IN THE SUPREME COURT OF NEW ZEALAND
TE KŌTI MANA NUI **SC 61/2023**

Between **DAMIEN KURU**

Appellant

And **THE KING**

Respondent

SUBMISSIONS FOR THE APPELLANT

Counsel for the Appellant certify that this submission contains no suppressed information and is therefore suitable for publication

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MAY IT PLEASE THE COURT

1. Mr Damien Kuru appeals his manslaughter conviction on the following grounds:[1]

    a. the jury's verdict was unreasonable;[2]

    b. evidence provided by Detective Inspector Scott about gangs caused a miscarriage of justice;[3] and

    c. the trial judge misdirected the jury regarding party liability which caused a miscarriage of justice.[4]

BACKGROUND

2. Mr Kuru is a "son of the Whanganui River" with whakapapa to the River tribes and Ngāti Tūwharetoa.[5] He was born into the Whanganui Black Power[6] and reluctantly inherited the Presidency after the death of his uncle, Craig Rippon. In this role, he promoted a pro-social influence within his community and contributed towards initiatives such as the Gang Action Plan, the Matipo Community Trust, and E Tu Whanau. At his sentencing, Ellis J described these pro-social activities as "genuine", "impressive", and "important".[7]

3. Sometime around August 2021, Kevin Ratana, a Mongrel Mob member, moved into the Whanganui suburb of Castlecliff.[8] One morning, a group of Black Power members met at a nearby property.

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1 Under s 240(2) of the Criminal Procedure Act 2011, a second appeal court must allow the appeal if satisfied that the appeal should be allowed on any of the grounds described in s 232(2).

2 Criminal Procedure Act 2011, s 232(2)(a).

3 Section 232(2)(c).

4 Section 232(2)(c).

5 Dennis O'Reilly, Section 27 Report for Damien Kuru, at [14]. **[Supplementary Material, Tab 1, Page 6]**

6 Damien Kuru's father, Tui, was the President of Whanganui Black Power. He was murdered when Damien was 8 years old.

7 *R v Kuru & Runga* [2022] NZHC 309 at [51]-[52], Ellis J acknowledged that Mr Kuru's commitment to the community, as well as own personal development, describing at "impressive". [Sentencing Notes]. **[SC Casebook at 66]**

8 The property was owned by Ms Ratana's girlfriend, Ms Wairoa Herewini.

They "hastily formulated" a plan to go to Mr Ratana's house and intimidate him into leaving the area.[9] Mr Kuru was not part of this group.

4. As the group approached Mr Ratana's house, they yelled out that he had "*a week to get out of the Cliff or you're dead"* and struck his car with poles and batons. Mr Ratana came out the front door wearing his Mongrel Mob patch and brandishing a loaded shotgun. The group immediately took cover. One of them fired a shotgun which fatally struck Mr Ratana in the neck. The group quickly dispersed and fled the scene.

5. Although Mr Kuru was not present at the initial congregation or the fatal scene, the Crown charged him as a party to manslaughter. His defence was – and remains – that he had no knowledge of such a plan and would have firmly disapproved of it.

TRIAL AND APPEAL

6. At trial, the Crown acknowledged that there was no direct evidence that Mr Kuru was involved in the formation or execution of the plan to visit Mr Ratana's house. Instead, it alleged that "as the president of the Chapter, [he] must have been aware of it and – expressly or implicitly – given it [his] blessing."[10]

7. Absent any direct evidence to support this claim, the Crown called an expert witness, Detective Inspector Scott, who prepared a Brief of Evidence saying that an attack on a rival gang "*would only occur with the sanction of the president*." After the defence objected, Ellis J permitted DI Scott to testify "in general terms about his experience

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9 Sentencing Notes, above n 7, at [12]. Ellis J said that: "My own view of the matter is that it was hastily formulated on the morning of the shooting. That is consistent with the evidence at trial … and is consistent with the evidence of the Friesens." **[SC Casebook at 56]**

10 At [18]. **[SC Casebook at 57]**. See also: *Kuru v R* [2023] NZCA 150 at [19]. [Court Appeal decision]. **[SC Casebook at 15-16]**

and knowledge of a President's role" but "no further than that."[11] But he did go further. DI Scott's evidence became "the focus of the Crown's case"[12] and stood alone to support the claim that that Mr Kuru sanctioned the plan to intimidate Mr Ratana.

8. Making this point, the Crown began its closing address regarding Mr Kuru in the following way:[13]

> Mr Kuru had to be aware of this attack because of its scale, the amount of planning and co-operation it requires, and that it would be the type of action that the gang president would have to know about and sanction. So that requires us to take the evidence of what we know about Damien Kuru and marry it up to Detective Inspector Scott told us about how these gangs operate and what the president role would be.

9. The jury accepted this submission and found Mr Kuru guilty of manslaughter. He was sentenced to five years and two months' imprisonment.

10. Mr Kuru appealed his conviction. A majority of the Court of Appeal dismissed the appeal. Dissenting, Cull J concluded that the "jury verdict was unreasonable" and the conviction was "unsafe."[14]

GROUND ONE: THE JURY'S VERDICT WAS UNREASONABLE

11. This Court must allow Mr Kuru's appeal if it is satisfied that the jury's verdict was unreasonable.[15]

Appellate review of jury verdicts is a fundamental constitutional function

12. A jury verdict is not – and should not be – sacrosanct. A jury room is not a place of undeviating intellectual rigour and it would be

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11 *R v Fantham-Baker* [2021] NZHC 2632 at [18]. [Gang Evidence Decision]. **[Supplementary Material, Tab 2, Page 6-7]**

12 Court of Appeal decision, above n 10, at [102] per Cull J. **[SC Casebook at 40]**. The majority acknowledged at [26] that a significant portion of the Crown's case "hinged upon the evidence" of DI Scott. **[SC Casebook at 19]**

13 **[CA Casebook at 313]**

14 At [115]. **[SC Casebook at 44]**

15 Criminal Procedure Act 2011, s 232(2)(a) and 240(2).

dangerous to deny that a jury's verdict may be prejudiced, perverse, or wrong.[16] Accordingly, parliament has entrusted appellate courts to review the reasonableness of jury verdicts to identify and remedy wrongful convictions. This is increasingly important in the modern era, as the "revelation machine" of DNA has revealed the serious accuracy problems of equivalent criminal justice systems.[17] New Zealand's own experiences indicate a serious – but so far unquantified – error rate.[18]

13. This jurisdiction has existed in New Zealand for almost 100 years.[19] Under the current formulation, an appellate court *must* allow the appeal if it considers a jury verdict to be unreasonable. Through this power, parliament has expressed its expectation that appellate courts will intervene, on the facts, where appropriate.[20]

14. Yet counsel's research suggests that the Court of Appeal has exercised this jurisdiction in only two cases since 2007.[21] While it is impossible to review the accuracy of appellate court decisions *post-facto* and without access to the trial evidence and written submissions, it defies belief that New Zealand juries have returned only two unreasonable verdicts in 16 years.[22]

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16 *R v Coutts* [2006] UKHL 39 at [20]; *Chamberlain v R (No. 2)* (1984) 153 CLR 521.

17 A wave of innocence is cresting internationally. In the US, the National Registry of Exonerations has recorded 3,250 exonerations since 1989. In the UK, the Criminal Cases Review Commission has successfully referred 544 cases since 1997.

18 Although New Zealand does not record such figures, for a small population there are many high-profile examples of wrongful convictions: Arthur Allen Thomas, David Dougherty, Tania Vini, Lucy Akatere, McClushla Fuataha, Phillip Johnston, Jaden Knight, Teina Pora, David Lyttle, Mauha Fawcett, and Allen Hall.

19 See: Criminal Appeal Act 1945, and Crimes Act 1961, s 385(1)(a).

20 Criminal Procedure Act 2011, s 232(2)(a).

21 See: *Watson-Crooks v R* [2016] NZCA 251; *H (CA742/2020) v R* [2021] NZCA 139. This research is limited by the availability of judgments on publicly accessible databases.

22 Statistics on this point have proven difficult to obtain. However, for reference, the District Court averaged 3,625 new jury trials *each year* between 2017-2022. Extrapolating those figures would suggest that roughly 11,000 have occurred in the District Court alone since 2007. See: Annual Report of District Court 2022 at p 19.

15. During this period, appellate decisions have repeatedly emphasised that s 232(2)(a) imposes a "high bar".[23] While appellate courts must always respect the jury's fact-finding function, this should not be confused with adherence to unreasonable jury decision making. Excessive deference to jury verdicts flouts parliament's expectation and undermines the important constitutional function of appellate courts. Given the ever-emerging frailties of human decision-making, appellate intervention should not be a rarity.

Principles for appellate review of jury verdicts

16. The Court of Appeal outlined the guiding principles for appellate review of jury verdicts in *Munro v R*.[24] This Court endorsed those principles in *Owen v R*.[25]

17. Once an appellant provides a "sufficient basis" for their claim that the jury's verdict was unreasonable, the appellate court must undertake "a detailed review of the evidence."[26] A "sufficient basis" may arise when the appellant challenges the evidence as a whole, and not particular points in the evidence.[27] It might also occur if the appellate court experiences a "lurking doubt or uneasiness", as this "may be an important indication that the verdict was not reasonable."[28]

18. After completing this detailed review of the evidence, an appellate court has no discretion. It ***must*** allow the appeal if a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant:[29]

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23 *Wetere v R* [2021] NZCA 119 at [18]. See also: *Gibbons v R* [2020] NZCA 116 at [9]; *R v Kuka* [2009] NZCA 572 at [9].

24 *Munro v R* [2007] NZCA 510. **[Appellant's Authorities, Tab 1].** This guidance remains relevant under s 232(2)(a) of the Criminal Procedure Act 2011.

25 *Owen v R* [2007] NZSC 102. **[Appellant's Authorities, Tab 2]**

26 *Munro v R*, above n 24, at [233]. **[Appellant's Authorities, Tab 1, Page 71]**

27 At [233]. **[Appellant's Authorities, Tab 1, Page 71]**

28 At [88]. **[Appellant's Authorities, Tab 1, Page 29]**

29 At [86]. **[Appellant's Authorities, Tab 1, Page 29]**. The Court of Appeal majority in *Kuru v R* did not follow this directive. Instead it said at [46] that: "Inquiring into

> The correct approach to a ground of appeal under s 385(1)(a) is to assess, on the basis of all of the evidence, **whether a jury acting reasonably ought to have entertained a reasonable doubt** as to the guilt of the appellant. We consider the word 'ought' is a better indication of the exercise to be conducted than the word 'must' used in *Ramage*. It emphasises the task that the Court has to perform. This test also, in our view, accords with the statutory wording.
>
> [Emphasis added]

The Court of Appeal failed to properly apply these principles – the jury's verdict was unreasonable

19. In this case, Mr Kuru's challenge against the jury's verdict is based on the evidence as a whole. It does not challenge specific pieces of evidence nor individual strands of the prosecution case. Therefore, this Court must undertake a detailed review of the evidence, which reveals that the jury's verdict was unreasonable.

20. The Court of Appeal majority appears to have fallen into error by nature of its approach. The majority rejected the submission that there is a difference between the analysis required in respect of a pre-verdict application for discharge[30] and a post-verdict challenge to a conviction on the grounds of evidential sufficiency.[31] This is not so.

21. There will inevitably be greater deference to a jury pre-verdict. If there is evidence upon which a jury *could* reasonably found guilt, the matter proceeds to trial. But the position post-verdict is materially different. At that point, the appellate court does not assess whether or not there was evidence upon which a jury *could* found proof, but whether or not the verdict is evidentially unsound. As the Court of Appeal explained in *Parris v Attorney-General*:[32]

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what the jury ought to have done risks this Court substituting its view of the guilt or innocence of the defendant for that of the jury".

30 Under s 147 of the Criminal Procedure Act 2011.

31 Under s 232 of the Criminal Procedure Act 2011.

32 *Parris v Attorney-General* [2004] 1 NZLR 519 at [14].

> Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal has the reserve power to intervene on evidentiary grounds.

22. In *Owen v R*, the Supreme Court explained that an appellate court considering evidential sufficiency does not assess the reasonableness of a verdict in the abstract: the question is not whether a jury *could* have convicted, but whether the conviction was *actually reasonable* having regard to the evidence presented at trial.[33]

23. In this case, the Court of Appeal's approach meant that its conclusion was inevitable. There will always be *some evidence* upon which the factfinder *could* have found guilt. But as Williams J rightly noted in *Neems v R*:[34]

> … the appellant is not required to demonstrate a complete absence of supporting evidence for the verdict of guilty. Rather, a verdict may be unreasonable even if there is some evidence to support it. A more holistic assessment is called for.

24. The Court of Appeal majority's unfortunate approach in this case might explain why it has only found two jury verdicts unreasonable over the past 16 years.

An overview

25. This was a large trial. It involved two defendants and spanned five weeks. However, because Mr Kuru was not present at the scene of the shooting, the evidence against him was more confined. This makes it easier for an appellate court to review the evidence and determine whether the jury ought to have entertained a reasonable doubt.

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33 *Owen v R*, above n 25, at [17], stating: "The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer." **[Appellant's Authorities, Tab 2, Page 8]**

34 *Neems v R* [2017] NZCA 21 at [11].

26. Throughout the trial, the Crown accepted that there was no evidence that Mr Kuru knew about – let alone sanctioned – the plan to intimidate Mr Ratana. As Ellis J noted at sentencing:[35]

> There was no evidence of your direct involvement in either the formation of the plan or its execution. Rather, the Crown case was that, as the president of the Chapter, you must have been aware of it and — expressly or implicitly — given it your blessing.

27. Similarly, the Court of Appeal majority said that:[36]

> The Crown case was presented on the basis that, as president of the local chapter of Black Power, Mr Kuru must have known about the gang's intention to intimidate Mr Ratana into leaving the area and that he would also have approved of the plan. The Crown accepted, however, there was no evidence of Mr Kuru having played a direct role in either the formation of the plan to intimidate Mr Ratana or its execution.

28. Lacking any direct evidence, the Crown relied on the following strands of circumstantial evidence:

    a. **Assembly:** On the morning of the attack, Black Power members allegedly assembled outside Mr Kuru's house at 60 Matipo Street.

    b. **Observation point**: From there, this group made their way towards Mr Ratana's residence. Mr Kuru was not part of the group, but allegedly followed from a distance to an "observational point".

    c. **Return to Matipo Street**: Shortly after the attack, Mr Kuru was observed on Matipo Street. The Crown alleged that he was following the co-offenders and oversaw their return.

    d. **Role of the gang president:** DI Scott provided expert evidence that a serious organised gang crime against another gang "would likely occur with the sanction of the president".

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35 Sentencing Notes, above n 7, at [18]. **[SC Casebook at 57]**

36 Court of Appeal decision, above n 10, at [19]. **[SC Casebook at 15-16]**

29. As the following paragraphs demonstrate, the first three strands were wholly unsupported by the evidence presented at trial. Therefore, the jury must have relied on the fourth strand to conclude that Mr Kuru sanctioned the attack on Mr Ratana. This was not a permissible basis to find Mr Kuru guilty and renders the verdict unreasonable.

Assembly

30. The Crown argued that the attack on Mr Ratana's residence was launched from outside Mr Kuru's house.[37] Not one witness gave evidence supporting this. In fact, the evidence strongly suggested that the initial assembly occurred at other locations around Whanganui.

31. Josiah Freisen testified that Gordon Runga picked him up just before 9am on 21 August 2023 and drove him to 73 Matipo Street.[38] Mr Freisen then dropped his children off at school on Cornfoot Street. As he returned to Matipo Street, he encountered a green Primera and a blue Commodore on the corner of Tiki and Matipo Streets.[39] He followed these vehicles up Tiki Street towards Pūriri Street and to Mr Ratana's residence. Mr Friesen was clear that he did not see Mr Kuru on any occasion that morning.[40]

32. Several other Crown witnesses gave evidence of meetings and assemblies at residences associated with known Black Power members.[41] These included:

    a. **155 Pūriri Street**: Jason Osbourne, Black Power member.

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37 **[CA Casebook at 19].** The Court of Appeal majority appeared to accept this argument, see: Court of Appeal decision, above n 10, at [11]-[14]. **[SC Casebook at 14-15]**.

38 Notes on Evidence, p 1084 at line 9.

39 Notes on Evidence, p 1085 at line 15-17.

40 Notes on Evidence, p 1069-70.

41 These were: Brodie Hill, Pua Te Tepu Takuira, Witness O, Queten De Jager, Gareth Robinson, Cassandra Hardie, Robert Steer, and Susan Maddren.

b. **88 Harper Street**: Anthony Kuru, patched Black Power member and co-accused who pleaded guilty to manslaughter.

c. **58 Rimu Street**: Gordon Runga, patched Black Power Black Power member and co-accused who was convicted of manslaughter.

d. **55 Matipo Street**: Josh Te Tua, ranking member of the Black Power; Damien Fantham-Baker, patched Black power member and co-accused who pleaded guilty to manslaughter.

33. The Crown disregarded this evidence and maintained that the group assembled outside Mr Kuru's house. To support this assertion, it relied on the testimony of Mark McKenzie and Gemma Parker. But even their evidence failed to support the Crown's claim.

34. Mr McKenzie saw a car *"coming down the street and, um, the driver was just yakking to a bunch of guys on the side of the road*".[42] He also saw a Blue Commodore driving on Matipo Street *"down past 56 and towards 54 and around into the next street, Tiki".*[43] The driver was talking with a group of four or five men walking in single file on the footpath. Critically, he did not see the "big man" (i.e. Mr Kuru, who he saw later) with the Commodore and this group of men.[44] Nor did he see a congregation outside 60 Matipo Street. His evidence indicated that Mr Kuru was not a part of the initial assembly and was consistent with Mr Friesen's testimony – that a brief assembly occurred on the corner of Tiki and Matipo Streets.

35. Ms Parker's evidence was equally unhelpful for the Crown. She testified that she saw a group of men on Tiki Street, heading toward Pūriri Street, before she heard shots fired.[45] She never saw a

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42 Notes on Evidence, p 754 at line 17.
43 Notes on Evidence, p 754 at line 33.
44 Notes on Evidence, p 765 at line 3.
45 Notes on Evidence, p 247 at line 13.

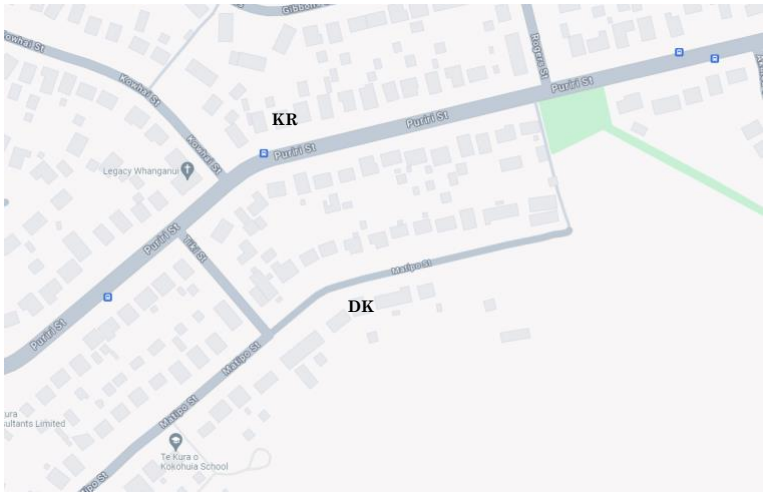
congregation outside 60 Matipo Street and did not describe a man who matched Mr Kuru's physical description and notable size.[46]

36. On the evidence presented, the jury could not have reasonably concluded that Mr Kuru was part of the initial congregation, nor that it occurred outside Mr Kuru's house at 60 Matipo Street.

Alleged "observation point"

37. The Crown argued that Mr Kuru assumed an "observation point" on Tiki Street as the group made their way to Mr Ratana's residence. Once again, the evidence presented at trial did not support this – it suggested the opposite.

38. Mr Kuru's presence on Tiki Street was entirely explicable. He had a pre-arranged meeting with Tuhi Smith, the principal of Kokohuia School, at 10am on 21 August 2021.[47] Although the most direct route from Mr Kuru's house to the school is along Matipo Street and past the corner of Matipo and Tiki Street, it is entirely plausible that he was diverted by the noisy confrontation occurring nearby outside Mr Ratana's residence:



KR = Kevin Ratana's house, DK = Damien Kuru's house

46 Notes on Evidence, p 247-250.
47 Notes on Evidence, p 971 at line 3. Mr Kuru's child attends Kokohuia School.

39. Several witnesses gave evidence about the loud noise before, during, and after the attack. Witness H said that multiple male voices were yelling gang slogans as they walked along Pūriri Street.[48] Wairoa Herewini yelled back at the men, saying "*fuck off*" and "*fuck off n..gers*".[49] The yelling and shouting continued as the men approached Mr Ratana's vehicle and struck it loudly with poles and batons.[50]

40. This noise was heard by witnesses on Kowhai Street[51] and Maire Street,[52] over a kilometre away. Mr Kuru was much closer and would undoubtedly have heard the confrontation brewing. As the President of Whanganui Black Power, it is entirely reasonable that he would have ventured towards the source of this noise. On the evidence at trial, the Crown was unable to negate that possibility. As such, Mr Kuru's presence on Tiki Street was not "proof" that he had prior knowledge of the attack on Mr Ratana's residence, as the Crown alleged.

41. To be sure, there can be no suggestion that Mr Kuru was on Pūriri Street at any point. The scene witnesses confirmed this,[53] including Mr Ratana's partner, Waiora Herewini, who said that Mr Kuru (who she knows) was not present on Pūriri Street on the day of the shooting.[54]

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48 Notes on Evidence, p 276 at line 30-32.
49 Notes on Evidence, p 292; p 568, line 6-10.
50 Notes on Evidence, p 315 at line 17-22, per Natasha Whiting.
51 Notes on Evidence, p 216, per Robert Steer.
52 Notes on Evidence, p 194, per Gareth Robinson.
53 See: Notes on Evidence, p 384-401 for a helpful summary of the other scene witnesses' evidence which confirm that Mr Kuru was present on Pūriri Street. Of the 30 scene witness called by the Crown, only Remus Edwards gave evidence remotely suggesting that Mr Kuru was on Pūriri Street observing the attack on Mr Ratana's residence. But under cross-examination Mr Edwards explicitly acknowledged and agreed that he had made a mistake. See: Notes on Evidence, p 483-484 at line 28-29.
54 Notes on Evidence p 569 at line 13-15.

Return to Matipo Street

42. Finally, the Crown alleged that Mr Kuru "oversaw" the group's return from Pūriri Street to Matipo Street. Five witnesses gave evidence on this issue: Mr O'Neill, Ms Gibson, Mr McKenzie, Graeme Brown, and George Yandall.

Mr O'Neill

43. Mr O'Neill, a court bailiff, was near Mr Ratana's residence on the morning of the attack. He told the jury that, after he heard gunshots, he saw Mr Kuru come down Tiki Street onto Matipo Street.

44. Mr O'Neill said that Mr Kuru was moving quickly, "*more than just a casual amble*."[55] His head was not swivelling, he was looking straight ahead as he entered Matipo Street.[56] He had a quick look behind him as he crossed the grass, travelled straight across the footpath, crossed the road, and continued down Matipo Street.[57] He went around the corner and went out of sight. This lasted around 20-25 seconds.[58]

45. Then, some 15-20 seconds after Mr Kuru had disappeared out of sight, the other four men appeared at the corner.[59] From what Mr O'Neill saw, Mr Kuru did not interact with the other men in any way. Mr O'Neill captured his vantage point in the following photo:

55 Notes on Evidence, p 649.
56 Notes on Evidence, p 650 at line 3.
57 Notes on Evidence, p 650 at line 15.
58 Notes on Evidence, p 668 at line 28.
59 Notes on Evidence, p 671 at line 27.

Ms Gibson

46. Ms Gibson said that after hearing the "bangs" she saw Mr Kuru come from Tiki Street onto Matipo Street. She last saw him when he was half-way across Matipo Street.[60] Then, 15 seconds after Mr Kuru went out of sight, she first saw the "*men with gang patches*."[61] Like Mr O'Neill, she said that Mr Kuru did not speak with or interact with the other four men in any way.[62]

Mr McKenzie

47. Mr McKenzie's account changed during his testimony. Initially, he said that the group of men caught up to Mr Kuru before all the men left in a Primera.[63] However, under cross-examination, he readily accepted that Mr Kuru did not get into the Primera at all.[64]

48. Once Mr McKenzie was shown Mr O'Neill's photo, he agreed that it was entirely possible that what he remembered was actually three men catching up with the man in the grey hoody, as depicted in one of the photos (rather than catching up with Mr Kuru).[65]

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60 Notes on Evidence, p 699 at line 17.
61 Notes on Evidence, p 699 at line 26.
62 Notes on Evidence, p 701 at line 1.
63 Notes on Evidence, p 758-761. Mr McKenzie described Mr Kuru as "the big lad".
64 Notes on Evidence, p 771 at line 31.
65 Notes on Evidence, p 767-769.

49. Thus, Mr McKenzie's final evidence was that he did not observe any interaction between Mr Kuru and the other men, nor did he see him getting into the Primera. Ultimately, his evidence was consistent with Mr O'Neill and Ms Gibson – there was no interaction between Mr Kuru and the other men.

Graham Brown & George Yandall

50. Graham Brown and George Yandall saw the men in gang patches returning to Matipo Street after the gunshots, but neither described a man with the distinctive physical build of Mr Kuru.

51. Graham Brown witnessed the men in gang patches returning to Matipo Street, but did not see a man with Mr Kuru's large build. He said that he could see the Primera coming out of Mr Kuru's driveway at 60 Matipo Street.[66] However, it was clear from Mr O'Neill's photograph (who was standing right beside him) that this was impossible, as Mr Brown was unable to see this driveway from his vantage point.[67] The photograph also showed that the Primera had been parked out 57 Matipo Street (near the residence of Messers Te Tua and Fantham-Baker) rather than 60 Matipo Street.

52. George Yandall initially suggested that some of the men who came from Tiki Street then travelled towards Matipo Street – "*probably number 60*".[68] In this respect, his evidence was inconsistent with the balance of the Crown witnesses. But his evidence also changed during cross-examination and it became clear that actually Mr Yandall saw two individuals entering 55 Matipo Street[69] and, at most, one unidentified man somewhere outside 60 Matipo Street.[70] Moreover,

66 Notes on Evidence, p 781 at line 31.
67 Notes on Evidence, p 771 at line 34.
68 Notes on Evidence, p 806 at line 18
69 Notes on Evidence, p 827 at line 8.
70 Notes on Evidence, p 840 at line 14.

from his vantage point, he could not see even if the individual went into the property or continued walking down Matipo Street.[71]

Evidence consistent with an absence of involvement or knowledge

53. There was also an array of evidence consistent with Mr Kuru's account – that he had no knowledge and no involvement.

Josiah Freisen's evidence

54. Josiah Freisen was the Crown's key witness. He was granted immunity against prosecution for murder and the Crown described him as being "in the thick" of the attack at Mr Ratana's residence.[72]

55. Mr Friesen's evidence was irreconcilable with the Crown's case against Mr Kuru. Although he gave unflinching evidence about his associates' involvement, he was adamant that Mr Kuru was not involved and that he did not see him before or during the attack:[73]

> Q. But as far as you know, as far as you know Damien had nothing to do with this, did he?
>
> A. As far as I know, yes.
>
> Q. And that was the case when you made your statement. In fact, that was the case when you made your initial statement with the lawyer Julian Hannam on the 17th of October. Damien not involved. It was also the case when you made your statement on the 25th of October, the main statement which you may still have in there. It was the case then, too, wasn't it?
>
> A. That is the case, yes.
>
> Q. And also, interestingly, after you'd gotten immunity and made a further statement where the police went fishing with you, figuratively, on the 13th of November, you said in your statement: "I have been asked if I can remember anything about my interactions with Damien Kuru later in the day after the shooting" and you said: "I can't remember anything more than I said in my first statement." So even after you got your immunity, it was still the same: as far as you knew, there was nothing?

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71 Notes on Evidence, p 836 at line 15; 840 at line 14.
72 **[Court of Appeal Casebook, Page 385].**
73 Notes on Evidence, p 1073.

A. Yeah.

56. This was powerful evidence supporting Mr Kuru. Mr Friesen was the only witness who participated in the attack on Mr Ratana and the Crown consistently advertised him as a credible and reliable witness.[74] But on this single point, the Crown said – without any evidential basis – that he was lying, presumably because his evidence was entirely inconsistent with its theory that Mr Kuru was involved. Mr Friesen's testimony is properly seen as a "obstacle evidence"[75] which created a reasonable doubt of guilt.

57. As a general point, it seems doubtful that the Crown can pick and choose when an immunity witness is to be believed without some other evidence demonstrating a lack of credibility or reliability on the point in issue.

Mr Kuru's conduct after the attack

58. One witness, Ms Catherine Burton, gave evidence that she retrieved her dog from her front yard on Tiki Street immediately after hearing the third gun shot.[76] While doing so, she encountered Mr Kuru.

59. Ms Burton did not connect Mr Kuru with the gunshots in any way.[77] She described a brief conversation with him about their shared experience of hearing the gunshots. She testified that he said something along the lines of "*strange eh*?" and accepted that he may also have said something like "*that doesn't sound good*."[78] There is no suggestion that the comments were feigned or disingenuous. Ms Burton confirmed that, during this encounter, Mr Kuru was not

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74 In its closing address, the Crown repeatedly told the jury that Mr Freisen was a reliable witness and that he was "telling the truth". See: **[CA Casebook at 298]**.

75 As described by the High Court of Australia in *Pell v The Queen* [2020] HCA 12. **[Appellant's Authorities, Tab 3].**

76 Notes on Evidence, p 1227 at line 25-30.

77 Notes on Evidence, p 1241 at line 14.

78 Notes on Evidence, p 1242 at line 28.

followed by any other people. Her best recollection was that there was no one else on Tiki Street at the time.[79]

60. Ms Burton' testimony placed Mr Kuru outside 6 Tiki Street immediately after the third shot. He was not running, he was not with a group, and his comments were consistent with a genuine lack of knowledge.

Mr Kuru's conduct at the meeting after the attack

61. The day after Mr Ratana's death, Mr Kuru organised a meeting with Black Power members. Josiah Friesen gave evidence that himself, Mr Kuru, Carlos Rippon, Uriah Rippon, Gordon Runga, Matthew Nepia and potentially others were present.[80]

62. Mr Freisen said that Mr Kuru took the lead at this meeting and was "*fucked off*".[81] He demanded to know who was there, who was responsible, and what had happened.[82] This meeting involved individuals who were not involved in the attack at all, demonstrating Mr Kuru's genuine lack of knowledge about the details of the attack.

63. The attendees at this meeting group did not give Mr Kuru any answers and he left "*in a rage*."[83] This shows the agency and subordinating tendencies of these Black Power members.

64. If Mr Kuru had sanctioned the attack on Mr Ratana, there would have been no need for this meeting. The Crown tried to explain this by arguing that Mr Kuru organised this meeting as an elaborate attempt to insulate himself from police suspicion. Once again, there was simply no evidence of this.

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79 Notes on Evidence, p 1244 at line 26.
80 Notes on Evidence, p 1070-1071.
81 Notes on Evidence, p 1073 at line 5.
82 Notes on Evidence, p 1071 at line 20-25.
83 Notes on Evidence, p 1073 at line 6.

Mr Kuru's conduct after the attack

65. Around 2pm on the afternoon of Mr Ratana's death, Mr Kuru passed through a police cordon with his partner and children. He spoke freely with two officers and allowed them to take his photo.[84] During this interaction, both officers observed that Mr Kuru was anxious about the safety of his children and was leaving Whanganui to keep away from danger.[85]

66. If Mr Kuru had any prior knowledge of the attack, he would have known that his family would have been an obvious target for retaliation. He therefore would have moved his family to a safe place *before* the attack occurred. Text messages and telecommunication data confirm that Mr Kuru and his family only left Whanganui *after* the attack.

67. Similarly, Detective Constable Burrett gave evidence that Mr Kuru's house was fortified with a make-shift construction several days after the attack.[86] Again, if Mr Kuru had prior knowledge of the attack, one would expect that the fortification and preparation for retaliation would have occurred *before* the attack.

68. Finally, when Mr Kuru spoke with police at the police cordon, he was wearing the same clothes he was wearing earlier – his distinctive brown oilskin vest and a light hoody.[87] Once again, if he had any involvement Mr Ratana's death, one would expect that he would have changed his clothing.

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84 Notes of Evidence, p 964 a line 8. See also: Exhibits at 289.

85 Notes on Evidence, p 965 at line 6-10 (Vincent HeiHei); p 1319 at line 3 (Luke Cranston).

86 Notes on Evidence, p 1295 at line 5-10.

87 **[Exhibits at 289]**

The jury's verdict was unreasonable

69. Damien Kuru has spent much of his adult life trying to bring a pro-social influence into his community. On several occasions, he has invited members from opposing gangs to help with this kaupapa.[88] The notion that he orchestrated an armed attack on another young man – on his own doorstep and with his own whānau just a block away – is an extraordinary proposition.

70. The Crown's case against Mr Kuru relied upon the jury drawing inferences from several strands of circumstantial evidence to find Mr Kuru guilty of manslaughter. But, as the previous paragraphs show, the collective strength of those strands was insufficient to support a guilty verdict. They "at best" created a "suspicion or a possibility or even a probability" that Mr Kuru knew about the plan to attack Mr Ratana.[89] That is not enough. Juries are "regularly directed, suspicion and/or probability is not enough."[90]

71. Overall, the evidence presented by the Crown fell "well short of proving that Mr Kuru knew of the plan, foresaw that an unlawful shooting was a probable consequence, and sanctioned the plan."[91]

72. The promise of the law is not that all guilty persons will be convicted. The promise is the innocent will not be. That is the genius of the onus and standard of proof. It injects caution into the process and protects against the risk of wrongful conviction. On an objective review of the evidence, there is a reasonable doubt about the guilt of Mr Kuru. The jury's guilty verdict was unreasonable and must be quashed.

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88 Dennis O'Reilly, Section 27 Report for Damien Kuru, at [38]. **[Supplementary Documents, Tab 1, Page 12]**

89 Court of Appeal Decision, above n 10, at [93], per Cull J. **[SC Casebook at 36-37]**

90 At [93], per Cull J. **[SC Casebook at 36-37]**

91 At [95], per Cull J. **[SC Casebook at 37]**

GROUND TWO: DETECTIVE INSPECTOR SCOTT'S EVIDENCE CAUSED A MISCARRIAGE OF JUSTICE

73. One explanation for the jury's unreasonable guilty verdict lies in the evidence of Detective Inspector Scott. Although he was called to provide an "expert opinion" on the operation of gangs in New Zealand, he ultimately told the jury that a crime of this nature "*would likely occur with the sanction of the president*".[92]

74. This evidence became the central focus of the Crown's case. As it was the only piece of evidence to suggest that Mr Kuru sanctioned the attack on Mr Ratana, the inescapable conclusion is that jury relied on it to find him guilty. This was impermissible and caused a miscarriage of justice.

Detective Inspector Scott's evidence

75. DI Craig Scott had been a member of the New Zealand Police for approximately 34 years at the time Mr Kuru's trial. Most of this time was spent in the Gisborne area. He had never worked in Whanganui.

76. The Crown called DI Scott to give expert evidence on the operation of gangs in New Zealand. In qualifying himself as an expert, he said: "*I have previously prepared formal statements and given evidence in both the District and High Court's in relation to gangs and gang related activity.*"[93] The Crown has now disclosed these previous statements. The results are alarming. It is abundantly clear that DI Scott recycles almost all the material contained in his written statements, as illustrated by Appendix A. They are boiler-plate documents which provide very little (if any) nuance or tailoring to the particular case.

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92 Notes on Evidence, p 1555-15556.

93 Statement of Detective Inspector Scott at [24]. See: [Notes of Evidence at 1555].

77. In Mr Kuru's case, DI Scott initially proposed making the following statements about the role of a gang president:[94]

> **THE PRESIDENT**
>
> 39. The President is the figurehead of the gang or chapter, and is the chairman at meetings.
>
> 40. In some gangs the President can also be known as the 'Prez or Captain'. He is a senior member who has developed into the recognised leader usually through a combination of personal strength, leadership skills and personality. He has the final authority over all chapter business and its members.
>
> 42. An organised gang crime against another gang **would only occur with the sanction of the president.**
>
> 43. The **president's authorisation would be required** due to the obvious risks and consequences that the particular gang would be exposed to which would likely include intense scrutiny by the Police and serious retaliation by the opposing gang.
>
> [Emphasis added]

78. Mr Kuru challenged this pre-trial, arguing that it was impermissibly unequivocal. Ellis J largely agreed, and ruled that the underlying allegation that the incident was an "organised gang hit" would have to be established by evidence.[95] Her Honour also ruled that DI Scott was to only express – in a "more contingent way" – that such an event was "unlikely" to occur without the President's knowledge and authorisation.[96] DI Scott was only permitted to speak "in general terms about his experience and knowledge of a President's role", but "no further than that."[97]

79. But DI Scott went much further. At trial, he provided – without any evidential basis – an opinion on the ultimate issue, stating: "*In my experience a (serious) organised gang crime against another gang*

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94 Gang Evidence Decision, above n 11, at [7]. **[Supplementary Material, Tab 2, Page 2]**. There must be a sense of unease that DI Scott – as an experienced expert witness – considered it appropriate to tell the jury that an organised gang crime of this nature would *only* occur with the sanction of the president.

95 At [17]. [**Supplementary Material, Tab 2, Page 6]**

96 At [17]-[18]. **[Supplementary Material, Tab 2, Page 6-7]**

97 At [17]. [**Supplementary Material, Tab 2, Page 6-7]**

would likely *occur with the sanction of the president*."[98] This contravened Ellis J's ruling, as Cull J explained:[99]

> Despite the amendment and the Judge's caution that the Detective Inspector could go no further than speaking in general terms about his experience and knowledge of a President's role, the Detective Inspector's evidence was the key piece of evidence to fill the gap in the Crown's case against Mr Kuru.

80. DI Scott's evidence then became "the focus of the Crown's case."[100] This is evident from the Crown's closing address, in which the first four transcribed pages (approx 12 minutes) are spent discussing DI Scott's evidence. This included telling the jury that the entire case should be viewed through the "lens" provided by DI Scott.[101]

81. On appeal, Mr Kuru argued that DI Scott's evidence, and the way the prosecution used it, caused a miscarriage of justice. Counsel's written submissions comprehensively canvassed the risks associated with police officers purporting to provide expert evidence about gangs. But the Court of Appeal majority did not address (nor acknowledge) these risks and were content to treat DI Scott's evidence the same as any other expert evidence:[102]

> Police officers may be qualified as experts and be permitted to give expert evidence provided the usual rules concerning the qualification of experts and the way they give their evidence is strictly adhered to.

82. With respect, this approach failed to recognise the unique issues associated with this type of evidence and how it can cause miscarriages of justice – as it did here. Relying on the "usual rules" is not sufficient. Because of its "incendiary"[103] and "highly inflammatory" nature, courts should "carefully scrutinise" this evidence before admitting it.[104]

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98 Notes of Evidence, p 1555-15556 [Emphasis added].
99 Court of Appeal Decision, above n 10, at [102]. **[SC Casebook at 39]**
100 At [102]. **[SC Casebook at 39]**
101 **[CA Casebook at 267]**
102 At [58]. **[SC Casebook at 29]**
103 *Gutierrez v. State*, 32 A.3d 2, 13 (Md. 2011).
104 *People v. Williams,* 940 P.2d 710 (Cal. 1997).

Expert gang evidence from police officers is problematic and requires a cautious approach

83. Across comparable jurisdictions, courts and academics recognise the dangers of police officers giving expert evidence about gangs. Although this evidence may have utility in some cases, if left unchecked it can "be used to unfairly disadvantage the defendant and even threaten the constitutional right to a fair trial."[105]

84. As the following paragraphs explain, police officers are rarely experts on gangs and often lack impartiality. When they do give expert evidence about gangs, their evidence is often unreliable, contains hearsay and propensity evidence, and disproportionately disadvantages Māori.

Police officers are rarely "experts" on gangs

85. The Evidence Act 2006 creates a framework for admitting expert opinion evidence. For these purposes, an "expert" is a person who "has specialised knowledge or skill based on training, study, or experience."[106]

86. In certain circumstances, police officers may properly qualify as an expert. But, as the Privy Council has cautioned in relation to gang evidence, "care must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise."[107] Because gang evidence carries a risk of unreliability and unfair prejudice, judges should be "much more robust than they

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105 Hon Jack Nevin "Conviction, Confrontation, and *Crawford*: Gang Expert Testimony as Testimonial Hearsay" (2011) 34 Seattle Law Review at 857. **[Appellant's Authorities, Tab 4, Page 17]**

106 Evidence Act 2006, s 4.

107 *Myers v The Queen* [2015] UKPC 40 at [58]. **[Appellant's Authorities, Tab 4, Page 22]**

typically have been in insisting that such experts demonstrate the reliability of their expertise."[108]

87. Police officers are not – by virtue of their occupation alone – experts on gangs. Gangs are studied by individuals with specialised training in fields such as ethnography, sociology, and psychology.[109] True experts in these fields have advanced degrees and are subject to "ethical standards that warn against manipulating data to advance their personal objectives."[110] They are also required to conduct field research and "immerse themselves into the setting in which the group operates."[111]

88. By contrast, police officers obtain their "expertise" from on-the-job experience and education sessions prepared and delivered by other police officers. The content of these sessions is not publicly available, making it impossible to scrutinise their substance. While they might make police officers experts at policing and prosecuting gangs, these sessions are unlikely make them experts on "sociological topics such as "gang sociology" or "gang culture.""[112] In the United States, equivalent sessions have been described as "non-academic",[113] "cursory," "outdated," and "unhelpful".[114]

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108 Tony Ward and Shahrzad Fouladvand "Bodies of Knowledge and Robes of Expertise: Expert Evidence About Drugs, Gangs, and Human Trafficking" Criminal Law Review (6) 442-460 at 460. **[Appellant's Authorities, Tab 4, Page 18]**

109 Christopher McGinnis and Sarah Eisenhart "Interrogation is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology" (2010) 7(1) Hastings Race and Poverty Law Journal 111. **[Appellant's Authorities, Tab 7]**. The Californian Supreme Court has accepted that gang expert testimony falls within the field of "sociology": *People v. Gardeley*, 927 P.2d 713, 722 (Cal. 1996).

110 Sara Hildebrand "Racialized Implications of Officer Gang Expert Testimony" (2022) 92(1) Mississippi LJ 156 at 169. **[Appellant's Authorities, Tab 8, Page 15]**

111 At 169. **[Appellant's Authorities, Tab 8, Page 15]**. There are several such experts in New Zealand. For example, Dr Jarrod Gilbert and David Haslett respectively have PhD and Masters degrees focusing on gangs in New Zealand

112 Magdalena Ridley "Down by Law: Police Officers as Gang Sociology Experts" (2016) 52 Crim. Law. Bulletin. at p 23. **[Appellant's Authorities, Tab 9, Page 23]**

113 At page 27. **[Appellant's Authorities, Tab 9, Page 27]**

114 Anna Lvovsky "The Judicial Presumption of Police Expertise" (2017) 130 Harv. L. Rev. 1995 at 2013-2014.

89. Experience obtained through on-the-job experience is no more helpful. Because interactions between police and gang members "generally occur in antagonistic circumstances", Dr Jarrod Gilbert states that police are "unable to get close enough to gang members to gain a true sense of the gang scene".[115]

Police officers may lack impartiality

90. In appropriate circumstances, police officers may provide independent expert evidence in criminal trials.[116] But again, the Privy Council has cautioned that compliance with the exacting standards of an expert witness "can be difficult for a police officer who is effectively combining the duties of active investigator (if not of the current case) with those of independent expert."[117]

91. This is particularly difficult with gangs. The New Zealand Police adopt an openly adversarial stance towards gangs. It implements specialised suppression programmes to "target,"[118] "tackle",[119] and "crack down" on gangs, then work closely with prosecutors to build cases and secure convictions. Individual police officers routinely monitor, servile, investigate, and arrest gang members.

92. As a result, there is a "widespread, an often deeply held, disdain for gangs within the police."[120] This contributes to a phenomenon called "Blue Vision" – a "form of 'group think' or cognitive dissonance whereby officers only accept information supports their preconceived

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115 Jarrod Gilbert *Patched* (Auckland University Press, 2013) at Chapter 8.
116 See: *R v Oakley* (1980) 70 Cr App R 7 (Crim App) at 9-10.
117 *Myers v The Queen*, above n 107, at [60]. **[Appellant's Authorities, Tab 5, Page 23]**
118 New Zealand Police "Operation Cobalt passes new milestone: 50,000 charges laid; 500 firearms seized" (6 September 2023).
119 New Zealand Police *New Zealand Police Annual Report 2021* (Auckland, June 2023) at 13.
120 Jarrod Gilbert *Patched* (Auckland University Press, 2013) at Chapter 8.

notions of gangs and dismiss counter-evidence".[121] As Dr Jarrod Gilbert explains:[122]

> On the basis that gangs are an affront to the principles they are charged with upholding, many within the police seem drawn to information that highlights negatives and ignores positives, which thereby works as a shutter against information that does not support the view that has built up about gangs as inherently criminal entities.

93. There is a real risk that – consciously or unconsciously – police officers giving expert evidence on gangs will not meet the high standards of independence and neutrality demanded of experts. These concerns are present across comparable jurisdictions. In the United Kingdom, a recent report commented that "the use of police officers as experts amounts to no more than the prosecution calling itself to give evidence."[123]

Police expert gang evidence is unreliable

94. Because jurors often place "blind faith" in the accuracy of police expert testimony, it can be "extremely dangerous" if it is admitted without a "searching inquiry into its reliability."[124]

95. The study of gangs falls within the field of social science.[125] Social science research follows a standardised methodology involving a hypothesis, data collection, and objective analysis.[126] If a proper methodology is not used, this process is "rife with possibility for errors that can lead to collection of unreliable data … and unreliable conclusions."[127]

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121 Ibid.
122 Ibid.
123 Tony Ward and Shahrzad Fouladvand, above n 108, at 460. **[Appellant's Authorities, Tab 6, Page 18]**
124 Sara Hildebrand, above n 110, at 181. **[Appellant's Authorities, Tab 6, Page 27]**
125 Christopher McGinnis and Sarah Eisenhart, above n 109. **Appellant's Authorities, Tab 7]**. *People v. Gardeley*, 927 P.2d 713, 722 (Cal. 1996).
126 Sara Hildebrand, above n 110, at 169. **[Appellant's Authorities, Tab 8, Page 15]**
127 At 173. **[Appellant's Authorities, Tab 8, Page 19]**

96. It is a basic tenet of social science that diversity of individual characteristics makes it "exceedingly difficult to draw valid generalisations from even the most careful observation."[128] Despite this, police gang experts often declare:[129]

> what gangs and gang members think, why they take the actions they do, and what is a probable result of those actions, all without a clear analytical methodology, much less one that accords with sociological standards.

97. Police officers do not follow a standardised methodology to form their opinions about gangs. Instead, they base their opinions on individual experiences – both in the field and internal police training sessions.[130] Reflecting on these methods, Dr Jarrod Gilbert explains that:[131]

> … much of the gang intelligence collected by police is informally gathered and comes from either paid informants or others who have a vested interested (such as those seeking bail, getting charges reduced, and so on), or via street information that is often based on rumour or misinformation.

98. Unsurprisingly, much of this information "proves to be false – often ridiculously so."[132] In his Masters Dissertation, former Detective Dave Haslett says that these issues create "considerable room for distortion of fact, prejudice, and outright misinformation and mythmaking".[133] The same issues arise in the United States, where the methods by which police officers formulate their opinions about gangs have been "widely criticised" as "unreliable".[134]

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128 Magdalena Ridley, above n 112, at p 33 citing: Stuart Chapin, The Elements of Scientific Method in Sociology, 20 Amer. J. of Sociology 3, 371 (1914). **[Appellant's Authorities, Tab 9, Page 33]**

129 At p 34. **[Appellant's Authorities, Tab 9, Page 34]**

130 Fareed Nassor Hayat "Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases" 51 (2021) N.M. L. REV. 196 at 202-204. **[Appellant's Authorities, Tab 11].**

131 Jarrod Gilbert *Patched* (Auckland University Press, 2013).

132 Ibid.

133 David Haslett "Riding at the Margins" (Masters Dissertation, University of Canterbury, 2007) at 128. This does not only occur with gang evidence, for years police officers purported to be experts in calculating yields of cannabis plots, but consistently overstated those yields. See: See: *R v Taylor* HC Rotorua CRI-2009-077-806, 13 November 2009.

134 Magdalena Ridley, above n 112, p. 23. **[Appellant's Authorities, Tab 9, Page 23].**

99. When a police officer substitutes their personal training and experience for a reliable methodology, it can quickly lead to unreliable results.[135]

Police expert gang evidence contains hearsay evidence

100. The dangers of hearsay evidence are well-known. The "central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability."[136] As the Canadian Supreme Court cautions:[137]

> Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts.

101. The common law has long-imposed rules protecting criminal defendants from the dangers of hearsay evidence.[138] This is now codified under s 17 of the Evidence Act 2006, which states that a hearsay statement is not admissible unless it falls within one of the statutory exceptions.[139]

102. Although it is "well established" that an expert witness may draw upon a general body of knowledge when giving evidence, that does not mean that expert witnesses are "immune from all inhibition on hearsay."[140]

103. Police officers obtain much of their "expertise" about gangs from conversations with gang members or other police officers (who, in turn, likely obtained it from conversations with gang members).[141]

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135 Magdalena Ridley, above n 112, p. 34. **[Appellant's Authorities, Tab 9, Page 23].**
136 *Khelawon v R* [2006] 2 SCR 787, 2006 SCC 57.
137 At [2].
138 See: *Myers v DPP* [1965] AC 1001 at 1021.
139 *Gwaze v R* [2010] NZSC 52; (2010) 24 CRNZ 702 at [44].
140 *Myers v The Queen*, above n 107, at [63]. **[Appellant's Authorities, Tab 5, Page 24].**
141 Jarrod Gilbert *Patched* (Auckland University Press, 2013) at Chapter 8.

When police officers give "expert evidence" at trial, they are often reciting information they obtained during these conversations.

104. Although the presence of hearsay ought not disqualify police officers from giving expert evidence about gangs, the reliance on hearsay statements casts further doubt on the reliability of such evidence.

Police expert gang evidence contains propensity evidence

105. The dangers of propensity evidence are equally well-known. Because people often behave differently in different situations, an individual's past acts will seldom carry significant probative value. Even less probative are the past acts of *other* people.

106. Jurors often fail to recognise this, which creates a real risk of unfair prejudice. First, there is the risk that the presumption of innocence will be eroded if jurors give too much weight to evidence of past behaviour.[142] Second, the jury may consider the defendant as "bad" and worthy of punishment.[143]

107. To protect against these dangers, the Evidence Act 2006 tightly regulates the use of propensity evidence. The prosecution may only offer propensity evidence if "the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant."[144]

108. But DI Scott's evidence frequently goes further than this. He tells the jury how gang members – as a uniform class of people – typically

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142 Law Commission *Disclosure to Court of Defendant's Previous Convictions, Similar Offending and Bad Character* (NZLC R103, 2008) at [8.11].

143 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 591.

144 Evidence Act 2006, s 43.

behave in certain situations.[145] His opinion is then used to support allegations of how the defendant acted in the particular case. Ordinarily, and quite rightly, the way a class of people "typically" behave in a situation is deemed logically irrelevant and misleading for juries.

Police expert gang evidence creates a high risk of unfair prejudice

109. Jurors tend to weigh expert evidence more heavily than ordinary evidence because of its "mystic infallibility".[146] This is exacerbated when the expert witness is a police officer, who often carry an additional "cloak of authority."[147] The problem was stark in this case, as the Crown told the jury that the "whole event" should be viewed through the "lens" provided by DI Scott.[148]

110. Because jurors rarely have first-hand experience with gangs, they usually "rely heavily on officer expert testimony to bolster their understanding."[149] In an adversarial dispute, the police gang expert will often represent the only seemingly objective source of information, offering the jury a "much sought-after hook on which to

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145 For example, in 18 separate cases DI Scott has filed an expert Brief of Evidence with the following absolute statements: "A prospect is expected to obey all instructions given by patched members of that chapter" and "A prospect is expected to put the chapter and its activities above all else including the prospects family."

146 *Daubert v. Merrell Dow Pharm*, 509 U.S. 579, 592 (1993).

147 *Keil v Police* [2017] NZCA 430 at [39]. See also: Patrick Mark Mahoney, "Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions: Did *Gardeley* Go Too Far?" (2004) 31 Hastings Constitutional Law Quarterly 385, saying: "many jurors believe that police officers possess an "'aura of special reliability and trustworthiness."

148 **[CA Casebook at 267]**. In full:

> *Yes, may it please the Court, yes, good morning, Mr Foreperson, members of the jury, I want to start with the evidence from the gang expert, Detective Inspector Craig Scott, because this is a gang shooting and it's that gang context that I suggest this whole event needs to be looked at and considered in. That's the lens, if you like, that we should look through to understand what has gone on here and put briefly, Detective Inspector Scott provides us with that lens.*

149 Sara Hildebrand, above n 110, at 167. **[Appellant's Authorities, Tab 8, Page 13]**

hang its hat."[150] As a result, they have a "unique ability" to shape the course of a trial.[151]

111. This carries serious risks. Although veiled as an independent expert, it remains a police officer giving their opinion about how a criminal case should be decided. By allowing a police officer to testify as an expert on about gangs – evidence that is already inflammatory – carries increased influence upon the jury. As the Privy Council warned in *Pora v R*, there are dangers inherent in an "expert expressing an opinion as an unalterable truth" where "the opinion is on a matter which is central to the decision to be taken by a jury."[152]

Police expert gang evidence disproportionately disadvantages Māori men

112. As of December 2022, 100% of the individuals on the National Gang List were men and 76% were Māori.[153] If the Crown routinely relies on unreliable expert evidence from police officers to convict "gang members", this will disproportionally disadvantage young Māori men.

Conclusion

113. All of these issues are unique to this type of evidence. They create a perfect storm of prejudice and risk undermining a defendant's right to a fair trial. Accordingly, a distinctly cautious approach is required.

114. Police expert gang evidence allows prosecutors to cast a wide net to establish criminal liability for seemingly innocent behavior that are

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150 *People v. Keister* No. 340931 (Mich. Ct. App. Oct. 29, 2020); *People v Carver* (Mich. Ct. App. Aug 29, 2017); *People v. Beckley* 456 NW2d 391 (1990).

151 Jacob Guerard "Police Officers as Gang Experts: A Call for Stricter Standards for Admitting Gang Expert Testimony" 38 (2017) U. LA. Verne L. Rev. 235.

152 *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [27].

153 New Zealand Police *National Gang List* (December 2022).

not obviously related to the alleged crime.[154] Courts and jurors ought to be aware of the risks of this evidence and proceed with caution.

115. Police gang evidence also places the defendant in an impossible position.[155] If they attempt to discredit it, they will have to comprehensively explain to the jury the reliability concerns of this evidence. This runs the risk of simply emphasising it. But if the defendant chooses not to address this evidence – as Mr Kuru did – its reliability is left uncontested and the jury's prejudices are left unchecked.

Judicial treatment of police officer expert evidence about gangs in New Zealand and abroad

New Zealand

116. The leading case in New Zealand is *Thacker v R*.[156] Three defendants were charged with raping a woman in a vehicle. The Crown alleged that the offending was committed in a gang context and called a police officer to provide expert evidence on two gang-related matters. First, that the Tribesmen gang commonly address each other as "Co".[157] Second, that "prospects" are required to demonstrate loyalty to the gang, which extends to committing criminal acts.[158]

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154 Christopher McGinnis and Sarah Eisenhart, above n 109, at 126. **[Appellant's Authorities, Tab 7, Page 17]**

155 As the Privy Council's explained in *Myers*, above n 107, at [72]. **[Appellant's Authorities, Tab 5, Pages 27-28]:**

> …it is necessary for the judge in every case to look carefully at the overall effect of gang evidence and to reach a judgment as to the balance between legitimate probative value and unfair prejudicial effect. When assessing that balance, a highly relevant consideration is the ability of the defendant to test the evidence. It is likely to be unfair for the witness to state a bald conclusion such as "I consider X to be a member of the M gang". The defence cannot be expected to embark upon speculative cross-examination as to the basis for such a conclusion, at the risk of inadvertently eliciting either inadmissible or unfair information.

156 *Thacker v R* [2019] NZCA 182. **[Appellant's Authorities, Tab 12]**

157 This was relevant because the complainant heard her attackers calling each other "Co".

158 At [11]-[12]. **[Appellant's Authorities, Tab 12, Page 4]**

117. Importantly, there was direct evidence that one of the defendants "raped the complainant first, and that the other two defendants then complied with an instruction by him that they were also to rape her."[159] The expert evidence provided contextual information to help the jury *interpret* this piece of direct evidence. It informed the jury that, while it may be difficult to believe that a young man would rape someone just because another person told them to do so, the dynamics of gang prospects might provide an answer.

118. This can be readily distinguished. In the present case, there was no evidence that the jury needed assistance construing or interpreting. There was nothing that Mr Kuru (or anybody else) did or said that indicated he sanctioned the plan to attack Mr Ratana.[160]

United Kingdom

119. The leading case in the United Kingdom is *Myers v The Queen*, in which the Privy Council heard three appeals from the Bermuda Court of Appeal.[161] In all three appeals, the appellants challenged the admissibility of police expert evidence on the operation of gangs.[162]

120. The Board said that the ambit of gang evidence will depend on what "legitimate role it may have in helping the jury to resolve one or more issues in the case."[163] Although some police officers may give expert evidence about the "practice, mores, and associations of gangs", the Board emphasised "two important provisos."[164]

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159 At [8]. **[Appellant's Authorities, Tab 12, Page 3]**

160 At [19]-[21]. **[Appellant's Authorities, Tab 12, Page 6]**. This Court denied leave to appeal in *Thacker v R* [2021] NZSC 89.

161 *Myers v The Queen* [2015] UKPC 40.

162 The officer, Sergeant Rollin, was a member of a small police unit charged with targeting gangs in Bermuda. He regularly patrolled the street where gangs congregated, spoke to their members, and had undergone specialist training in gang monitoring and study from the FBI.

163 At [56]. **[Appellant's Authorities, Tab 5, Page 21]**

164 At [58]. **[Appellant's Authorities, Tab 5, Page 21]**

121. First, police officers must satisfy the "ordinary threshold requirements for expertise."[165] The Board cautioned that "care must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise".[166] Police officer must have:[167]

> made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact.

122. Second, even if a police officer qualifies as an expert, they must comply with the "same duties to the court as does any other expert."[168] They should "state the facts or assumptions on which their opinion is based"[169] and make "full disclosure" of the nature of their material. This includes "at least" the following:[170]

    a. They must set out their qualifications to give expert evidence.

    b. They must not only state their conclusions, but also how they arrived at them. If they are based on their own observations or contacts with particular persons, they must say so. If they are based on information provided by other officers they must show how it is collected and exchanged and, if recorded, how. If they are based on informers, they must at least acknowledge that such is one source, although of course they need not name them.

    c. In relation to primary conclusions in relation to the defendant or other key persons, the officer must go beyond a mere general statement that they have sources of kinds A, B and

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165 At [58]. **[Appellant's Authorities, Tab 5, Page 22]**
166 At [58]. **[Appellant's Authorities, Tab 5, Page 22]**
167 At [58]. **[Appellant's Authorities, Tab 5, Page 22]**
168 At [59]. **[Appellant's Authorities, Tab 5, Page 23]** See: *R v Harris* [2005] EWCA Crim 198 at [271]-[272].
169 At [59]. **[Appellant's Authorities, Tab 5, Page 23]**
170 At [68]. **[Appellant's Authorities, Tab 5, Page 26-27]**

C, but must say whence the particular information they are advancing has come.

123. Because "compliance with these exacting standards can be difficult for a police officer", it is "particularly important" that a police expert witness should:[171]

> fully understand that once he is tendered as an expert he is not simply a part of the prosecution team, but has a separate duty to the court to give independent evidence, whichever side it may favour. **In particular a police expert needs to be especially conscious of the duty to state fully any material which weighs against any proposition which he is advancing, as well as all the evidence on which he has based that proposition.**
>
> [Emphasis added]

124. In *Myers*, the police officer's evidence "contained a number of bare assertions, unsupported by the basis for them."[172] In these statements, the officer did not "sufficiently distinguish between assertions based on his own observations and contacts and those to which others had contributed."[173] This left the defence to explore what the sources were in "speculative cross examination before the jury".[174] It also left the jury with "over-generalised assertions".[175] These statements were inadmissible and should have been excluded.[176]

Australia

125. In Australia, judicial discussion of the admissibility of opinion evidence about the nature, structure and conduct of gangs is "sparse."[177]

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171 At [60]. **[Appellant's Authorities, Tab 5, Page 23-24].** Excuse the gendered language in the original.
172 At [70]. **[Appellant's Authorities, Tab 5, Page 27]**
173 At [70]. **[Appellant's Authorities, Tab 5, Page 27]**
174 At [70]. **[Appellant's Authorities, Tab 5, Page 27]**
175 At [70]. **[Appellant's Authorities, Tab 5, Page 27]**
176 At [73]. Although the statements should have been excluded, no miscarriage of justice occurred as they did not have a significant impact on the trial.
177 *R v Cluse* [2014] SASCFC 97 at [7], per Kouraskis CJ.

126. In some cases, police officers have been permitted to give expert evidence about gangs.[178] When this evidence is based on police intelligence, the Chief Justice of South Australia has said that it "must be founded in a course of study or special experience" and "informed by reliable data."[179] This information must be "systematically collected and validated data confirmed from a variety of sources which may include personal experience".[180] These comments have been cited in later cases.[181]

This case illustrates the issues with police officers giving expert gang evidence: DI Scott's evidence caused a miscarriage of justice

127. In this case, the use and effect of DI Scott's evidence caused a miscarriage of justice. His evidence should have been excluded under ss 8 or 25 of the Evidence Act. As this evidence was the central feature of the Crown's case, Mr Kuru's appeal must be allowed.[182]

DI Scott's evidence should have been excluded under s 8 of the Evidence Act 2006

128. Section 8 of the Evidence Act inquires whether "the connection between the evidence and proof is 'worth the price to be paid by admitting it in evidence.'"[183] In this case, the answer was no.

178 See: *R v Cluse*, above n 177; *R v Hawi (No 1)* (2011) NSWSC 1647; *R v Pringle* [2017] SASCFC 9.
179 At [2].
180 At [2].
181 See: *R v Hawi (No 1)* (2011) NSWSC 1647; *R v Pringle* [2017] SASCFC 9.
182 Criminal Procedure Act 2011, s 232(2)(a).
183 *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [62], per Elias CJ and Blanchard J.

DI Scott's evidence had minimal probative value

129. Unlike in *Thacker v R*[184] and *Poutai v R*,[185] DI Scott's evidence did not assist the jury understand a discrete piece of direct evidence. Instead he provided an "expert opinion" on the central issue in the case – an issue on which there was no direct evidence.

130. Although his evidence likely made a strong impression on the jury, it had little probative value:

    a. First, DI Scott is not an expert on the Whanganui Black Power, nor has he ever met Mr Kuru or any of the other defendants. His opinion was based entirely on his anecdotal experience with other, unspecified, "serious organised gang crimes."[186] Gangs in New Zealand are not monolithic, they are notoriously chaotic, disparate, and dynamic. As Dr Jarrod Gilbert explains, generalities alone will often "lead to conclusions that are demonstrably unsafe."[187] For this reason, he "strongly caution[s] against an overreliance" on a "traditional view" when "examining specific incidents".[188]

    b. Second, DI Scott failed to "set out the facts upon which" his opinion relied.[189] He told the jury that his opinion was based on his "experience" but failed to explain what that meant.

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184 *R v Thacker* [2019] NZCA 182. In *Thacker*, the expert evidence provided contextual information to help the jury interpret direct evidence of prospects being instructed to rape the complainant. It informed the jury that, while it may be difficult to believe that a young man would rape someone just because another person told them to do so, the dynamics of gang prospects could help explain this. **[Appellant's Authorities, Tab 12]**

185 *Poutai v R* [2010] NZCA 182. In *Poutahi*, the Crown alleged that the defendant, a senior gang member, had instructed junior gang members to attack a prison inmate who belonged to a rival gang. Two prison officers gave evidence about the defendant's gang affiliations, which painted a picture of the offending in conjunction with, and as explanatory of, the other direct evidence. **[Appellant's Authorities, Tab 13]**

186 Making matters worse, his experience was acquired in Gisborne, not Whanganui.

187 Jarrod Gilbert, Brief of Evidence, at 4.11. **[CA Additional Materials, Tab 3, Page 6]**.

188 Ibid.

189 *R v Turner* [1975] 1 QB 834 at 840.

Contrary to the Privy Council's guidance in *Myers,* he did not identify whether his opinion was based on his "own observations or contact with particular persons."[190] Without this, his opinion was a bare assertion without a legitimate foundation.

c. Third, DI Scott's opinion was grounded upon illegitimate propensity reasoning. He reasoned that, because other (unspecified) gang presidents have sanctioned attacks on rival gangs, it is likely that Mr Kuru did so too.[191]

d. Fourth, DI Scott's opinion was informed by hearsay evidence. He said that he obtained his expertise from "association with gang informants in Gisborne", receiving "intelligence on gang related offending and their members", and attending "gang conferences and workshops held at the Royal New Zealand Police College".[192] None of this material was before the jury. The substance underlying his "expertise" remains unknown.

e. Fifth, he failed to provide any material which weighed against his proposition.[193] For example, he did not tell the jury that gangs and individual gang chapters have different internal cultures and ways of operating. Nor did he tell the jury that events may occur spontaneously and without the knowledge of the President. As an independent expert, DI Scott should have been aware of this. His failure to include it in his evidence provided the jury with an incomplete picture.

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190 As the Privy Council required in *Myers*, above n 107, at [68](b). **[Appellant's Authorities, Tab 5, Page 26]**

191 Although, as mentioned above, DI Scott did not set out the facts underpinning his decision. It is thus unclear which "other gang presidents" he is referring to.

192 Statement of Detective Inspector Scott at [7]-[18].

193 In *Myers*, the Privy Council said at [60] that an expert witness must has a duty to "state fully any material which weighs against any proposition which [they are] advancing". **[Appellant's Authorities, Tab 5, Page 23]**

131. These factors significantly reduced the reliability and probative effect of DI Scott's evidence.

DI Scott's evidence was unfairly prejudicial

132. At the same time, DI Scott's evidence caused significant unfair prejudice. The Crown provided no direct evidence to suggest that Mr Kuru was aware of the planned attack – no witnesses, no telecommunications, no inculpatory statements. DI Scott's evidence stood alone to support a narrative that was otherwise absent on the evidence.

133. In an article titled *Prosecuting Gang Cases: What Local Prosecutors Need to Know,* American prosecutor Alan Jackson provides an alarming blueprint of how prosecutors can use expert gang evidence to "shore up a number of elements that would otherwise be lacking" and ultimately obtain a conviction.[194] He gives the following example:

> A youngster rides up on a bicycle and fires a bullet into the man's head, killing him. There is no connection between the two. Jurors yearn for an explanation; the gang expert provides one. The expert will explain that in the most violent gangs, recruits must show loyalty to their brethren by committing murder.

134. The Crown followed this blueprint expertly. In this case, a group of Black Power members congregated and descended on Mr Ratana's residence armed with firearms. One of them shot and killed him. Despite no direct evidence that Mr Kuru was aware of the plan, DI Scott offered the jury a speculative and unreliable theory that, as the President, he "must have known".

135. Providing the jury with expert evidence to understand *why* an instruction may have taken is one thing. However, permitting DI Scott to opine *if* an instruction occurred at all, without any evidential basis for doing so, is quite another.

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194 Alan Jackson "Prosecuting Gang Cases: What Local Prosecutors Need to Know" (Prosecutor, April-June 2008) at 32. **[Appellant's Authorities, Tab 14, Page 2]**

136. Although Ellis J rightly cautioned the jury about DI Scott's evidence, the damage was already done. In her dissent, Cull J explained that DI Scott's evidence, and the way in which the Crown used it, led the jury into impermissible deductive reasoning, namely:[195]

> Presidents of gangs know about and sanction rival gang attacks; this was a rival gang attack by Black Power on the Mongrel Mob; Mr Kuru is a gang President; and therefore, he must have known and sanctioned this rival gang attack.

137. The prejudicial value of DI Scott's evidence significantly outweighed any probative effect it might have had. It should have been excluded.

DI Scott's evidence should have been excluded under s 25(1) of the Evidence Act

138. Section 25(1) of the Evidence Act 2006, reads:

> **25 Admissibility of expert opinion evidence**
>
> (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

139. The requirement that the evidence be *substantially* helpful creates a "higher threshold than simple probativeness."[196] This requires consideration of an "amalgam of relevance, reliability and probative value in assessing the admissibility of expert evidence."[197]

140. Expert evidence is supposed to "help the jury understand the significance of case-specific facts proven by competent evidence, not to place before the jury otherwise unsubstantiated assertions of fact."[198] But that is precisely what DI Scott did.

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195 Court of Appeal Decision, above n 10, at [106]. **[SC Casebook at 40]**

196 *Robinson v R* [2014] NZCA 249 at [26]; *Platt v R* [2010] NZCA 43 at [39]; *Lichtwark v R* [2014] NZCA 112 at [27].

197 *Mahomed v R* [2010] NZCA 419 at [35].

198 *People v Valencia* B283588 (Cal. Ct. App. Aug. 5, 2019) at 19.

141. As outlined above, DI Scott's opinion about the likelihood of a President sanctioning an attack against a rival gang was unreliable, unsubstantiated, and carried minimal probative weight. It certainly did not substantially help the jury and, for that reason, it should have been excluded.

Conclusion

142. Without DI Scott's evidence, there was not a single piece of evidence that Mr Kuru knew about the plan. To fill this evidential gap, the Crown employed a police "expert" to invite the jury to accept – based on his expertise alone – that Mr Kuru "must have" known about the plan and accordingly "must have" sanctioned it. Respectfully, that cannot be correct. It is precisely the sort of speculative train of reasoning the law has long disdained.

GROUND THREE: THE JURY WAS MISDIRECTED REGARDING PARTY LIABILITY

143. Section 66(2) of the Crimes Act 1961 provides:

> **66 Parties to offences**
>
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

144. There is a growing appreciation that the current application of s 66(2) yields unjust outcomes.[199] Indeed, that issue is presently before this Court in *Burke v R*.[200] The outcome in *Burke* may well dictate the outcome in Mr Kuru's case.

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199 This appreciation is emerging from all corners. The prosecutor in Mr Kuru's case appeared before this Court in *Burke v R* on behalf of the Criminal Bar Association deprecating the use of s 66(2) in precisely the circumstances as occurred here.

200 *Burke v R* SC 75/2022.

Mr Kuru's proposed approach to s 66(2)

145. Mr Kuru adopts the same position as he did in the Court of Appeal, which broadly aligns with the Appellants in *Burke*, the Criminal Bar Association, and Te Matakahi | Defence Lawyers Association of New Zealand. This can be distilled down to the following points:

    a. A secondary party is guilty of any offence committed by a principal in the prosecution of a common purpose, provided the commission of that offence was a probable consequence.

    b. The essential ingredients for manslaughter are: (i) the killing of any person (ii) by any unlawful act. Accordingly, for a party to liable for manslaughter under s 66(2) they must have foreseen death as a probable consequence of the common purpose.

    c. The term "probable consequence" ought to follow its ordinary meaning.[201] That requires, at least, that the consequence is more likely than not.

Application of s 66(2) to Mr Kuru's case

146. At Mr Kuru's trial, the Crown argued that he was part of a group which held a common intention to threaten Mr Ratana and damage his property, while being accompanied by firearms.

147. The jury was instructed that they could find Mr Kuru guilty merely if he knew a shooting "*might well happen*".[202] This set the bar too low. By merely *implicitly authorising* a plan to damage Mr Ratana's car,

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201 Regrettably, courts have read down the meaning of "probable consequence" to mean less than it should, e.g. "a real or substantial risk" and "could well happen". Indeed, in this case the trial judge instructed the jury that they could find Mr Kuru guilty merely if he knew a shooting "*might well happen*". This has rightly received academic criticism, see: Julia Tolmie "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441.

202 **[CA Casebook at 419]**

while remaining entirely unaware that Mr Ratana *may* present a firearm and a firearm *might be used* in response, the jury was able to find Mr Kuru guilty of manslaughter. This chain of reasoning is too speculative and fails to provide a satisfactory foundation for a finding of culpable homicide.

148. This is another tragic case in which an individual was convicted of a homicide under s 66(2) despite not being at the crime scene. As Elias CJ observed in *Ahsin*, it is "impossible" not regard such cases with a sense of "anxiety".[203]

Dated: 29 February 2024

CWJ Stevenson **Oliver Fredrickson**

To: *The Registrar of the Supreme Court of New Zealand*
And to: *Crown Law*

[203] *Ahsin v R* [2013] NZSC 153 at [23].