IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC12/2023**

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

Referrer

SOLICITOR-GENERAL'S SUBMISSIONS

5 July 2023

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Issue

1. Mr Darling pleaded guilty to aggravated robbery under s 235(b) of the Crimes Act 1961 on the basis of an agreed summary of facts that established the elements of that offence. He was properly advised, pleaded guilty after accepting a sentence indication, and was given credit at sentencing for his guilty plea. His co-offender, Mr Anderson, proceeded to trial on a different charge which alleged a different form of aggravated robbery (s 235(a)) arising out of the same incident, and was acquitted. On appeal, the Court of Appeal held that Mr Anderson's acquittal meant that Mr Darling could not, in law, be convicted of the offence with which he had been charged, and his conviction was quashed.

2. This Court granted leave to the Solicitor-General to refer the following question of law arising out of the Court of Appeal's decision in *Darling v R*:[1]

> 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?

Summary of Argument

3. The answer to the referred question is no. Mr Darling's conviction properly stands despite Mr Anderson's acquittal. The two outcomes were arrived at in respect of different charges separately pursued against two defendants who took opposing stances: one admitting his offending and pleading guilty, and the other denying it and putting the Crown to proof.

4. The Court of Appeal erred in:

   4.1 Failing to address the central question in *R v Le Page*,[2] namely whether on the admitted facts a conviction is available as a matter of law. The analysis[3] did not reference the admitted facts

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1 *Darling v R* [2022] NZCA 504 [CA Judgment] **[Supreme Court Casebook at 7].**

2 *R v Le Page* [2005] 2 NZLR 845 (CA) **[Referrer's Materials at Tab 1].**

3 Paras [51]-[57] **[Supreme Court Casebook at 17–19].**

at all, but instead assessed the validity of the conviction with reference to Mr Anderson's acquittal.

4.2 Failing to engage with the significance of a guilty plea in criminal proceedings. A guilty plea is a cogent, public admission of guilt. In accordance with established principles, Mr Darling's available route to a successful conviction appeal was limited. It was not satisfied in these circumstances.

4.3 Posing the central question as whether Mr Darling's guilty plea can be "reconciled" with Mr Anderson's acquittal.[4] The Court erroneously treated Mr Darling's appeal as akin to a miscarriage argument founded upon unreasonable (inconsistent) verdicts. This is inapt in circumstances where the relevant party pleads guilty, and more so when that plea is to a different charge with different available evidence.

5. The Court of Appeal's judgment, without proper regard to principle, substantially expands the circumstances in which guilty pleas can be impugned in cases of joint enterprise. In effect, a guilty plea is provisional, and awaits the outcome of the co-offender's trial. The value of guilty pleas is diminished, and the principle of finality eroded.

Background

6. The charges stem from an incident in Nelson in November 2018. The two complainants, Mr Tatu and Ms Horsfall, were visiting from Auckland and spent time socialising with Messrs Darling and Anderson. Ms Horsfall won several hundred dollars from a pokie machine, and the Crown alleged Messrs Anderson and Darling formed an intention to rob the pair.

7. The summary of facts for Mr Darling's sentencing (as set out in the Court of Appeal decision[5]) records that the group was travelling in Mr Darling's

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4 At [51] **[Supreme Court Casebook at 17].**

5 At [5]–[16]. This summary replicates the Notes of Judge D C Ruth on Sentence indication: **[Case on Appeal [COA] at 121].** Of note, it also appears that the Crown Prosecutor filed an amended summary of facts in advance of the Sentencing Indication hearing, but this does not appear from the record to have been referred to at any stage. Rather, it appears that the Judge proceeded on basis of the original

car. As Mr Darling drove, Mr Anderson reached forward from the back seat and attacked Mr Tatu, who was in the front passenger seat, hitting him repeatedly in the head and face. Mr Darling struck Mr Tatu also. Both he and Mr Anderson yelled at the complainants to hand over their phones and bags.

8. The car slowed down and Mr Tatu dived out the passenger door. However, he realised Ms Horsfall was still inside, and ran after the car to catch up with it. Ms Horsfall tried to open her door but Mr Anderson grabbed her and prevented her from doing so. Mr Tatu caught up and climbed back inside the still open front passenger door, in order to help Ms Horsfall. Mr Anderson produced a knife and stabbed him several times in the right side of his head and body. Mr Darling joined in by striking him to his head.

9. The car came to a stop. Ms Horsfall, fearing further attacks, gave both men her phone and handbag. She and Mr Tatu escaped and hid in a nearby building.

10. Mr Tatu was hospitalised with serious knife wounds. When police located Messrs Darling and Anderson a short time later, their car had been put through a car wash. A broken and bloody knife blade was found in the rear passenger footwell. The knife with a broken blade was found in Mr Anderson's backpack. Property belonging to the complainants was also found in the car (although not specifically set out in the Court of Appeal's decision, Ms Horsfall's handbag was located wrapped in a jacket and concealed beneath the spare tyre). Mr Darling was found with knuckledusters in his pocket.

Summary of Facts, albeit noting the concessions made by the Crown that Mr Darling had no knowledge of the knife, and joined into what was happening rather than being an instigator: [19] **[COA 124-5]**. It was this original summary that was read out during the sentence indication, after which Mr Darling pleaded guilty. (The amended summary as filed in the District Court is attached to the **Referrer's Materials at Tab 21.** It was not before the Court of Appeal and so does not affect the terms of the Solicitor-General's Reference.)

Charges

11. Both Mr Darling and Mr Anderson were originally charged under s 235(a) with aggravated robbery (being robbery causing grievous bodily harm),[6] kidnapping,[7] and conspiring to supply methamphetamine.[8] Mr Darling also faced a charge of possessing an offensive weapon.[9]

12. After plea arrangement discussions and a sentence indication, Mr Darling pleaded guilty to an amended aggravated robbery charge under s 235(b).[10]

13. Section 235 materially provides:

> Everyone is liable to imprisonment for a term not exceeding 14 years who—
>
> (a) robs any person and, at the time of, or immediately before or immediately after, the robbery, causes grievous bodily harm to any person; or
>
> (b) being together with any other person or persons, robs any person; or
>
> (c) being armed with any offensive weapon or instrument, or any thing appearing to be such a weapon or instrument, robs any other person.

14. Robbery is "theft accompanied by violence or threats of violence, to any person or property, used to extort the property stolen or to prevent or overcome resistance to its being stolen."[11] As stated in *Reddy v R*:[12]

> Robbery is theft assisted by violence. The violence must be used for the purpose of making the theft possible. It need not be the only reason for using violence, but it must be one of them. Otherwise it is theft, and it is separately assault, but it is not robbery.

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6 Crimes Act 1961, s 235(a) and 66(1).

7 Crimes Act 1961, s 209 and 66(1).

8 Misuse of Drugs Act 1975, s 6(2A)(1).

9 Crimes Act 1961, s 202A(4)(a): in relation to knuckledusters found in his possession at the time of his arrest.

10 He also pleaded guilty to possessing an offensive weapon, being knuckledusters found in his possession when arrested.

11 Crimes Act 1961, s 234.

12 *Reddy v R* [2011] NZCA 184, [2011] 3 NZLR 22 at [33].

15. An aggravated robbery under s 235(b) requires proof that the accused was part of a joint enterprise of robbery by two or more persons. There will be sufficient participation if the accused joins a co-offender in the infliction of force on the victim, or by words or conduct participates in the making of threats of violence. The essence of the offence is that the robbers have a common intention to use their combined force, either in any event or as circumstances may require, in carrying out the robbery.[13] It requires "the forces of two or more persons acting in concert" to be "deployed against the victim in the actual commission of the offence."[14]

16. The Crown accepted for the purpose of resolution that Mr Darling did not know Mr Anderson had a knife and therefore was not culpable in respect of Mr Tatu's stabbing. The Crown withdrew the remaining charges.

17. Specifically, Mr Darling accepted that he, together with Mr Anderson, robbed Ms Horsfall of her handbag. He specifically accepted that he directly participated in the assault on Mr Tatu as demands were made for the couple's property.[15]

18. As explicitly recorded on Mr Darling's behalf at the sentencing indication: "It has been agreed that the sentencing indication may take place on the basis that the aggravated robbery was committed together with Mr Anderson, at Mr Anderson's instigation."[16]

19. It is common ground that Mr Darling was properly advised at the time of entering his plea.[17] His plea was unequivocal.

20. Mr Darling was subsequently sentenced to four months' community detention and nine months' supervision.[18]

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13 *R v Galey* [1985] 1 NZLR 230 (CA) at 233–234.

14 At 234.

15 Both in the summary of facts taken from the Notes of Judge D C Ruth on Sentence indication**: [COA at 121]**; and in the amended summary drafted by the prosecutor and filed in the District Court prior to the sentencing indication.

16 Crown Sentencing Indication Memorandum dated 5 November 2019 at [5].

17 CA Judgment at [60] **[Supreme Court Casebook at 19].**

18 He was subsequently resentenced to 90 hours' community work and nine months' supervision: *Police v Darling* [2020] NZDC 27657 **[Additional Materials at 3].**

Mr Anderson's trial

21. Mr Anderson proceeded to trial on the original form of the charge:[19] namely, that he robbed Ms Horsfall of her handbag and, at the time of, or immediately before or immediately after, caused grievous bodily harm to Mr Tatu. He also faced charges of wounding with intent to cause grievous bodily harm in the alternative,[20] and kidnapping.[21]

22. Accordingly, the elements the Crown was required to prove against Mr Anderson were significantly different. Specifically, the Crown had to prove that Mr Anderson caused grievous bodily harm to Mr Tatu and that the inflicting of grievous bodily harm was proximately connected to the taking of Ms Horsfall's handbag. Neither element was part of the offence to which Mr Darling pleaded guilty.

23. Mr Anderson's case at trial was that Mr Tatu was the aggressor. He claimed that Mr Tatu brought the knife into the car, and then attacked Mr Darling. Mr Tatu was put into a headlock and there was a struggle with the knife which caused Mr Tatu to be injured.[22] Mr Anderson gave evidence to this effect in his defence.

24. The Crown did not adduce evidence of Mr Darling's conviction. Indeed the Crown placed little focus on his role, explaining to the jury that "Mr Darling… is not a participant in this trial."[23] The trial Judge directed the jury (somewhat favourably) that: [24]

> There were no charges in relation to him. You should not speculate at all about what has happened to him. He is obviously one of the people involved in what happened, but you do not need to trouble yourself as I say with those matters.

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19 Albeit that at the start of trial, he pleaded guilty to conspiring with Mr Darling to supply methamphetamine and offering to supply methamphetamine. Crown Charge Notice R v Reuben James Anderson and Kane Stuart Darling, 27 February 2019 **[COA 20].**

20 Crimes Act 1961, s 188(1).

21 Crimes Act 1961, ss 209 and 66(1).

22 **COA 54–55** (Defence Opening Statement).

23 **COA 46** (Crown Opening Statement).

24 **COA 105** (Judge's Summing Up). This did not reflect the reality of the position and may have bolstered the defence position that Mr Tatu was the aggressor and Mr Darling was the victim.

25. At the end of his trial, in September 2020, Mr Anderson was acquitted of all charges.

26. All that may be inferred from his acquittal is that the particular jury who heard the case against Mr Anderson did not accept the evidence reached the requisite level to prove the charge. How and why is unknowable.

27. However:

    27.1 The evidence at trial was capable of proving the charge of aggravated robbery. There was no s 147 application or directed acquittal.

    27.2 To the extent it is possible to reconstruct events,[25] it seems the jury was unsure about how (or perhaps precisely when) Mr Tatu's injuries were inflicted. This seems evident from Mr Anderson's acquittal on the alternative charge of wounding.

    27.3 Other aspects of the case against Mr Anderson also proved, perhaps unexpectedly, problematic at trial. It must be underscored that these issues can be viewed as borne out of the dynamic ever-changing trial process, rather than as illustrative of inherent flaws in the prosecution case.

    27.4 For example, one of the complainants, Mr Tatu, failed to come up to brief regarding the theft of Ms Horsfall's handbag. Despite recounting in his initial statement that the offenders said "give me your bag" during the attack,[26] in his evidence Mr Tatu recalled their words as "where's the money", and said that Ms Horsfall's handbag was "left in the car when we made our escape… you don't sort of worry about a handbag."[27] While this was inconsistent with Ms Horsfall's evidence that Mr Anderson

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25 As in inconsistent verdict cases, albeit that the focus in inconsistent verdict cases should be on justifying the conviction, rather than explaining the acquittal: "the decisive question is not whether the acquittals are reasonable, but whether the conviction was not" (at [69], citing *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [10]).

26 "as this was happening": see his Formal Witness statement [Additional Materials at 6].

27 Notes of Evidence ["NOE"] 28.

was telling her to give "him my handbag and phone"[28] and "it was a $1000 handbag that was my favourite handbag and there's no way I was leaving it behind,"[29] the defence exploited the apparent inconsistency to maximum advantage. Indeed, the overarching submission from defence counsel was "in the end if you're not sure", you should acquit.[30]

27.5 While Mr Tatu's memory may have proved more fallible at trial, the other significant development in Mr Anderson's trial was arguably his own evidence. It may well have been aspects of his evidence (which from a Crown perspective was fluid and farcical)[31] that nevertheless caused the jury to entertain doubts about what occurred.

28. The upshot is that Mr Anderson faced a different charge and elected to plead not guilty. The Crown proceeded accordingly, deploying their case against only him, and directing it at his culpability for the offence with which he was charged. Consideration of the defence opening statement illustrates that the trial proceeded differently against Mr Anderson alone than it would have had Mr Darling also been a defendant.[32]

Court of Appeal decision

29. Following Mr Anderson's acquittal, Mr Darling appealed his conviction arguing that his guilty plea was made under pressure and there was no reasonable basis for his conviction, being a robbery "together with" another person who had been acquitted.

30. In summary, the Court of Appeal held:

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28 NOE 81.

29 NOE 102.

30 See Defence closing address (COA 76).

31 See for example his description of how Mr Tatu's injuries came to be inflicted: from NOE 309.

32 Enabling the defence to suggest Mr Darling was himself a victim of the complainants: "The defence case is Mr Darling was not violent at all. He was the victim of an attack" (COA 49).

30.1 Mr Anderson's acquittal meant that Mr Darling could not, in law, have been convicted of an offence under s 235(b).[33] It called into question whether there was a robbery at all.[34] Applying *McIntyre v R*,[35] the Court of Appeal concluded, "Mr Darling cannot be found guilty of committing an aggravated robbery together with Mr Anderson if there is no proof that a robbery was committed".[36]

30.2 The not guilty verdict suggested there was reasonable doubt about whether Mr Anderson had the necessary intention to commit a robbery. "But even if the jury were satisfied of that element, it is different to the common intention required to prove s 235(b): If Mr Anderson did not have an intention to act together in concert to commit the robbery, then an essential ingredient of the offence against Mr Darling cannot be proved."[37]

30.3 The pool of evidence against the defendants was the same, which pointed against different results being justified.[38]

30.4 The Crown consistently linked Mr Darling's offending to Mr Anderson's, with Mr Anderson as the primary offender. That was reflected in the fact that the defendants were initially charged under ss 235(a) and 66(1), in the sentence indication, and in the way the Crown opened its case at trial. Given the presentation of the Crown case, it is inconceivable that Mr Anderson would have been acquitted, but a verdict of guilty returned against Mr Darling.[39]

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33 CA Judgment at [61] **[Supreme Court Casebook at 19].**

34 At [54] **[Supreme Court Casebook at 18].**

35 *McIntyre v R* [2017] NZCA 579, [2018] NZAR 43 **[Referrer's Materials at Tab 2].**

36 CA Judgment at [54] **[Supreme Court Casebook at 18]**.

37 At [55] **[Supreme Court Casebook at 18].**

38 At [56] **[Supreme Court Casebook at 18]**.

39 At [57] **[Supreme Court Casebook at 18]**.

30.5 The circumstances in which Mr Darling entered his plea added weight to the risk of a miscarriage of justice.[40] However, there was no trial counsel error – Mr Darling was properly advised.[41]

31. Notwithstanding his guilty plea, the Court of Appeal allowed Mr Darling's appeal, quashed his conviction and did not order a retrial.

Conviction appeals following a guilty plea

32. At its essence a guilty plea is an admission of guilt to the specific charge.[42] It has been described as the most cogent admission of guilt that can be made.[43]

33. A guilty plea is not lightly departed from. After all, a defendant is best placed to assess whether he or she has committed an offence. Just as with any other admission, a guilty plea can be entered for a variety of reasons.[44] And a person can admit to things that the prosecution would otherwise not be in a position to prove.

34. Guilty pleas are central to the administration of criminal justice and should generally be able to be relied upon. In some cases, an early guilty plea will end an ongoing investigation, foreclosing the possibility of further evidence being obtained.

35. For reasons of finality, the circumstances in which a guilty plea can be vacated are tightly constrained. It is well settled that only in exceptional circumstances will an appeal against conviction be entertained following a guilty plea.[45] An appellant must show that a miscarriage of justice will result if the conviction is not overturned.[46] Where an appellant fully

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40 At [58] **[Supreme Court Casebook at 19]**.

41 At [60] **[Supreme Court Casebook at 19]**.

42 See for example this Court's discussion in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [28] when discussing guilty pleas, citing a reference in a 1968 CA decision to UK dictum: "it is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that clearly is in the public interest."

43 *Charlesworth v R* [2009] NSWCCA 27 at [25].

44 *Meissner v R* [1995] HCA 41, (1995) 184 CLR 132 , 157 per Dawson J.

45 *R v Le Page,* above n 2, at [16] **[Referrer's Materials, Tab 1, p 8].**

46 At [16] **[Referrer's Materials, Tab 1, p 8].**

appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned.[47]

36. In the leading authority, *R v Le Page,* the Court of Appeal outlined "at least three broad situations" where a miscarriage of justice will be indicated following a guilty plea:[48]

    36.1 The first is where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge. These are situations where the plea is shown to be vitiated by genuine misunderstanding or mistake.

    36.2 The second is where on the admitted facts the appellant could not in law have been convicted of the offence charged. Examples given in *Le Page* are where a charge required special leave and such was not obtained, a charge was out of time or where, as a matter of law, the (admitted) facts were insufficient to establish an essential ingredient of the offence.

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

37. In *R v Merrilees*, the Court of Appeal added (with qualifications) trial counsel error in advice prior to guilty plea to the categories described in *R v Le Page*.[49] And, in *Wilson v R* this Court recognised that abuse of process affords a further circumstance.[50] Neither situation arises in the present case.

38. As the established categories demonstrate, the threshold is high and the focus narrow when a conviction appeal follows a guilty plea.

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47 At [16] **[Referrer's Materials, Tab 1, p 8].**

48 At [17] – [19] **[Referrer's Materials, Tab 1, pp 8–9].**

49 *R v Merrilees* [2009] NZCA 59 at [34] – [35].

50 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [104]. The competing argument (that Mr Wilson made an informed decision to plea guilty and should be held to that) was also recognised (at [106]).

The United Kingdom

39. The Court of Appeal of England and Wales set out the development of the law on appeals following a guilty plea in *T v R.*[51] The Court summarised the three broad categories of circumstances where, notwithstanding a guilty plea, an appeal may be allowed:

39.1 In the circumstances, the plea is vitiated. This includes cases where the plea was equivocal or unintended or affected by drugs; when the guilty plea was compelled as a matter of law by an adverse and wrong ruling that left no arguable defence to be put before the jury; or where it is vitiated by improper pressure (e.g. from the Judge or by incorrect legal advice).[52]

39.2 Where there is a legal obstacle to the defendant being tried for the offence. For example, because the prosecution would be stayed on the grounds that it is offensive to justice to bring the defendant to trial. These are often called "abuse of process" cases. This category does not depend upon the circumstances in which the plea was entered or whether the accused is innocent or guilty.[53]

39.3 Where it is established that the appellant did not commit the offence, or, in other words, that the admission made by the plea is a false one.[54] Examples included a case where it was established the appellant was actually in prison on the relevant date and therefore could not have committed the offence,[55] and another where a man confessed to a rape the appellant had been convicted of.[56] Of this category, the Court of Appeal said:[57]

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51 *T v R* [2022] EWCA Crim 108, [2022] 2 Cr App R 1 at [151] **[Referrer's Materials, Tab 13, p 206].**

52 At [154]–[159] **[Referrer's Materials, Tab 13, p 207–208].**

53 At [160]–[161] **[Referrer's Materials, Tab 13, p 208–209].**

54 At [162] **[Referrer's Materials, Tab 13, p 209].**

55 At [163] citing *R v Verney* (1909) 2 Cr App R 107 **[Referrer's Materials, Tab 13, p 209].**

56 At [163] citing *R v Foster* [1985] 1 QB 115, 79 Cr App R 61.

57 At [171] **[Referrer's Materials, Tab 13, p 211].**

> …following a freely made guilty plea, the conviction does not depend on the jury's assessment of disputed evidence. The evidence has never been heard, still less tested. It cannot be appropriate to enquire how it might have emerged and might have been assessed if there had been a trial. A submission that the evidence leaves a doubt about the guilt of the defendant is simply inappropriate. In such a case, of a free and informed plea of guilty, unaffected by vitiating factors, it will normally be possible to treat the conviction as unsafe only if it is established that the appellant had not committed the offence, not that he or she may not have committed the offence. Therefore, the test is not that of "legitimate doubt", still less a "lurking doubt", but instead it must be demonstrated that the appellant was not culpable.

40. As those categories were explained:[58]

> In the case of category 1, the ordinary consequences of the public admission of the facts which is constituted by the plea of guilty are displaced by the fact that the plea was vitiated, whether in fact or by reliance on error of law. In the case of category 2, the ordinary consequences of the public plea are irrelevant, because the defendant ought not to have been subjected to the trial process (or to that form of trial process) at all. But ordinarily, the plea of guilty, by a defendant who knows what he did or did not do, amounts to a public admission of the facts which itself establishes the safety of the conviction. There remains, however, a small residual third category where this cannot be said. That is where it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one.

41. The Court made it clear that the required approach on appeal is different following a guilty plea than a jury verdict: [59]

> Where 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. So, 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.

42. Although the third category is expressed somewhat differently, it is the functional equivalent of the second category in *Le Page*. The English approach usefully emphasises that it is intended to capture clear-cut cases, where it is plain the offence has not in fact been committed and the defendant is demonstrably innocent. This strikes an appropriate balance between on the one hand recognising the defendant's autonomy

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58 At [162] **[Referrer's Materials, Tab 13, p 209].**

59 At [151] **[Referrer's Materials, Tab 13, p 206].**

and the value of a guilty plea as an admission, and, on the other, the need to ensure the defendant is culpable.

Australia

43. In Australia, as in New Zealand, the ultimate question on appeal following a guilty plea is whether there was a miscarriage of justice. The focus is primarily on the integrity of the plea, and the circumstances in which it was entered.[60]

44. In the New South Wales decision *Layt v R*, Payne J summarised the relevant principles (Walton and Fullerton JJ agreeing) as follows:[61]

> Where an applicant has entered a plea of guilty and subsequently seeks to appeal against conviction, it is not necessary to conduct an examination into the applicant's guilt or innocence. Rather, the relevant inquiry is into the integrity of the plea of guilty: Sabapathy v R [2008] NSWCCA 82 at [14]; Thafer v R [2019] NSWCCA 143 at [287].
>
> When a person enters a plea of guilty, that person admits to all of the elements of the offence (at least to the minimum level necessary for a conviction) and the conviction will not be set aside unless it can be shown that a miscarriage of justice has occurred: R v Chiron [1980] 1 NSWLR 218.
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> The rarity with which this Court grants leave to withdraw the plea of guilty at trial is an aspect of the public interest in the finality of proceedings: Reg. v O'Neill [1979] 2 NSWLR 582.
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> While the categories are not closed, some examples of where leave to withdraw a plea of guilty has been granted are:
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> > "(1) the nature of the charge to which the plea has been entered is not appreciated: R v Ferrer-Esis (1991) 55 A Crim R 231 at 233;
> >
> > (2) the plea is not 'a free and voluntary confession': R v Chiron at 220;
> >
> > (3) the 'plea [is] not really attributable to a genuine consciousness of guilt': R v Murphy [1965] VR 187 at 191;
> >
> > (4) there has been a 'mistake or other circumstances affecting the integrity of the plea as an admission of guilt': Sagiv v R (1986) 22 A Crim R 73 at 80;

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60 *R v Rae (No 2)* [2005] NSWCCA 380, (2005) 157A Crim R 182 at [20] **[Referrer's Materials, Tab 8, p 75].**

61 *Layt v R* [2020] NSWCCA 231 at [24]–[28] **[Referrer's Materials, Tab 9, pp 116–117].**

> (5) the plea has been 'induced by threats or other impropriety' and the appellant would not otherwise have pleaded guilty: R v Cincotta (Court of Criminal Appeal (NSW), 1 November 1995, unrep); and
>
> (6) the plea is not unequivocal or is made in circumstances suggesting it is not a true admission of guilt (Maxwell v The Queen (1996) 184 CLR 501 at 511; [1996] HCA 46)."
>
> It is for the person seeking to withdraw the plea of guilty to satisfy the Court that leave to withdraw the plea should be granted: R v Boag (1994) 73 A Crim R 35; R v Ferrer-Esis. It is only where the material before the Court discloses a real question about the guilt of an accused that the Court will grant leave to withdraw the plea: R v Toro-Martinez [2000] NSWCCA 216; (2000) 114 A Crim R 533.

45. In *Borsa v The Queen*,[62], the Court of Criminal Appeal for Western Australia discussed the circumstances in which a guilty plea will be set aside in similar terms to *Le Page*:

> It is no easy matter for an appellant to persuade a court to set aside a conviction based on a plea of guilty. There must be a strong case and exceptional circumstances: Nutall v [The Queen], unreported; CCA SCt of WA; Library No 920090; 26 February 1992; Pilkington v The Queen [1955] Tas SR 144 and Harman v Ayling, unreported; SCt of WA (Parker J); Library No 960633; 5 November 1996. Before an appellate court will set aside a conviction of that kind, the appellant must show that there has been a miscarriage of justice: Duffield v [The Queen], unreported; CCA SCt of WA; Library No 950065; 14 February 1995 and Nobes v [The Queen], unreported; CCA SCt of WA; Library No 960486; 26 August 1996. In Harman at 5, Parker J, after acknowledging that the circumstances which will amount to a miscarriage of justice can never be exhaustively identified, said that there are three well-recognised circumstances in which a plea of guilty will be set aside. The first is when the appellant did not understand the nature of the charge or did not intend to admit guilt; the second is if, upon the admitted facts, the appellant could not in law have been guilty of the offence; the third is where the guilty plea was obtained by improper inducement, fraud or intimidation and the like. See, in this respect, Meissner v The Queen (1995) 184 CLR 132 at 157 per Dawson J, Maxwell v The Queen (1996) 184 CLR 501 at 510-511 per Dawson and McHugh JJ, at 522 per Toohey J, and at 531 per Gaudron and Gummow JJ, and Tihanyi v The Queen (1999) 21 WAR 377 at 390-391 per Murray J.

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62 *Borsa v The Queen* [2003] WASCA 254 at [20] per Steytler J (Murray ACJ and Hasluck J concurring) **[Referrer's Materials, Tab 10, pp 129–130].**

46. Notwithstanding "those three categories of cases", in *R v Carkeet*,[63] the Supreme Court of Queensland (Court of Appeal), following the English approach, allowed an appeal against conviction "in the rare and wholly exceptional circumstances" of an appellant who otherwise had entered an informed guilty plea voluntarily, but who was subsequently found to be "demonstrably innocent of the offence of which he has been convicted."[64]

Category two of *Le Page* – focus on "the admitted facts"

47. Explicitly, assessment under this category depends upon the admitted facts, and not on other available evidence, or what the prosecution may or may not be able to prove in a trial setting. This is made clear in *Le Page* itself, and in *R v Mohammed* which was given as an example of a case falling within this category.[65]

48. Examples of the second category of *Le Page* in practice can be found in the decisions of *Whichman v R*,[66] *R v Dar*,[67] *Coupe v Police*,[68] *Rutherford v Canterbury Regional Council*,[69] and *Rizvi v Police*.[70] These decisions

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63 *R v Carkeet* [2008] QCA 143 **[Referrer's Materials, Tab 11].**

64 At [26] and [30] **[Referrer's Materials, Tab 11, p 145].** This was accepted by the Crown, another person having subsequently been identified by his fingerprints as the likely offender, having made full admissions, and been charged with the offence.

65 *R v Le Page,* above n 2, at [19] citing *R v Mohammed* CA415/96, 13 November 1996. Mr Mohammed's convictions for forgery were quashed not withstanding his guilty pleas when it was established that the documents underlying each of the charges were not, as a matter of law, "false documents" and were not therefore forgeries." **[Referrer's Materials, Tab 1, p 9].**

66 *Whichman v R* [2021] NZHC 3463. The appellant argued on appeal that on the admitted facts he could not have been guilty of aggravated robbery because there was no evidence of a common intention between him and his co-offender to rob the complainant. He said that his purpose was to intimidate the complainant only and he opportunistically asked for money from the complaints after the asserted robbery was over. The High Court said of the second category in *Le Page,* "This assessment of whether the appellant could have been convicted of the offence is based on the admitted facts, not based on other evidence that may be available": [21].

67 *R v Dar* [2007] NZCA 140: Mr Dar pleaded guilty during trial to entering an enclosed yard (an avocado orchard) with intent to commit a crime (steal avocados). He appealed his conviction on the basis that he was unaware when he pleaded that he had a defence: the orchard was not an "enclosed yard". In its analysis, the Court of Appeal considered the District Court file and original exhibits. It found that the evidence fell "well short" of establishing the orchard was an "enclosed yard", and as such, burglary was not established, on the admitted facts: [22].

68 *Coupe v Police* [2013] NZHC 717: In the High Court considered a conviction appeal following a guilty plea to assault with intent to commit a crime (namely, theft by violent means rendering the victim incapable of resistance). The appellant argued that he held a claim of right as he was pursuing the return of his friend's money. The High Court Judge considered the meaning of "claim of right" as against the summary of facts, not the evidence: [38]–[40].

69 *Rutherford v Canterbury Regional Council* [2021] NZHC 1506: Mr Rutherford pleaded guilty to charges of discharging sediment into the "bed" of a river. He unsuccessfully sought to challenge the charges based on the definition of "bed". He indicated he wanted to appeal that decision and sought an adjournment of trial on that basis. The adjournment was declined and Mr Rutherford pleaded guilty. However, the High Court subsequently overturned the lower court's decision on what constituted a

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.

49. The 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.[71]

Should the Court look beyond the admitted facts?

50. The Crown accepts that there will be rare cases where subsequent events can impact upon the safety of a conviction consequent upon a guilty plea. Conceivably situations may arise where extraneous factors will impact upon the admitted facts themselves, but those occasions must be limited to those rare cases covered by the third category in the UK, and equally recognised in Australia, where the appellant has demonstrably established that he or she did not, in fact, commit the offence charged.

51. Unsurprisingly, there are few cases where post-conviction events impact upon an otherwise un-impugned guilty plea, still less where, as in *Darling*, the events in question concern the outcome of another defendant's proceedings.

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river "bed". The Regional Council accepted the charges could not succeed on the basis of the High Court's decision and his conviction appeal was allowed: [50] – [52].

70 *Rizvi v Police* [2020] NZHC 411: the appellant sought to appeal his conviction following a guilty plea for burglary relating to an incident where, being subject to a protection order, he entered his former partner's home and assaulted her. He appealed on the grounds that the admitted facts did not amount to a burglary. The High Court defined the central issue as whether, "as a matter of law, on the admitted facts, a properly directed fact-finder could reasonably conclude that the appellant possessed the intention to commit an imprisonable offence when he entered the house without authority".[70] The Court found "there is no doubt that, on the basis of the agreed summary of facts, a properly directed fact-finder could reasonably find Mr Rizvi broke into the victim's house intending to commit a breach of the protection order and was therefore guilty of burglary: [38].

71 Specifically provided for in statute: s 232(2)(a) "The first appeal court must allow a first appeal under this subpart if satisfied that in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable."

McIntyre v R

52. One such rare case is *McIntyre v R*,[72] which the Court of Appeal relied upon here. Mr McIntyre pleaded guilty to being an accessory after the fact to murder. Thereafter, the principal offender successfully defended his murder charge at trial on the grounds of self-defence.

53. Mr McIntyre appealed his conviction. The Crown conceded that the principal's successful self-defence claim meant "there was no murder" (ie, no culpable homicide) and that Mr McIntyre "cannot be an accessory to a murder that did not occur."[73]

54. By consent the Court allowed the appeal, and a brief decision was issued on the papers. On its face, it is unclear if the Crown's concession was prompted solely by the fact the principal was acquitted, or whether there were other circumstances in play (e.g. an acknowledgment the prosecution was flawed from the outset).[74]

55. On first principles however, the fact that a person has been acquitted of an offence does not mean "there was no offence" in fact. As the authorities below make clear, the acquittal may be a reflection of the high standard of proof, and the particular evidence available to be considered at the person's trial.

56. The particular circumstances of *McIntyre*, the brevity of the reasons, and the Crown concession render *McIntyre* of limited precedential value for the Court of Appeal's approach in the present circumstances.

57. However, critically, it is also distinguishable. A charge of accessory after the fact may arise from acts remote in time from the offence itself (as indeed it did in *McIntyre*[75]), and which are not in themselves in any way

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72 *McIntyre v R*, above n 35 **[Referrer's Materials, Tab 2].**

73 At [2] **[Referrer's Materials, Tab 2, p 14].**

74 Noting that s 137(2) of the Criminal Procedure Act 2011 expressly contemplates that a person charged with being an accessory after the fact "may be proceeded against and be convicted for the offence whether or not the principal offender or any other party to the offence or the person by whom the property was obtained has been proceeded against or convicted."

75 Mr McIntyre was not present at the time the victim was stabbed but assisted afterwards by burning bloodied clothing.

criminal. In this sense, the offence is "parasitic" on the principal offence. Mr McIntyre may have believed he was assisting after the fact of a murder, when in fact no such offence was committed. In essence the facts he admitted remained unchanged, but the culpability that attached to them was impacted by the principal's acquittal. The position here is vastly different. Mr Darling's offence was not parasitic upon Mr Anderson's. His plea of guilty was to joint participation in acts of violence and robbery. Having been present at the crucial time, Mr Darling was well placed to know exactly what happened and to admit it. The facts he admitted were unaffected by Mr Anderson's acquittal. He remained demonstrably culpable of the offence of which he was convicted.

The impact of a co-offender's acquittal on a guilty plea

58. A more relevant and persuasive analysis for present purposes can be found in the House of Lords decision in *DPP v Shannon*.[76] This case concerned a man's guilty plea to a charge of conspiracy, in circumstances where his sole co-conspirator elected to go to trial and was ultimately acquitted. Allowing an appeal from the Court of Appeal's decision quashing the conviction, the House of Lords stated that, if this was what was required, then "the law will be producing a strange result."[77]

> No one could know better than A whether he did or did not agree with B to do something wrongful and if, fully understanding what he was doing, and having skilled advice to guide or assist him, he acknowledged by way of confession to the court that he had so agreed, the law might seem to be artificial and contrary-wise which required that because the charge against B failed A must be held to be not guilty when he himself knew and had admitted that he was guilty.

59. As the House of Lords also noted, if the two defendants had both pleaded not guilty, been tried separately and different verdicts resulted, then:[78]

> If A has been fairly and properly tried with the result that on the evidence adduced he was properly convicted, I see no reason why his conviction should be invalidated if for any reason B on his subsequent trial is acquitted. The reasons for the acquittal of B may

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76 *DPP v Shannon* [1975] AC 717, (1974) 59 Cr App R 250 (UKHL) **[Referrer's Materials, Tab 14].**

77 At 254 **[Referrer's Materials, Tab 14, p 230].**

78 At 261 **[Referrer's Materials, Tab 14, p 237].**

> have nothing to do with A… if A pleads Guilty or is found Guilty I see no reason why his conviction must be set aside if B on his later separate trial is acquitted.

60. And, as was later expressed in the judgment (per Viscount Dilhorne):[79]

> Where an accused person pleads Guilty to a charge of conspiracy and it cannot be said that he has done so mistakenly, it cannot, in my view, be right that his conviction should be quashed if his co-conspirator or conspirators are tried subsequently - and it might be after the man who had pleaded Guilty had served a sentence of imprisonment - and he or they are not found guilty or on appeal have their convictions quashed. It may be that owing to lapse of time important witnesses may not have been available at the subsequent trial. It may be that owing to lapse of time their recollection of events has faded. While the non-availability of witnesses who were available at the first trial or the failure of witnesses to recollect events might account for the acquittal of the co-conspirator or conspirators, it is no ground for saying that the conviction of the man who pleaded Guilty was wrong.

61. A more recent decision from England also assists. In *R v Ashard*[80] the Court of Appeal (Criminal Division) opined:[81]

> The issue raised by this application is whether, having pleaded guilty to conspiracy to supply ketamine following professional advice, the applicant's conviction is inconsistent with the later acquittals of his co-conspirators. We say at the outset that we consider it to be a surprising and unfortunate outcome if a person in the applicant's position could vacate his guilty plea, freely made and with the benefit of professional advice, simply because the co-conspirators named in the indictment had been acquitted at a later trial; or argue on an appeal that the conviction consequent on his plea of guilty was, therefore, unsafe.

62. The Court noted this was a different case than if the offenders had been tried together and he had been convicted and they acquitted, which could support an argument that inconsistent verdicts resulted:[82]

> But that did not happen. He was not tried with them. We cannot speculate about what evidence might have been adduced at a trial of the other named conspirators and of the applicant. But this contention does not help the applicant. He freely entered a plea of guilty to the indictment before the trial.

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79 At 265–266 **[Referrer's Materials, Tab 14, pp 241–242].**

80 *R v Ashard* [2018] EWCA Crim 2206, [2018] 9 WLUK 479 **[Referrer's Materials, Tab 15].**

81 At [12] **[Referrer's Materials, Tab 15, p 257].**

82 At [24] **[Referrer's Materials, Tab 15, p 262].**

63. Similarly in Scotland, in *Reedie v HM Advocate,*[83] the Court said that "a plea of guilty constitutes a full admission…It is not a conditional admission that is subject to reconsideration in the light of a subsequent decision of the court; nor in our view, in the light of a subsequent verdict in the trial of another party on the same charge."[84] The Court went on to discuss the "illogical proposition" tendered by the appellant which "if sound, it would mean that if [the co-defendant proceeded against in a separate trial] had been acquitted, the appellant would have been entitled to withdraw his plea in its entirety."

64. The Court emphasised that:

> [14] The appellant did not plead that he was guilty art and part of whatever Kerr should be proved to have done. He pled guilty to the charge outright. The court must proceed, in our view, on the principle that an accused who pleads guilty as libelled to a crime does so because he committed it.
>
> [15] We conclude, therefore, that the proceedings at the trial of the co-accused have no bearing on the appellant's plea. We therefore refuse the appeal.

65. The rationale for viewing distinct proceedings separately, albeit against related defendants, is clear. It pertains to the function of the finder of fact, and the value of their judgment. This was discussed at some length by the High Court in Scotland (sitting as a five Judge bench) in *Howitt v HM Advocate*[85] in which the appellants essentially argued that the verdict of another accused in related proceedings determined at a separate trial should impact upon the determination of their own proceedings.

66. Of this argument the Court opined that:[86]

> The proposition that underlies the submissions for the appellants appears to us to be that when, in a criminal trial, the jury, applying the ordinary rules as to onus and standard of proof, determines a particular matter on the basis of the evidence presented to it, that determination thereby becomes a "fact" in its own right with validity and evidential value in other proceedings; or the verdict

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83 *Reedie v HM Advocate* [2005] HCJAC 55, [2005] SLT 742 **[Referrer's Materials, Tab 16].**

84 At [11] **[Referrer's Materials, Tab 16, p 266].**

85 *Howitt v HM Advocate* [2000] SLT 449 (ScotHC) **[Referrer's Materials, Tab 17].**

86 At 452 **[Referrer's Materials, Tab 17, p 270].**

> itself is of evidential value in criminal proceedings subsequently brought against persons not indicted in the trial in which the verdict was obtained. That, we consider, is a mistaken view.

67. The Court considered that while a jury's verdict has continuing validity in terms of that trial and its own consequences, "a jury does not… make or issue findings in fact that have validity out with the context of the trial itself".[87] Further:[88]

> Underlying this analysis is the recognition that a "fact" in a criminal trial is something that is established to the satisfaction of the jury by competent and sufficient evidence adduced, and in relation to a person indicted in that trial. A "fact" of that character has no existence outside the context of the trial; and the facts established at a trial against one accused may well differ from the facts established against a co-accused in the same proceedings; they commonly do.

68. The Court also noted that the appellant's submission "appears to reflect a widespread but mistaken view that a person acquitted by the jury's verdict in a criminal trial is thereby declared to be "innocent" of the charges he has faced at the trial, so that he thereby acquires an unimpeachable certificate of innocence. He does not. An acquittal on a charge in a criminal trial means only that the charge has not been established beyond reasonable doubt; it is not a positive proof that the acquitted person did not commit the crime charged. Proof of guilt is the issue in a criminal trial; innocence is not."[89]

The impact of a co-offender's verdict, absent guilty plea considerations

69. Beyond the strictures of guilty plea cases lie the more commonly advanced "inconsistent verdict" appeals, when an appellant is convicted of some charges but acquitted of others, or where different defendants receive different verdicts. Such appeals are premised upon argument that the jury's verdicts are "irreconcilable" and "cannot stand together." To succeed, an appellant must persuade the appellate court that no reasonable jury could, on the evidence properly used, have arrived at

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87 At 452 **[Referrer's Materials, Tab 17, p 270].**

88 At 453 **[Referrer's Materials, Tab 17, p 271].**

89 At 453 **[Referrer's Materials, Tab 17, p 271].**

different verdicts on the different counts, and that the conviction is unsafe.[90]

70. Most of the cases relied upon by the Court of Appeal in *Darling* fall into this category. Critically, they are cases which do not involve guilty pleas, such that the appellate Court's focus was entirely different, and free of the limitations and constraints necessarily involved in a case of admitted guilt, which necessarily admits every element of the offence.

71. One of those cases is *R v Stewart.*[91] Ms Stewart and Ms Oliver were jointly charged with sexual violation by unlawful sexual connection. It was alleged that Ms Oliver manually penetrated the complainant while Ms Stewart encouraged her to do so. Ms Oliver was the principal, and Ms Stewart the secondary party. They were tried together, and both were found guilty. Thereafter their appeals against conviction were separately determined. During Ms Oliver's appeal, she adduced fresh evidence in the form of expert evidence that the complainant's injuries were inconsistent with the account she had given of the assault. Her appeal was successful,[92] the Crown offered no evidence at the retrial, and she was discharged under (then) s 347 of the Crimes Act 1961.

72. When Ms Stewart consequently appealed her own conviction,[93] the Crown accepted that her appeal should also succeed. As the Court summarised it:[94]

> [W]here, as here, the successful appeal and subsequent s 347 discharge of the principal offender indicates reasonable doubt about whether the alleged primary offending took place at all, the conviction of a secondary party must be considered unsustainable. In such circumstances the acquittal of the principal implies the elements of the offence cannot be proved, so that the primary offence cannot be said to have been committed, especially where the acquitted person was the only possible principal. If no crime

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90 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [24].

91 *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1 **[Referrer's Materials, Tab 3].**

92 *Oliver v R* [2007] NZCA 326.

93 It was in fact her second appeal against conviction, her first having been advanced unsuccessfully, prior to Ms Oliver's and on different grounds: *R v Stewart* CA515/05, 15 August 2006.

94 *Stewart v R,* above n 91, at [6] **[Referrer's Materials, Tab 3, p 17].**

> occurred, the secondary party cannot be said to have helped the principal offender to commit it.

73. Because both co-defendants had been charged with the same offence and had been convicted at the same trial, the argument was effectively an unreasonable verdict/inconsistent verdict case. All parties accepted it would constitute a miscarriage of justice for Ms Stewart to be convicted of encouraging Ms Oliver to commit an offence in these circumstances. As this Court has itself described the decision in *Stewart,* "the basis upon which the conviction of the principal was set aside was equally applicable to the conviction of the accessory."[95]

74. The Court in *Stewart* was also careful to note that "it will not always be the case that a secondary party must also be acquitted in the absence of the conviction of a principal offender…" going on to reference, as an example of this, those cases where the criminal liability of the parties is separately established, especially on the basis of different evidence.[96]

75. *Jones v R*[97] is another case akin to *Stewart* which the Court of Appeal also relied upon in *Darling*,[98] but which also involved no guilty plea.

76. Mr Jones was convicted as a party to blackmail in the same trial in which the principal offender was convicted. Thereafter the principal offender's conviction was quashed on appeal. The Court of Appeal considered Mr Jones' conviction could not stand either: "this is a case where Mr Jones as a secondary party would have been acquitted in the absence of the conviction of Mr Clutterbuck. This is not the type of situation recognised in *Stewart* where a party could be convicted in the absence of the conviction of the, charged, principal offender."[99]

77. The absence of a guilty plea is not the only distinguishing feature in both *Stewart* and in *Jones*. Significantly both cases also concerned defendants

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95 *Weenink v R* [2017] NZSC 4 at footnote 7, describing the decision of *Stewart v R,* above n 91 **[Referrer's Materials, Tab 4, p 21].**

96 *Stewart v R*, above n 91, at [5] **[Referrer's Materials, Tab 3, p 17].**

97 *Jones v R* [2014] NZCA 613 **[Referrer's Materials, Tab 5].**

98 CA Judgment at [45] **[Supreme Court Casebook at 16]**.

99 *Jones v R,* above n 97, at [27] **[Referrer's Materials, Tab 5, p 31].**

who were tried and convicted together. Where, following appeal, the outcome materially altered for one co-defendant, the Court appropriately considered whether those circumstances also materially impacted upon the other.[100]

78. Unsurprisingly, an inconsistent verdict appeal faces significant challenges where the impugned verdicts result from separate trials. In *Weenink* it was argued that the subsequent acquittal of a co-offender at a retrial should render unsafe the convictions of co-offenders convicted at the first trial.[101] This Court did not accept that argument, noting that the differing results simply meant "the two juries at the two trials assessed the case differently…".[102] The Court also stated:[103]

> Where inconsistency is relied on successfully in conviction appeals, it is usually, perhaps always, of a kind which impeaches the reasoning process of the jury. In the present case where the verdicts in issue were given at separate trials, the asserted inconsistency does not raise any doubt as to the reasoning of the first jury. Interestingly, no cases were cited involving inconsistency of verdicts at separate trials resulting in successful conviction appeals.

79. This was the same point made by the Court of Appeal in a related case, *McMaster v R*:[104]

> [N]o authority was cited for the proposition that a challenge based on inconsistent verdicts reached by different juries has been successful, let alone advanced as a serious proposition. That is so despite the not uncommon occurrence of defendants allegedly involved in a joint criminal enterprise being tried separately where particular exigencies of the case have necessitated separate trials.

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100 This is similar to *Balasubramanian v R* [2022] EWCA Crim 1404 in which B pleaded not guilty to a charge of assault and was convicted following a jury trial. Four of his co-accused succeeded in an appeal against their convictions and a retrial was ordered. They were again convicted and again appealed. The basis of their appeal was fresh evidence which entirely undermined the partiality and credibility of a Crown witness whose evidence had been read at the first trial and was crucial to the Crown case. Their appeal succeeded and their convictions were quashed. B was the only defendant who remained convicted in respect of a group assault; the Court emphasising that "the case against him entirely depended upon the guilt of" one of his, now acquitted co-offenders. With the Crown's agreement, the Court concluded that if his co-offender was "to be considered a man who was not guilty of the offence, the circumstantial evidence which demonstrated links between [him] and the appellant would mean nothing." His conviction should be considered unsafe for the same reason his co-offenders' convictions had been quashed: because "the evidence that was read against him should never have been read at all": [21]. **[Referrer's Materials, Tab 18, p 279].**

101 *Weenink v R,* above n 95 **[Referrer's Materials, Tab 4].**

102 At [5](a) **[Referrer's Materials, Tab 4, p 21].**

103 At [5](b) **[Referrer's Materials, Tab 4, p 21].**

104 *McMaster v R* [2016] NZCA 612 at [85] **[Referrer's Materials, Tab 6, p 60].**

80. These decisions accord with previous authority. In *R v Wahrlich*,[105] a New Zealand case, Mr Wahrlich was charged with committing grievous bodily harm together with another offender who could not be found at the time of the trial, such that two separate trials resulted. Mr Wahrlich was convicted. His co-offender was subsequently acquitted. Mr Wahrlich's resulting appeal on the grounds of inconsistent verdicts was dismissed: "we see nothing in the circumstances of the Z trial which satisfies us that the Wahrlich trial involved a miscarriage of justice", referencing "established authority" that "inconsistent verdicts from different juries in respect of defendants charged with the same offence in respect of the same alleged conduct do not necessarily render the guilty verdict unsafe."[106] The Court of Appeal cited a decision of the English Court of Appeal to similar effect:[107]

> As long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses…
>
> …where the verdicts are returned by different juries the inconsistency does not, of itself, indicate that the jury which returned the verdict was confused or misled or reached an incorrect conclusion on the evidence before it. The verdict 'not guilty' includes 'not proven'. We do not therefore accept Mr Hazan's submission that inconsistent verdicts from different juries ipso facto renders the guilty verdict unsafe.

Submissions: the present case

81. With the benefit of sound legal advice Mr Darling unequivocally admitted facts that established, as a matter of law, the elements of the offence under s 235(b). This is not a case that comes within the second category in *Le Page,* either as described in that decision or as illustrated in the authorities to date.

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105 *R v Wahrlich* [1976] 2 NZLR 9 (CA) **[Referrer's Materials, Tab 7].**

106 At 12 **[Referrer's Materials, Tab 7, p 67].**

107 *R v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118; [1972] 1 All ER 65 at 125-126; 71.

82. Mr Anderson's acquittal in relation to a different offence, albeit arising out of the same events, does not alter this position.

83. In the Crown's submission, the only way in which Mr Anderson's acquittal could impact upon Mr Darling's conviction is if it was one of those rare cases covered by the third category in the UK where it demonstrably established that Mr Darling did not, in fact, commit the offence charged. Plainly Mr Anderson's acquittal did no such thing. Evidence remained that Mr Tatu and Ms Horsfall had been the victims of theft assisted by violence aggravated by two persons acting in concert and using their combined force to carry out the robbery. Mr Darling's conviction remained safe.

Where the Court of Appeal went wrong

84. The Court did not examine the admitted facts, or analyse whether those facts were, as a matter of law, capable of satisfying the elements of the offence. Rather, it proceeded to ask itself the wrong question: whether Mr Darling's plea of guilty under s 235(b) can be "reconciled" with Mr Anderson's acquittal under s 235(a).[108]

85. It drew support for this approach by reference to authorities that can readily be distinguished. *Stewart, Jones, Darby* and *Wahrlich* all involved trials[109] and not guilty pleas. While *McIntyre* featured a guilty plea, it was a brief concession-based judgment concerning a very different set of circumstances. Further, the Court did not consider authorities more directly on point and inconsistent with its analysis (*Shannon, Ashard, Reedie, Weenink).*

86. The only other authority cited by the Court is the English case, *Zaman*.[110] However, *Zaman* provides an example of a charge where the Court of Appeal held that two differing outcomes for two connected offenders

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108 CA Judgment at [51] **[Supreme Court Casebook at 17].**

109 *Stewart v R*, above n 91*; Jones v R,* above n 97*; R v Darby* [1982] HCA 32, (1982) 148 CLR 668 **[Referrer's Materials, Tab 12]** all involved joint trials and *R v Wahrlich*, above n 105 involved a separate trial.

110 *R v Zaman* [2010] EWCA Crim 209, [2010] 1 WLR 1304. Z pleaded guilty to assisting an offender concerned in the supply of heroin. M was charged and acquitted of being the principal offender. **[Referrer's Materials, Tab 19].**

(one resulting from a plea and one from an acquittal following trial by jury) could safely co-exist.[111] It does not support the Court of Appeal's reasoning.

87. By considering whether Mr Anderson and Mr Darling's outcomes could be reconciled, the Court approached the question under appeal as akin to an unreasonable "inconsistent verdict" inquiry. Indeed, it took this even further, effectively treating it as an inconsistent verdict appeal advanced by defendants who had been tried together. This was in error.

88. Nothing from Mr Anderson's trial established Mr Darling's innocence. Mr Darling's admitted guilt remained unaffected by the findings of a jury tasked only with determining Mr Anderson's guilt of the offence with which he was charged.

89. Although the Court of Appeal opined that "Mr Anderson's acquittal draws into question whether there was a robbery at all",[112] it does not. It suggests only that the jury sitting in respect of his trial were not satisfied to the requisite standard that he had committed the s 235(a) offence. Nothing more.

90. The Court then proceeded to apply the "reasoning in *McIntyre*" and hold that Mr Darling "cannot be found guilty of committing an aggravated robbery together with Mr Anderson if there is no proof that a robbery was committed."[113] Again, this misstates the position:

    90.1 The jury's verdict does not equate with a finding that no robbery was committed. This may or may not have been its view. Equally the jury may have considered the robbery was proved, but the manner of its aggravation was not. Certainly, the jury heard evidence that an aggravated robbery had been committed. The

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111 The Court considered that Z "would inevitably have…knowledge over and above what the prosecution were able to adduce at M's trial…By his plea the appellant conceded not that M may have committed the offence, but that he had in fact done so: the threshold condition": [19]-[20] **[Referrer's Materials, Tab 19, p 286].**

112 CA Judgment at [54] **[Supreme Court Casebook at 18].**

113 CA Judgment at [54] **[Supreme Court Casebook at 18].**

fact that the jury did not convict Mr Anderson does not extinguish that evidence from the record.

90.2 Further, in Mr Darling's case, he admitted there was an aggravated robbery and that he actively participated in it. Consequently, there was no requirement for him to be "found guilty". By admitting his guilt, he dispensed with the Crown's need to prove its case against him.

90.3 Finally, this is not a case like *McIntyre* where the principal's subsequent acquittal altered the legal characterisation of Mr McIntyre's admissions. Nothing that emerged during Mr Anderson's trial was capable of altering Mr Darling's admissions.

91. Other aspects of this decision also warrant comment. The Court stated: "If Mr Anderson did not have an intention to act together in concert to commit the robbery, then an essential ingredient of the offence against Mr Darling cannot be proved."[114] But, in its prosecution of Mr Anderson, the Crown was not tasked with proving the "common intention" required to prove an offence under s 235(b). Mr Anderson's acquittal was thus entirely silent on whether the Crown could prove the necessary common intention for a s 235(b) offence, both as against Mr Anderson and Mr Darling.

92. By this reasoning the Court also stretches the Crown's burden to prove the common intention element of a "together with" robbery, requiring proof of Mr Anderson's mens rea in Mr Darling's case. However, to establish Mr Darling's guilt the Crown must prove Mr Darling had the intention to rob, knowing that intent to be shared with Mr Anderson.[115] The mens rea element necessarily focusses on the person to whom the charge relates. It would be perverse if a defendant was prevented from pleading guilty because of a requirement to prove a co-offender's

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114 CA Judgment at [55] **[Supreme Court Casebook at 18].**

115 *R v Feterika* [2007] NZCA 526 at [32]–[37].

intention to join in the joint enterprise. (It is also at odds with the House of Lords reasoning in *Shannon* upholding one conspirator's conviction notwithstanding their alleged co-conspirator's acquittal.)[116]

Unreasonable verdict analysis does not assist

93. Notably, even on the approach taken to an "unreasonable verdict" analysis, there were differences between the two cases such that the different outcomes can be "reconciled".

94. The Court of Appeal considered it significant that "the pool of evidence against both defendants was the same."[117] However, where this pool of evidence is capable of proving the charge, the lack of any differentiation is immaterial. There were also substantial differences in "the pool of evidence" that the Court failed to observe. One was that the evidence was theoretically being deployed at two different charges (such that its failure to prove one of the charges would not automatically equate with a failure to prove the other.) The second was that Mr Darling admitted his guilt whereby Mr Anderson did not. Indeed, the treatment of Mr Darling in Mr Anderson's trial may also have been a contributing factor.[118] And, of course, Mr Anderson ventured a competing narrative before the finder of fact. Had it been appropriate for the Court to consider this case using "inconsistent verdict" reasoning, these differences would have been sufficient to defeat an argument that Mr Anderson's acquittal and Mr Darling's conviction were irreconcilable and could not stand together.

95. As to the latter point, the Court of Appeal of England and Wales in *R v Burke* commented on the significance of this when considering whether a defendant's conviction should stand in the face of the subsequent acquittal of his co-defendant, Cook, following his separate trial at which he gave evidence in his own defence.[119] The Court said that "it did not

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116 *DPP v Shannon,* above n 76; *R v Darby,* above n 109.

117 CA Judgment at [56] **[Supreme Court Casebook at 18].**

118 The jury having been told there were "no charges" against Darling, they may have considered that his conduct was unproblematic (thereby lending support to the defence narrative that Mr Darling was the victim of Mr Tatu's aggression.)

119 *R v Burke* [2006] EWCA Crim 3122 **[Referrer's Materials, Tab 20].**

automatically follow from the acquittal of Cook that the conviction of the appellant is unsafe… Once it is appreciated that the suggested inconsistency between the verdicts at the two trials is not of itself any reason to hold the appellant's conviction unsafe, a further reason must be identified as to why that may be so."[120] The Court identified this reason as Cook's evidence at his own trial. In terms of the impact of this upon the appellant's trial, the Court said this:[121]

> The court is thus being asked to allow the appeal on the ground of fresh evidence where there is no application before the court to receive the evidence, where the evidence in question, namely that of Andrew Cook in the form of a witness statement, is not placed before the court, and where the witness is not available to give evidence to the court. The effect is that the court is asked to assume that the court would find the evidence of Andrew Cook credible and that it would exculpate the appellant…We do not suppose that Andrew Cook would welcome an opportunity to give evidence to this Court…what Andrew Cook would say to this Court is a matter of speculation.

96. Simply put, the Court of Appeal's decision is wrong. There was no basis for overriding Mr Darling's plea in these circumstances, and certainly no grounds for quashing his conviction. Mr Darling's admitted guilt and the safety of his conviction remained notwithstanding Mr Anderson's acquittal.

Consequences of Court of Appeal reasoning

97. Left unchecked, the Court of Appeal's decision has significant, and undesirable, wide-ranging consequences for criminal law, and the interests it protects.

98. It significantly extends the second category of *Le Page.* It is no longer constrained by "the admitted facts." It extends the ambit of the Court's review to other matters post-dating the entry of the plea. (After all, it ascribes weight and relevance to events transpiring at a subsequent jury trial for a related defendant facing a different charge.)

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120 At [24] and [26] **[Referrer's Materials, Tab 20, p 295].**

121 At [27] **[Referrer's Materials, Tab 20, p 295].**

99. Taken to its natural conclusion, the effect of the decision undermines the significance of a guilty plea as an unequivocal acknowledgement of guilt. The inevitable impact of the Court of Appeal's judgment wherever there are related proceedings is to ascribe an equivocal aspect to an otherwise unequivocal guilty plea. In effect, the Court is saying that in most if not all co-offender cases, a guilty plea is provisional, and awaits the outcome of any co-offenders' trial.[122] This cannot be correct. A guilty plea is not contingent upon a prosecution having proved successful against a defendant. It is trite that a defendant can validly plead guilty to a charge, notwithstanding that if they had proceeded to trial, they may have been acquitted. The same must apply in the context of co-offenders. While one offender might choose to plead guilty, their co-offender/s might choose to take their chances at trial. If they are then acquitted, this should not (except in very limited circumstances) act to impugn the first offender's guilty plea. If it does, that guilty plea serves little purpose. It can be viewed as little more than a placeholder to lock in considerable sentencing advantage lest a subsequent and related prosecution proves successful.

100. By undermining the value of a guilty plea, the concept of finality is significantly eroded. Indeed, this is illustrated by the pre-trial decision of *Channings v R,* the first case to apply *Darling.* In its decision the Court recognises that Mr Channings' upcoming trial for aggravated robbery may yet, if it results in acquittal, upset his co-offender's conviction for the offence, notwithstanding his guilty plea.[123]

101. The decision also extends the availability of inconsistent verdict reasoning across separate trials, contrary to this Court's observations in *Weenink,* to previous Court of Appeal authority, and to the approach taken in other jurisdictions. In so doing the Court has effectively embellished a jury's

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122 The Crown foresees that as a consequence, for example, it may be necessary to prove the involvement of the co-offender who has pleaded guilty at the trial of the co-offender who pleaded not guilty, so that the evidence against the former is adduced and tested, in case there is a subsequent conviction appeal.

123 *Channings v R* [2022] NZCA 661 at [35].

verdict with evidential value and continuing validity for defendants in other proceedings. This is a step that should not lightly be taken.

Summary

102. For the foregoing reasons, the question of law referred by the Solicitor-General should be answered in the negative.

5 July 2023

E J Hoskin / T C Didsbury
Counsel for the Solicitor-General

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

AND TO: Counsel to assist the Court.