Court in *McIlvride-Lister* makes a number of comments which are relevant:

- Incentives are offered for guilty pleas and it can be difficult for the courts to identify false pleas.[70]

- Guilty pleas invoke the societal interest in finality but finality must sometimes yield to other factors.[71]

- Innocent people do plead guilty for a variety of factors and the costs of maintaining innocence – be it financial, emotional, familial or other – may be seen as too high[72]

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[66] For more discussion on this see the attached journal article by Rebecca Helm, Roxanna Dehaghani and Daniel Newman 'Guilty Plea Decisions: Moving Beyond the Autonomy Myth' (2022) M.L.R 85(1).
[67] In some jurisdictions including the United States, there is a recognition of the utility in pleading guilty through what is known as the 'Alford plea' and allows a defendant to plead guilty whilst simultaneously maintaining their innocence: *North Carolina v Alford* 400 US 25 (1970).
[68] [2019] ONSC 1869
[69] In Canada, a guilty plea must be voluntary, unequivocal and informed in order to be valid: *R v Wong* [2018] 1 SCR 696 at [3]. Nevertheless, it has been recognised by the case law that even where a valid guilty plea has been entered, it may be necessary to withdraw the plea where the interests of justice require it.
[70] See [1] – [4]
[71] See [40]
[72] See [57] – [60], citing Christopher Sherrin, 'Guilty Pleas from the Innocent', (2011) 30 Windsor Rev Legal Soc Issues 1 at 34.

- Respecting a deliberate choice to plead guilty is not simple, the decision to plead guilty may flow from impossible dilemmas posed by coercive circumstances and to blithely accept false pleas would be to undermine the integrity of our justice system. Despite Canadian Judges conducting plea inquiries those inquiries do not absolve all difficulties.[73]

64. Thus, though a guilty plea is a weighty matter, as it usually involves a public confession of guilt and also that the elements of the offence are established, it is not determinative. Indeed, the empirical data highlights that a guilty plea is not always synonymous with actual guilt.

65. The Lawyers: Conduct and Client Care Rules 2008 highlight that a lawyer can still act for someone who maintains innocence but nonetheless wishes to plead guilty. Rule 13.13.3 states:

> Where a defence lawyer is told by his or her client that he or she did not commit the offence, or where a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.

66. Implicitly, a lawyer is entitled to act for someone who wishes to plead guilty yet maintains innocence.

Finality

67. Much of the Crown's argument rests on the principle of finality. Whilst this is an important principle in the criminal justice system it is by no means absolute. The rationale underpinning the principle is largely the public interest in preventing never-ending litigation. However, as has been well recognised in New Zealand the public interest not only favours finality, "but also the maintenance of confidence in the administration of justice".[74] Given this, it has been held that the "overall interests of justice in a particular case may call for balancing the wider interest of society in the finality of decisions against the interests of the individual applicant in having the conviction reviewed."[75] Arguably, an appeal by its very

[73] See [61] – [65]
[74] *Cheung v R* [2021] 3 NZLR 259 at [51]. See also *R v Lee* [2006] 3 NZLR 42 at [99].
[75] *R v Knight* [1998] 1 NZLR 583 (CA).

nature highlights permissible exceptions to the principle of finality in order to ensure true justice prevails. The Court of Appeal in *R v Smith* stated:[76]

> Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

68. Other jurisdictions have similarly recognised the need not to overstate the principle of finality. In *AFU v R* the England and Wales Court of Appeal stated:[77]

> The principle of finality is undoubtedly important. However, we do not consider that the fact that the applicant pleaded guilty renders his conviction safe on the facts of this case. Amongst other things, as set out above, had the prosecution complied with its duties under the Guidance, the prosecution would not have proceeded in the first place and/or would not have been pursued and/or the applicant would have had a proper opportunity to apply for a stay. And, as set out above, a conviction on a guilty plea in a case involving an abuse of process is as unsafe as one following trial. It would in our judgment be inconsistent with the due administration of justice to allow the applicant's plea of guilty to stand.

69. There is the oft-cited aphorism from Lord Atkin that "finality is good but justice is better".[78] In some occasions finality can be equated with justice but that requires an examination of the facts.

70. Similar sentiments have been expressed in Australia. For example, the integrity of the criminal justice system was described as the first duty of the courts in *Smith v Western Australia* where the Court said:[79]

> If public confidence in the system of criminal justice is to be deserved, criminal misconduct calculated to prevent free and frank deliberation by a jury must not be kept secret lest it become endemic. In such cases, the application by the courts of the exclusionary rule to preserve finality would be contrary to the first duty of the courts to preserve the integrity of the system of criminal justice which they administer.

71. The fundamental rights of Mr Darling and overarching purpose of the criminal justice system ought not be curtailed purely for the efficacy benefits a guilty plea has to the justice system. Moreover, the principle of finality should not preclude the Court from permitting Mr Darling to withdraw his plea where there is a real question of his guilt or some other factor pointing towards a miscarriage of justice. There is a greater public interest in ensuring only those who are truly

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[76] *R v Smith* [2003] 3 NZLR 617 at [36].
[77] *AFU v R* [2023] EWCA Crim 23 at 141.
[78] *Ras Behari Lal v King Emperor* [1933] All ER 723.
[79] *Smith v Western Australia* [2014] HCA 3 at [45].

guilty face the stigma, condemnation and repercussions associated with convictions.

Integrity of the Justice System

72. Related to the points above is the overarching importance of the integrity of the justice system. Proclamations of guilty and not guilty are not going to command the respect of society if they are found to be wrong.

73. In *Ellis v R (Continuance)* [2022] 1 NZLR 239 Joseph Williams J said the following:[80]

> This exemplifies another common law value: that of protecting the integrity of the justice system (proposition (c)). Its effect is that finality, though important, will not always predominate. There are, and perhaps always will be, cases in which concern entertained by a convicted person's whānau or defence team over the justice of a conviction persists even after all orthodox avenues of review have been exhausted. That concern about possible injustice may come to be shared more widely as it has in this case. Such concern is not just for the convicted person and their family, but ultimately for the integrity of the system itself. Our system of justice relies on community confidence that, although it is a human system and therefore fallible, it is also principled and ethical. It is willing to accept the possibility that mistakes leading to injustice may be made, and if they are detected, then it is committed to correcting them. Mr Ellis' case is potentially such a case. Despite two appeals and two independent inquiries (none of which found for Mr Ellis), there remains genuine concern that justice may have miscarried.

74. The manifest authority of the Court to dispense justice cannot be undermined. The judiciary cannot operate without the trust and confidence of the public. It must rely on moral authority.[81]

75. As the paramount object of the Court must always be to do justice, the general rule as to finality is, after all, only the means to an end and in some cases it must accordingly yield. This can cut both ways: sometimes finality will be in the interests of the integrity of the justice system.

76. Indeed, so important is the integrity of the justice system that, as noted above, the Court has intervened to allow an appeal following a guilty plea where there is an abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system.[82]

77. Simply put, finality is a factor but is not determinative.

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[80] At [242].
[81] For similar sentiments, in the area of contempt law, see Kriegler J of the Constitutional Court of South Africa in *S v Mamabolo* (CCT 44/00) [2001] ZACC 17 (11 April 2001) at [17] – [20]
[82] See *Wilson v R* [2016] 1 NZLR 705 (SC) at [104].

T v R[83]

78. This case is a recent decision of the English and Wales Court of Appeal on the ability to appeal following guilty pleas. In brief, Mr T had pleaded guilty to 11 counts of arson with intent to endanger life or being reckless as to whether life was endangered as well as 26 counts of manslaughter. The guilty pleas pertaining to the manslaughter were entered on the basis that the Crown would not proceed with murder as had initially been charged. The case and the primary rationale for the convictions were the confessions made by the defendant (it seems the defendant had mental health concerns). Some of the convictions had been previously overturned, but there remained 10 counts of arson and 15 counts of manslaughter which had been referred by the Criminal Cases Review Commission following an eight-year investigation.

79. The Crown, in its submissions, state that the Court of Appeal "made it clear that the required approach on appeal is different following a guilty plea than a jury verdict."[84] It is submitted that there needs to be considerable caution taken before elevating an observation of the realities of the situation by a Court to an immutable rule. There will be a different approach to an appeal involving a guilty plea *viz a viz* one involving a jury verdict because there has been a guilty plea, which is akin to a confession. However, the law has highlighted that even confessions are not infallible and guilty pleas should be no different. But, a miscarriage of justice is a miscarriage of justice however produced. The Court in *T v R* cites *DPP v Shannon*[85] which states that a "plea of guilty is equivalent to a conviction" and adds "where entered by an individual who knows whether he or she committed the offence." As the academic research and cases show, sometimes an individual enters a guilty plea when s/he is unsure whether s/he has committed the offence or when s/he is positively certain s/he has not committed the offence. A plea of guilty is akin to a conviction, but even a conviction can be overturned if it involves a miscarriage of justice.

80. *T v R* was referred to in *AFU v R* where an appeal following a guilty plea was successful on the grounds of an abuse of process, namely, that there was evidence the defendant, who had pleaded guilty to a single count of conspiring to produce

[83] *T v R* [2022] EWCA Crim 108.
[84] See Crown submissions at [41]
[85] [1975] AC 717

a Class B drug (cannabis), had been a victim of human trafficking and the prosecution had failed in its duty to take this into account.[86] The Court stated that:

> 92. The "sole obligation" of the court, therefore, is to determine whether the conviction is "unsafe": see *R v Graham* [1997] 1 Cr App R 302 (at 309) . A guilty plea does not deprive the court of jurisdiction to hear the appeal: see *R v Lee* [1984] 1 WLR 579 (at 583) .
>
> 93. However, the court should be cautious when overturning convictions following guilty pleas. As Lord Hughes made clear in *R v Asiedu* [2014] EWCA Crim 567; [2014] 2 Cr App R 7 ("*Asiedu*") at [19] to [25], and [32], it will ordinarily be difficult to overturn a voluntary confession. The defendant, having made a formal admission in open court that they are guilty of the offence, will not normally be permitted to change their mind. The trial process is not to be treated as a "tactical game".

81. It is submitted the policy rationales outlined above and the specific statutory structure in New Zealand mean that appeals against conviction under 232(2)(b) follow the same legal pathway regardless of whether they involve guilty pleas. Any suggestion in *T v R* to the contrary should not be followed given our particular statutory structure.

82. Even the Crown comprehends of "rare cases where subsequent events can impact upon the safety of a conviction consequent upon a guilty plea."[87] The Crown limits those rare cases stating that they are covered by the "third category" where the appellant has "demonstrably established that he or she did not, in fact, commit the offence charged."[88] If by "demonstrably establish" the Crown sets a uniquely higher bar then that cannot be correct. Further, extraneous facts have influenced decisions in New Zealand. In *Wilson*[89] the Crown's failure to appeal a stay decision where a number of co-defendants had their prosecutions for more serious offending stayed led the Court to say "that it would be unfair to allow the appellant's convictions to stand, and would constitute a miscarriage of justice."[90] The appellant in *Wilson* did not establish that he did not commit the offence charged.

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[86] *AFU v R* [2023] EWCA Crim 23.
[87] See Crown submissions at [50]
[88] See Crown submissions at [50]
[89] [2016] 1 NZLR 705 (SC)
[90] *Wilson* at [108].

Focus on the "Admitted Facts" in *Le Page* Category Two Cases

83. The Crown state that a number of cited decisions "demonstrate that a Court's focus in such cases is rightly upon the facts admitted at the time of a defendant's guilty plea. Courts do not typically cast their net wider."[91]

84. The second 'category' of *Le Page* necessarily focuses on the admitted facts because that specific example of situations where a miscarriage of justice is likely to arise after a guilty plea is where on the admitted facts the appellant could not in law have been convicted of the offence charged. It directs the Court, when examining whether a miscarriage of justice has occurred, to focus on the facts admitted at the time of the guilty plea. That does not, however, mean that the Court's focus must always be so constrained. Courts can, and should, cast their net wider if the potential of a miscarriage of justice exists outside the ambit of the admitted facts.

The Impact of a Co-Offender's Acquittal on a Guilty Plea

85. A co-defendant's acquittal will almost always have zero impact on another co-defendant. The various speeches in *R v Shannon*[92] make the points in favour of an absolute rule, which is promoted by the Crown. However, counsel does not accept the position taken by the House of Lords in relation to the unimpeachable effect of a guilty plea. Studies and experience has shown that people do plead guilty for a myriad of reasons quite apart from actual guilt.

86. Sometimes, however, a co-defendant's acquittal can have an effect. There must, it is submitted, be situations where the evidence and allegations are so intertwined that despite separate trials, the justice system cannot countenance differing verdicts between two individuals. There must be some occasions where the long term interests of the justice system are better served by ensuring that the system "speaks with one voice" in terms of co-defendants' verdicts.

87. The Crown rely upon *Howitt v HM Advocate*[93] to support the argument that the facts do not exist outside one trial and a trial does not establish "innocence". That is correct so far as it goes. The point still remains that there are some

[91] See Crown submissions at [48].
[92] R *v Shannon* [1975] AC 717
[93] [2000] S LT 4 49 (ScotHC

occasions where the facts which must have been established in one trial bear so directly on the issues in another trial that the justice system cannot allow that inconsistency to exist. A potential example of this is *Ferris v Police*[94] where the High Court quashed a conviction as an abuse of process. Mr Ferris was acquitted in the High Court and then tried, for a different offence, in the District Court where he was convicted. The evidence was essentially the same between the two trials. The High Court held that to maintain the integrity of the first acquittal and in fairness to Mr Ferris he should not have been put on trial a second time and the conviction was quashed. It is submitted this highlights that in some cases, a separate earlier trial's outcome can have an effect on a subsequent trial.

The Outcome in Darling is Correct

88. It was open to the Court of Appeal to allow Mr Darling's appeal because Mr Darling's plea was vitiated by the extenuating circumstances.

89. The Court of Appeal correctly identified that it is only in exceptional circumstances that an appeal against conviction will be entertained following a guilty plea. The Court of Appeal also reminded itself that the appellant must show that a miscarriage of justice will result if their conviction is not overturned. Such an observation is not, of course, controversial in light of the requirements of s232. The Court of Appeal properly identified the immense pressure that Mr Darling was under at the time he entered his plea of guilty due to difficulties was experiencing in custody [redacted]. There was also the pressure of issues with a proposed EM Bail address. Overlaying these individualised pressures on Mr Darling was the fact that there was a significant risk that Mr Darling's time spent on remand would exceed the likely sentence he would receive. This is a systemic pressure which can have a significant incentive on individuals.

90. Though this situation does not fit neatly into the *Le Page* or *Merrilees* categories, that is not the test. The pressures on Mr Darling, both internal and external, have vitiated the plea. If forced to fit Darling within a category it would be the "first category" discussed in the English and Wales Court of Appeal case of *T v R*. There are various ways in which a plea can be vitiated. Indeed, New Zealand

[94] [1985] 1 NZLR 314 (HC)

has seen one example in *Gleason-Beard v R* where the Court of Appeal allowed the conviction appeal due to a Judge's intervention inappropriately impacted the appellant's decision on the plea and the role of counsel.[95]

91. In *Darling* the external and internal pressures on a young person combined to vitiate the plea. Those pressures unduly narrowed the proper ambit of his freedom of choice such that a miscarriage of justice occurred. To utilise the words of s232, the irregularities or occurrences were the following:

- [redacted];
- the offer of no jail if he pleaded guilty;
- the time until trial and that it would likely exceed any sentence; and
- the potential issues with an EM bail address.

92. It is clear that given the extended definition of trial in s232(5), these irregularities and occurrences were both "in relation to" and "affecting" the trial or, put otherwise, the guilty plea. Then the Court of Appeal would assess that those identified irregularities and occurrences created a real risk that the outcome of the trial, namely the guilty plea, and the entry of a conviction was affected.

93. Consistently with *Haunui v R*[96] which adopted *Wiley v R*[97] the Court must determine whether there is a reasonable possibility that another verdict would have been reached. Thus, is it a reasonable possibility that a not guilty verdict could have been reached in the case of Mr Darling? This is different to the Crown suggestion of "demonstrably establishing innocence". The "reasonable possibility" test is more in line with the common law and the policy intent behind the relevant provisions. This entails an assessment of the case, despite there having been a guilty plea.

94. In both steps, namely the primary step of identification of the error, irregularity or occurrence and the secondary, but required, step relating to the assessment of a reasonable possibility of another verdict the fact of the guilty plea is a factor to be taken into account. This then allows an evaluative judgment where the

[95] [2018] 3 NZLR 699 (CA)
[96] [2021] 1 NZLR 189
[97] [2016] 3 NZLR 1 (CA)

appellate Court, taking account of the guilty plea and any evidence it chooses to receive, looks at the case and goes through the steps of s232.

95. The Court of Appeal in *Darling* then utilised, appropriately, the evidence of the trial of Mr Anderson given its relevance to the question of a miscarriage of justice for Mr Darling. As noted, there were significant frailties in the Crown case and thus, after analysis, it was reasonably possible that a different verdict would have been reached if Mr Darling had not been unduly incentivised to enter his plea of guilty.

Conclusion

96. The Court of Appeal decision was correct, Mr Darling's appeal against conviction should have been allowed. The decision not to order a retrial was a decision open to the Court.

97. The overly narrow Crown approach in relation to appeals against conviction following guilty pleas is inconsistent with the New Zealand statutory scheme and the Court's duty to intervene in miscarriages of justice.

98. There will not be any opening of "floodgates". The approach outlined in these submissions to the appellate jurisdiction where guilty pleas have been entered is not a green light for prospective appellants to seek to appeal against convictions entered following guilty pleas. Rather, any determination will be robust and take account of the guilty plea. The Crown may even take issue with some of the factual assertions surrounding the guilty plea and that could be the subject of cross-examination and determination by the Court.

DATED at Invercargill and Christchurch on 1 August 2023.

I, Fiona Guy Kidd KC, certify that this submission is suitable for publication.

F E Guy Kidd KC and K H Cook

Counsel Assisting the Court