IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA SC61/2023

BETWEEN	**DAMIEN KURU**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS

31 January 2024

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COUNSEL FOR THE RESPONDENT'S CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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Issues

1. Mr Ratana, a patched Mongrel Mob member, began living in a Black Power part of Whanganui. His presence antagonised members of that gang over several weeks. He was eventually shot dead during a confrontation with Black Power members outside his house.

2. The appellant, Mr Kuru, is the Black Power president in Whanganui. He lived close by, and his house served as the gang's headquarters. Circumstantial evidence linked him with a common purpose to intimidate Mr Ratana and demand that he leave. The Crown also called evidence from a police officer with long experience of the two gangs.

3. Mr Kuru was tried for murder and found guilty of manslaughter.[1] He appealed unsuccessfully to the Court of Appeal. This Court granted leave to appeal on 10 August 2023. The approved question is "whether the Court of Appeal was correct to dismiss the appeal". The Court noted three questions raised by the appellant: unreasonable verdict, admissibility and use of the expert evidence, and misdirection on party liability. It imposed qualifications on the scope of argument. These are (to paraphrase): (1) the principles in *R v Owen* will not be revisited - the issue is their application in this case, and (2) argument should be confined to the admissibility of the police evidence in this case and not traverse the general approach to police as experts.

Summary

Unreasonable verdict

4. There was a clear pathway to a guilty verdict on manslaughter. Mr Ratana's presence in a Black Power suburb was provocative. It was common knowledge that he carried a gun and had already used it to brush aside an earlier attempt at intimidation. Because of his seniority, proximity to Mr Ratana, and his residence at the gang's headquarters, it was reasonable to infer Mr Kuru's awareness of these matters.

[1] He was not charged as a party to manslaughter. Cf the appellant's submissions at [5].

5. Mr Kuru's conduct on the day confirmed his involvement in the next phase of intimidation. A foot party and the members in cars were seen near Mr Kuru's address just before they went round to Mr Ratana's house. Mr Kuru tailed the members who walked there, carrying batons. His cover story, that he was on his way to a school interview, could easily be rejected. Nothing about the event surprised him. He was unperturbed by the gunshots. He returned and stood calmly at his property, watching other members depart. Mr Runga mobilised the attackers that morning. He was directly in front of Mr Kuru at the end, but felt no need to explain anything to his president – just as Mr Kuru did not seek information from his sergeant. This was consistent with an act of intimidation prearranged between president and sergeant, not rogue conduct by Mr Runga. The next day, Mr Kuru was not angry because there had been a confrontation, but angry because things had gone awry and a Mob member killed.

6. It was reasonable to construe the evidence in this way and conclude that Mr Kuru was part of the unlawful common purpose of intimidating Mr Ratana at his home around the corner.

Police evidence on gang structure and behaviour

7. This evidence was admissible. There was no issue with expertise. The evidence concerned usual features of the Black Power and Mongrel Mob gangs and usual – though not immutable – features of their structure and chain of command. It resembles the kind of evidence routinely admitted in allied jurisdictions.[2] An expert should not appear to comment directly on a defendant's state of mind, but may give evidence of gang organisation, hierarchy, and patterns of behaviour.

8. The evidence was correctly held to give substantial help to the jury. In particular, it explained the ultimate authority of the president on important matters, and the relationship between president and sergeant-at-arms. The

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[2] E.g. *R v Hawi and Ors (No 1)* [2011] NSWSC 1647 at [46]-[48]: **Respondent's bundle of authorities ("Respondent's BOA"), Tab 13, at 387**. Evidence of gang hierarchy was relevant to explaining why other gang members arrived and helped in an attack on a rival gang leader.

nature of those roles was not self-evident to lay people and illuminated issues in the case.

9. The expert evidence was not an illegitimate crutch, which compensated for an absence of any other evidence tying Mr Kuru to the common purpose. The circumstances already pointed to his involvement and the expert evidence was an aid to interpretation. It provided, for example, a framework for considering whether this was rogue behaviour, conducted behind the president's back. The Court explained the limits of the evidence and the way the jury could legitimately use it.

10. It was not unfairly prejudicial to say that a serious, organised attack on another gang was "likely" to be sanctioned by a president. The jury could compare that general statement with the unusually clear evidence of what the president did in this case, during and immediately after the confrontation. The statement was based on the consequences that typically flow from such an act. It suited the defence to rely on this. The defence submitted that Mr Kuru was unready for the consequences of Mr Ratana's death, which showed that death was not foreseen.

Manslaughter direction

11. The direction required the jury to be sure that Mr Kuru authorised the attack, knew details of how it would be conducted, and knew an unlawful shooting was a probable consequence. This overstated the mens rea for a party to manslaughter under s 66(2), but all the errors favoured Mr Kuru.

Suppression orders

12. Four witnesses at Mr Kuru's trial were granted permission to appear anonymously. There are ongoing suppression orders relating to these witnesses' names and identifying details.[3]

Background

Intimidation and a killing

13. Parts of Whanganui are the well-understood territories of the rival Mongrel Mob and Black Power gangs. Black Power claims the suburb of Castlecliff.

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[3] *R v Fantham-Baker* [2021] NZHC 1426 at [53]: **Court of Appeal Case on Appeal ("CA COA") 152**.

Matipo Street and Puriri Street are "the heart of the Black Power area".[4] Mr Kuru's house at no. 60 Matipo Street, the gang headquarters, lies along a short cul-de-sac at the northeastern end of the street.

14. Some four months before he was killed, Mr Kevin Ratana began a relationship with Ms Waiora Herewini. She lived at 144 Puriri Street, a block over from the Black Power headquarters.[5] From driveway to driveway, the houses are 242 metres apart. Mr Ratana (aged 27) was a senior patched member of the Mongrel Mob. He was associated with the Mongrel Mob Whanau chapter (Hastings) and helped create the Mongrel Mob Kingdom chapter (Hamilton). As he appreciated, he was out of place in Castlecliff.

15. Mr Ratana became a regular visitor to 144 Puriri Street and often stayed there. Ms Herewini described him taking precautions to avoid attention.[6] But he was not always discreet and Black Power members knew he was living among them.

16. Around 2 August 2018, a friend of Ms Herewini noticed a carload of Black Power members had stopped outside the address.[7] Ms Herewini also remembered another occasion when, after midnight, a group chanted Black Power slogans outside her home.[8]

17. On the morning of 13 or 14 August 2018, Mr Ratana was collecting a Mongrel Mob friend (Quaid Fraser) from an address in Kauri Street. Adam Reynolds, whose house it was, looked out and saw Mr Ratana in a car. He was wearing his Mongrel Mob patch which, to Mr Reynolds, "stuck out like dog's balls" because this was the Black Power side of town.[9] Two Black Power members approached. They carried steel bars (or crow bars) and struck Mr Ratana's car.[10] Mr Ratana got out, showed a gun and scared them off.[11]

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4 **Notes of Evidence ("NOE") 20**. A plan showing addresses associated with Black Power is Image 1 of the attached Appendix.

5 See Image 2 of the attached Appendix.

6 **NOE 508.**

7 **NOE 35** (Joanna Hina); **NOE 510** (Waiora Herewini).

8 **NOE 510** and **516**.

9 **NOE 65**.

10 **NOE 65** (Reynolds); **NOE 602** (Fraser); **NOE 900** (Ezra Tuapola); **NOE 537** (Herewini); **NOE 1040** (Friesen).

11 There are indications that others were involved in blocking the road. See **NOE 602**, line 4 (Quaid Fraser) and **NOE 900** (Ezra Tuapola).

18. Josiah Friesen was a Black Power witness for the Crown.[12] He said it was "quite common knowledge" that Mr Ratana:

> was going around Castlecliff with a gun on him and a few mobsters in the car and… I've been told from Ant man[13] that he had been rolled on from the car load of Kevin and a few other mobsters and they pulled a piece out on him. That was apparently what happened and they apparently rolled on him. Anthony Kuru as well.[14]

19. A few days after the incident on 14 August, several Black Power members were "chilling" in front of Damien Kuru's house. Mr Friesen said the others present were Jason Goff, Anthony Newton and Gordon Runga. Mr Runga was talking about Kevin Ratana being in the neighbourhood: "He was saying that… there's been car loads of the mutts coming out and that and fuck it, if they wanna call the buzz then, you know, they can get it. And he just opened his door and showed his thing of what he had, the shotty, yeah."[15]

20. After the failed attack on 14 August, when Mr Ratana was on the move, his residence at 144 Puriri Street became the target. On the morning of 21 August, Josiah Friesen was staying at 73 Matipo Street with members of his family. He heard a knock on the door and opened it to find Gordon Runga, the sergeant-at-arms. Mr Runga said "that asshole was up the road" and "Fuck. Shall we go and suss them out Joe?" Mr Friesen wanted to drop his children off first and Mr Runga said he would see him "back down Matipo". Mr Friesen remarked "… you know that fella's got a piece on him, eh". Mr Runga tried to reassure him by going to the car, a dark coloured Primera, and showing him a sawn-off shotgun with gang colours wrapped around it.[16] Mr Runga departed and Mr Friesen went on his errand.

21. That morning, Kevin Ratana was at Ms Herewini's house at 144 Puriri Street. Quaid Fraser was now staying there with his girlfriend Tegan Reynolds.[17]

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12 He was granted immunity from prosecution.

13 "Ant-Man" refers to Anthony Newton.

14 **NOE 1028**, line 11.

15 **NOE 1063**, line 6. This was "pretty much out front of Death Wish's house, Damien's" (line 25).

16 This was the same shotgun Mr Friesen had seen a few days earlier (**NOE 1032**). Mr Runga was apparently accompanied by others (**NOE 1063**). Terri Friesen said she spoke to Mr Fantham-Baker at this stage (**NOE 1167**).

17 **NOE 627**. They had moved after the incident in Kauri Street. Ms Herewini's children, her sister and the sister's baby were also there.

22. Tegan Reynolds was on the doorstep when she noticed a car driving slowly by – a Nissan Primera or Sunny.[18] She saw a full car with four to five men inside, all wearing bandanas and looking at towards the house.[19] Ms Herewini also saw a full car, with a minimum of five people squashed in.[20]

23. Ms Reynolds remembered men getting out of the car and approaching the house.[21] Some abuse was directed at occupants of the house. Ms Herewini was watching the car when a bus stopped outside her house and blocked the view. When the bus moved on, she saw the car going down Tiki Street towards Matipo Street.[22]

24. About five minutes later she saw a group of five men walking back from Tiki Street. They were carrying metal batons and walking in a line.[23]

25. Ms Herewini released her three dogs. She could hear the men at the front shouting and heard them demand: "bring the dog shits out".[24] She followed her dogs and stood behind a high fence dividing the section.[25] Anthony Kuru was unmasked and she recognised him.[26] She believed the other men included Hikitia Box, Anthony Newton, Damien Fantham-Baker and Gordon Runga.[27] Anthony Kuru was yelling, "and he said that we've got one week, fuckin week to move out or we're dead."[28] She told them to "fuck off" and get off her property. Ms Herewini explained that they had arranged to move out within the week.[29] Anthony Kuru appeared to accept this and she thought they were moving away.[30] But three of the group began hitting Mr Ratana's car, saying: "Just tell the dog shits to come out".[31]

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18 **NOE 628**.
19 **NOE 627-628**.
20 **NOE 524**, lines 6-9.
21 **NOE 628**, line 10; **NOE 606** (Fraser); **NOE 235** (Maddren).
22 **NOE 526-527**.
23 **NOE 528** and **NOE 552**.
24 **NOE 531**.
25 See Image 7 of the attached Appendix.
26 **NOE 566**.
27 **NOE 538**, line 27; **NOE 587**, lines 4, 13, 19; **NOE 591**.
28 **NOE 535**.
29 **NOE 567**.
30 **NOE 536**.
31 **NOE 537**.

26. Ms Herewini moved to the back of the house to deal with her dogs. Inside, Mr Ratana had donned his patch and armed himself with a sawn-off shotgun. He directed Mr Fraser to follow him.[32] He went out the front door, stepped right onto the path, and was immediately shot through the neck and killed.[33] On the Crown case, Gordon Runga fired this shot – the fatal wound was caused by a slug. Sheldon Rogerson fired further shots at the house as covering fire, causing some damage from shotgun pellets.

27. Shortly before this, Josiah Friesen had arrived back at Matipo Street, just in time to join the Black Power party. At the intersection with Tiki Street, he found Mr Rogerson and Mr Runga in their cars – Rogerson in his blue Holden Commodore and Runga in the same Primera. They were stopped nose-to-nose and talking through the car windows.[34] They said: "Fuck. The bros are on their way up there. That's us."[35] Mr Friesen followed these cars round to Puriri Street and parked in front of the Primera. Using his mirrors, he saw three men hitting the car.[36] Kevin Ratana and another person appeared at the door. Mr Friesen heard the "massive boom" of the first shot.[37] After another boom, the Primera left towards Tiki Street.[38] People were running away and falling over themselves. He heard one or two further booms and saw Sheldon Rogerson moving around with a shotgun.[39] Mr Rogerson noticed Mr Friesen was still there and told him to go, which he did.[40]

The appellant's movements

28. Remus Edwards lived on 152 Puriri Street, which has a view looking down Tiki Street. He heard gunfire and looked out and saw "guys laying fire into what looked like Waiora's at the time".[41] He believed he saw Damien Kuru in his brown vest along with the group outside Mr Ratana's house.[42] He accepted he may have been mistaken about seeing him on Puriri Street – his

32 **NOE 608**.
33 **NOE 609–610**.
34 **NOE 1037**.
35 **NOE 1039**.
36 **NOE 1041**.
37 **NOE 1043**.
38 **NOE 1042**.
39 **NOE 1043**.
40 **NOE 1044**.
41 **NOE 416**.
42 **NOE 417**.

Police statement only recorded that he saw him walking casually down Tiki Street, towards his house,[43] about five metres ahead of a group of others. Damien Kuru was about quarter of the way down Tiki Street when Mr Edwards stopped looking and went to find his daughter.[44]

29. Catherine Burton lived at no. 6 Tiki Street, mid-way along the block. She heard the shots (she thought a maximum of 20 seconds between the first and last shots)[45]. After the third shot she went out to retrieve her dog from the veranda. She saw and recognised a man outside. The defence identified him as Mr Damien Kuru. She thought he was calm, "as cool as a cucumber".[46] He remarked "strange eh?", in reference to the gunshots.[47] She found this a bizarre thing to say[48] and thought "it's not strange, it's a gun-shot".[49] She felt he was a little startled by her rushing out, but he seemed amused rather than confused.[50] After she went inside, Ms Burton listened at her bathroom window. She could hear a woman's cries of anguish and a man saying, "Well what would you have done then?"[51]

30. Around this time, an eviction was taking place further down Matipo Street, at number 33. Gary O'Neill (court bailiff), Brittany Gibson (lawyer) and Marc McKenzie (locksmith) were among those gathered for this purpose. They heard the noise of the shots on Puriri Street and wondered about its cause.[52] Looking in the direction of the noise they observed Mr Kuru emerging from Tiki Street.[53] He was now moving with more urgency than Remus Edwards and Catherine Burton had observed.

31. To Mr O'Neill, Mr Kuru seemed to be moving: "quite quickly, rapidly. He was not hanging around. More than just a casual amble, he was, yeah, moving

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[43] **NOE 478**.
[44] **NOE 418**.
[45] **NOE 1236**.
[46] **NOE 1229**.
[47] **NOE 1242**.
[48] **NOE 1229**.
[49] **NOE 1230**, lines 8-10.
[50] **NOE 1241**, line 1.
[51] **NOE 1230**.
[52] **NOE 648**.
[53] **NOE 648**.

away from something."[54] Mr Kuru looked behind once and carried on.[55] Four younger men quickly came into sight. The first of them emerged about 15-20 seconds after Mr Kuru.

32. Ms Gibson saw the first man (Kuru) "certainly running away from something so, um jogging, running." She noticed that his trousers were slipping down and he had to hold them up.[56] He got a couple of houses down Matipo Street before the next man appeared, she thought a gap of 10-20 seconds.[57] The younger men following were also jogging but grouped together after they had turned the corner and walked towards the car.

33. Mr McKenzie arrived at 33 Matipo Street "bang on" 9:30.[58] At the start, while chatting to the others he noticed the blue Commodore (Rogerson) "coming down past 56, towards 54" (no. 60 is next to 56).[59] It moved at walking pace, the driver conversing through the window with a group of men (he thought about four[60]) at about number 53: "then just around the corner and off he went."[61] The pedestrians also turned up Tiki St towards Puriri Street. After that, Mr McKenzie heard noises, which he thought were fireworks rather than gunfire. These were staggered over a period of 10-15 seconds. Soon – "I would say 15, 20 seconds, maybe longer… probably longer" – a "big lad" came around from Tiki Street and headed up Matipo Street. He was walking swiftly. Mr McKenzie described the appearance of some more men 10-15 seconds later. He said they caught up with the "big boy", "then all climbed into a car that was parked sitting there".[62] This was a dark coloured Primera, which did a three point turn, came back towards the eviction party and went up Tiki Street.

34. Once the younger men began appearing from Tiki Street, Mr O'Neill began taking photographs with his phone. There were gaps in this sequence as he

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54 **NOE 649**.
55 **NOE 651**.
56 **NOE 691**.
57 **NOE 691.**
58 **NOE 753**.
59 **NOE 754**, line 32.
60 **NOE 765**.
61 **NOE 754–755**.
62 **NOE 760**, line 32.

paused to talk to his companions.[63] As the first of this following group proceeds onto Matipo Street, Mr Kuru is captured standing at the front of his property. He faces away from the other four men. The Primera is directly ahead, to his left. He remains in the same position when the fourth member of the following group is seen, but he is not visible when the Primera is later photographed coming out of the Matipo Street cul-de-sac.[64]

A meeting the next day

35. The next day, Josiah Friesen saw Damien Kuru standing out on the road in front of his driveway. Mr Kuru waved down his car and told him there was to be a meeting at Carlos Rippon's house (the vice president) and he should get everyone there.[65] Mr Friesen collected Matthew Nepia and went to the meeting. He remembered Damien Kuru being present, along with Mathew Nepia, Gordon Runga, Carlos Rippon and Uriah Rippon.[66] Mr Kuru was angry and said: "Whoever done that shit up the road needs to fucking put their hand up." Nobody responded and Mr Kuru left in a rage.[67]

Earlier convictions

36. By the time Mr Runga and Mr Kuru were tried, Messrs Rogerson, Box, Fantham-Baker and Anthony Kuru had already pleaded guilty and been convicted of manslaughter or (in Mr Rogerson's case) murder.[68]

Some interpretation

37. The Crown submitted that the response to Mr Ratana's presence was "top of the agenda" for this Black Power chapter. The circumstances bore this out. Mr Ratana lived in the heart of their territory, very close to Mr Kuru's house (the gang pad). He wore his Mob patch in Castlecliff, brought another Mob member with him (Mr Fraser), and ignored earlier attempts at intimidation. The confrontation on 14 August was a humiliation for Black Power. He had seen off two Black Power members who were carrying weapons. Clearly, he was defiant and hard to dislodge. It was now known

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63 **NOE 676** and **NOE 683**, lines 20-30

64 See Images 4, 5 and 6 of the attached Appendix. **Court of Appeal ("CA") Exhibits at 118–122**.

65 **NOE 1070–1071**.

66 **NOE 1071**.

67 **NOE 1073**.

68 **CA COA 169**.

that he carried a gun and was prepared to show it in a confrontation. To avoid a further embarrassment, the Black Power members would need to respond in kind – on the next occasion it was obvious they would carry guns as well.

38. Consistent with his role as sergeant-at-arms, Gordon Runga is seen organising the bulk of the war party on the 21st. After speaking with Mr Friesen, Mr Runga's house was the initial assembly point for the other members before they moved on to Matipo Street to launch the attack. Mr Friesen had not been forewarned that his help would be needed that morning but he knew that a "rumble" was in prospect (Mr Runga had primed him for that, outside no. 60) and he knew what was expected of him. He understood Mr Runga's function, hence his comment after the post-shooting meeting, when Mr Runga told him Mr Rogerson fired the fatal shot: "Fuck, you're the sergeant-of-arms, you should be controlling that shit, man."[69] Mr Friesen was not a senior member and felt he should not speak up at the meeting: "I didn't want to get the ones [responsible] into trouble".[70] He thought the club was quite divided: "So, instead of, like, a solid club, it was more or less individuals were more tighter together than, than a solid club."[71] Mr Runga was older "so him and his generation were more or less tighter than me and my younger generation."[72] This illustrates that decisions about the response to Mr Ratana were made at a higher level and a junior member such as Mr Friesen merely answered the call.

39. As the prosecutor submitted, it is not plausible that Mr Runga organised the attack purely on his initiative. A reconstruction of Mr Runga's movements immediately after the shooting will help to explain this. To find Mr Runga guilty, even as a party to manslaughter, the jury was directed it must decide he was present outside no. 144.[73] The verdict implies that this requirement was met.[74] Two possibilities follow from this:

69 **NOE 1057**.
70 **NOE 1072**.
71 **NOE 1072**.
72 **NOE 1071**.
73 Summing up of Ellis J at [155]-[156]: **CA COA 437**.
74 *R v Kuru* [2022] NZHC 309 at [22]: **CA COA 479**.

39.1 Mr Friesen correctly described Mr Runga taking the Primera round to Puriri St for the altercation, then driving off after the initial shots (obviously back to Matipo Street, where the car was photographed).[75]

39.2 Alternatively, the Primera was left in Matipo street and Mr Runga was part of the returning foot party.[76]

40. The Friesen account means that the Primera was parked in Matipo Street before Mr O'Neill saw the four gang members on foot and started taking photographs. Mr Runga would have driven past Mr Kuru and parked the Primera opposite his house.[77] This suggests that the eviction party, possibly distracted, had not noticed the arrival of the car. But, as the Crown submitted, the timings allow for the car to turn up before the first photograph was taken.[78]

41. Alternatively, if the Primera had been left at Matipo Street and Mr Runga walked to Puriri Street, the car's location indicates that the vicinity of no. 60 was the home base of the operation, to which the foot party was to return.[79]

42. The O'Neill photographs, taken after the shooting, show Mr Kuru looking out from the front of his property. The Primera is just ahead of him. Either his sergeant-at-arms was inside, awaiting the return of the four others, or the sergeant-at-arms was one of the foot party, who were about to regroup and

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75 The eviction party did not notice the Primera driving into Matipo Street after the initial shots. They appear not to have looked continuously in that direction and there was some initial dialogue about the cause of the shots, which may have caused distraction. **NOE 648**, **690** and **698**.

76 Though only four were photographed returning and none carried a gun. The foot party was: Newton, Fantham-Baker, Box and Anthony Kuru. Damien Kuru made a fifth person (**CA COA 287**).

77 Cf the appellant's submissions at [51].

78 **CA COA 292–293**.

79 This possibility implies that Mr Runga had driven away from the Tiki Street intersection, where Mr Friesen had seen him talking with Mr Rogerson in their cars, and gone up Matipo Street to park near no. 60 (**NOE 1037–1039**). Despite [30] of the appellant's submissions, it does not seem that the Crown closed on the basis that the attack was launched from outside Mr Kuru's house. This was its position in opening (**CA COA 192**, **195**, **196** and **199**). Defence counsel issued a warning about that assertion in his opening statement (**CA COA 228**) and stressed as his third point in closing that there was no evidence of a launch from outside no. 60 (**CA COA 360**ff). The Crown did point out that Ms Gemma Parker, during the prelude to the attack, observed three of the men walking on Matipo street towards where her car was turning at the Tiki Street/Matipo Street intersection. She had indicated no. 60 Matipo Street as where she thought they were (**CA COA 321**; **NOE 250**, line 26). The Court of Appeal may have stated (at [13] (**SC COA 14**) that the Black Power party "drove to Matipo Street and parked adjacent to Mr Kuru's house" because the appellant had submitted (at [41](c) of his submissions) that the evidence showed "Shortly before the attack, the assailants congregated briefly near one of the group member's home on Matipo Street, which is near Mr Kuru's house."

get into the car as Mr McKenzie described. On either possibility, the end of the incident involves Mr Kuru's sergeant-at-arms and other members returning from a shooting and assembling in front of him. This happened under Mr Kuru's nose and the idea is "ridiculous", as the prosecutor put it, "that somehow Gordon Runga went off and formed a faction of his own and this was some sort of rogue activity…"[80]

43. Over time, Mr Ratana's conduct created a highly charged situation. The trouble was centred close to the home of the Black Power president. As a matter of common sense, it is not plausible that Mr Kuru was unaware of the Ratana problem or was not consulted about the response. His behaviour on the 21st reinforces this – there is nothing about it to suggest the confrontation was unexpected.

44. Mr Kuru told Police he was on his way to a school appointment when he heard the gunshots.[81] This was not a credible story:

44.1 The school was a short distance along Matipo Street (164m).[82] The logical route for Mr Kuru was simply to walk straight along that street. Diverting up Tiki Street implies an odd and indirect route to the school, about four hundred metres longer (570m).[83]

44.2 The first O'Neill photograph in Matipo Street was taken at 9:39 am. CCTV images showed the Pimera and Hyundai (Mr Friesen's car) had already gone from 144 Puriri St by 9:38. This indicates Mr Kuru had set off at around 9:35am.[84] If on his way to the 10:00am appointment, he had left inexplicably early. It would only take him

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80 **CA COA 315**.

81 "… I was in fact on my way to a meeting at my son's school with his teacher when I heard the gun-shots" (**NOE 1627**). There is no evidential basis for the submission that Mr Kuru heard the shouting which preceded the gunfire and was on Tiki Street *before* the shots were fired. Mr Kuru said he heard the *shots* and did not refer to going up Tiki Street at all, to investigate noise of any kind. (Cf appellant's submissions at [40] – it is unsurprising that shots were heard on Maire Street (**NOE 194**) or that Mr Steer (who was much closer, near the intersection of Kowhai and Puriri Streets) heard noises like metal or wood being hit (he thought a fence being struck), a "little bit" of shouting and the gunshots (**NOE 215–216**). If Mr Kuru had no awareness of what his members were doing, it is far from apparent that any distant shouting would be worth his attention. See Ms Burton's comments about the neighbourhood at **NOE 1239**, line 25.)

82 See Image 3 of the attached Appendix. **NOE 1628**.

83 **NOE 1628**; **CA COA 328**.

84 Because of the way the CCTV recordings were gathered, Police cautioned that the actual time an image was taken could be one minute either side of the time indicated.

three minutes to walk down Matipo St to the school using the obvious and shorter route.[85]

44.3 Mr Kuru was not seen proceeding up Tiki Street towards the origin of the shots. Mr Edwards and Ms Burton saw him *already on* Tiki Street, but returning directly after the shots had been heard. He was seen slightly ahead of the four pedestrians involved in the attack. This is consistent with Mr Kuru knowing that the Black Power party had gone from Matipo Street and following them towards 144 Puriri Street. If he had been drawn to investigate something unexpected, he would not have turned back without any inquiry.

44.4 (The defence submitted that Mr Kuru's presence on Tiki Street was coincidental. But: "If you think it is not a coincidence, then he has problems." [86] It was not part of the Crown's case that Mr Kuru occupied an "observation point".[87])

45. To the occupants of no. 144, Anthony Kuru shouted that they had one week to move out or they would be killed. This suggests a plan to give Mr Ratana an ultimatum, and signal fatal consequences if he did not comply.[88] Mr Kuru conveyed no sign of surprise on hearing the gunshots. Mr Edwards thought he walked down Tiki Street "casually and didn't appear to have a care in the world".[89] Ms Burton said he was "just so calm" and did not associate him with the shots.[90] Mr Kuru possibly thought guns were discharged to emphasise the lethal nature of the threat. His lack of concern also indicates an expectation that his members would take guns to the confrontation. And his retreat is unsurprising given the likelihood of wider neighbourhood alarm and the imminent arrival of police.

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85 Three minutes according to Google Maps or, being generous, "five minutes if he's strolling" according to the prosecutor (**CA COA 328**).

86 **CA COA 389**, line 25.

87 Appellant's submissions at [37].

88 The continued demands to "bring the dog shits out" could be seen as a test of mettle. If Mr Ratana sheltered within, it would be a moral defeat for him. If he did answer the challenge, past experience suggested he could do so armed, which is probably why a member of the Black Power party had drawn a bead on the front door.

89 **NOE 478**, line 16.

90 **NOE 1229**, line 34.

46. Mr Kuru lost some poise as he turned into Matipo Street and made for his house. He was anxious to preserve some separation between him and the gang members behind. He did not want to appear involved with this group because he knew he *was* involved with what they had done. On reaching his house he stood outside. An observer might now think that he had never left and was just another person drawn outside by the gunfire. To the returning gang members, he had the unruffled mien of a president in control.

47. The apparent absence of any inquiry or interaction with the returning members was a significant feature of Mr Kuru's conduct. He was ahead of them on Tiki Street; the eviction party did not see him converse with anyone on Matipo Street. An altercation had just taken place with the Mongrel Mob members around the corner, and guns discharged, yet Mr Runga, in particular, had no reason to give an explanation to his president and Mr Kuru had no reason to inquire. This strongly implies that what had just taken place conformed with Mr Kuru's expectations and Mr Runga knew his president was already apprised.

48. Mr Kuru's anger the next day does not distance him from the common purpose of intimidating Mr Ratana. Things had gone wrong. The confrontation was not the issue – Mr Kuru was untroubled immediately afterwards – but the killing of Mr Ratana was a major problem. Most of the members involved had walked in front of him in Matipo Street; therefore, when Mr Kuru demanded to know who had "done that shit up the road", he wanted the killer, not the other participants. Gordon Runga rounded up six other members for this encounter: if Mr Kuru wanted to chastise all those involved for acting against his will, Mr Runga and the foot party were the obvious people to confront first.

49. Mr Kuru's leadership of the gang was evident once he knew of Mr Ratana's death (instructing his members what to do, fortifying the pad, trying to manage the Mongrel Mob response). It would be strange if the consequences of the death were his business, but not the dangerous conflict which had caused it.

50. Overall, there was a strong case for party liability. As submitted below, the Scott evidence on gang structures had limited work to do.

Ground 1: alleged unreasonable verdict

51. As noted above, the Court will not be revisiting the principles in *Owen v R,*[91] the issue is their application in this case.[92]

52. The jury could be reasonably satisfied of these matters:

52.1 Mr Ratana's presence at 144 Puriri Street was intolerable to Black Power in Whanganui. This irritation had festered for some weeks.

52.2 Low level intimidation had not succeeded.

52.3 A more direct effort to force him to leave had failed on 14 August. He got out and drove off the attackers by showing his sawn-off shotgun. This incident had several implications:

52.3.1 Mr Ratana was bold and defiant.

52.3.2 He carried a gun, which he was prepared to show in response to the Black Power challenge.

52.3.3 Two members had failed to overawe him. This was a humiliation for Black Power Whanganui.

52.4 It was "common knowledge" that Mr Ratana carried a "piece" and had "rolled on" Anthony Newton and others.[93] As gang president, the occupier of the gang pad (a focal point for gang members), and a person who lived a few hundred metres from Mr Ratana, Mr Kuru shared that knowledge.

52.5 There was no sign that Mr Ratana intended to leave Castlecliff. More serious action would be needed. It would take a

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[91] *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37. See [12]–[17]: **Appellant's Bundle of Authorities ("Appellant's BOA"), Tab 2, at 85–87.** See also the Court of Appeal's comments at [45]-[46] regarding the test under s 147 and s 232 of the Criminal Procedure Act 2011: **SC COA 24.**

[92] *Kuru v R* [2023] NZSC 102 at [3]: **Supreme Court Case on Appeal ("SC COA") 10**.

[93] **NOE 1028**.

demonstration of more than equivalent force to dislodge him – more members and guns taken.

52.6 A house is a static target – easier for the assembly of a larger group of members – and Mr Ratana's occupation of no. 144 was the root of the trouble. But he was a Mongrel Mob leader, supported by Mr Fraser, and he used a gun to drive off the Black Power members on the 14th. Accosting him here was a serious step. This was certainly the president's concern, and the confrontation would take place close to where Mr Kuru lived with his family. No member would carry matters this far without involving him. As president, Mr Kuru was more than a symbolic figure. His authority was manifested in the aftermath of the shooting (this was consistent with the Scott evidence about ultimate control of gang business).

52.7 Mr Runga was the sergeant-at-arms. The Scott evidence explained that the sergeant's function was to enforce the orders of the president. Mr Runga's behaviour was consistent with this relationship.

52.8 A few days before the shooting, Mr Runga foreshadowed the use of violence against Mr Ratana and showed other members his gun. This happened outside Mr Kuru's house, which showed how readily the president and sergeant-at-arms could confer on the subject.

52.9 Mr Runga organised six other members to go with him to Puriri St. He drove four of them to Matipo Street in the Primera. The three cars involved arrived at Matipo street and the foot party came past no. 60. Mr Kuru knew the confrontation was about to take place and tailed the departing foot party. (The jury might have considered that following his members in this way was more relevant to his knowledge than the precise location of the "launch".)

52.10 Mr Kuru's reason for being on Tiki Street was a cover story. He was not there because of the school interview – it was far too early for

that and the direction was wrong. He was not seen going up the street to investigate the cause of the shots, but retreating back to Matipo Street after the shots had been fired. He made no inquiry of the returning foot party because he knew what they had just been doing.

52.11 Mr Kuru was unsurprised by the sound of gunfire. He expected his members to be carrying guns. The firing of guns was consistent with emphasising the deadly consequences of ignoring the Black Power ultimatum.

52.12 Mr Kuru was anxious to preserve some distance between him and the returning foot party. As the senior Black Power figure, he pulled the strings but should not be visibly involved in such an operation.

52.13 The jury could accept the Friesen evidence that Mr Runga drove the Primera to Puriri St, and left after the initial shots. Mr Runga then parked in Matipo Street and waited for the foot party.[94] The foot party got into the Primera and decamped with Mr Runga.[95] This happened directly in front of Mr Kuru, but no one saw him talk to anyone at this stage.

52.14 So far as Mr Kuru knew, the confrontation had proceeded in accordance with their plan. His ease at what had happened mattered more than the precise location of the Primera, but the car was virtually in front of where he stood as the foot party returned. As the Crown submitted, here was the sergeant-at-arms fulfilling the president's wishes. There was no need for explanations.

52.15 Mr Kuru soon learned that Mr Ratana had been killed. This changed his attitude. At the meeting on the 22nd, he was not outraged by Mr Runga organising a confrontation behind his back – he wanted

94 Mr Runga had one gun and Mr Rogerson the other. There was no evidence another gun was taken to Puriri St. Gunshot residue was found on the controls of the Primera (steering wheel, handbrake and driver's door). This was consistent with the Friesen evidence: Mr Runga had been present at Puriri St, had fired his gun there, and that was how the residue was deposited in the Primera (photographed soon afterwards in Matipo Street).

95 Mr Newton may have left on foot from Matipo Street. He was captured on CCTV at a liquor store shortly afterwards (where he did not buy anything).

to know who had killed a senior Mongrel Mob member, with all the consequences that entailed. Mr Kuru indicated to police that he had not "ordered" what happened. The jury accepted he did not order an assassination, but it could regard this as an authorised act of intimidation which produced an undesired result.

53. Interpreting the evidence along these lines, the jury could reasonably infer that there was a plan to intimidate Mr Ratana at his home, and that Mr Kuru was part of that unlawful common purpose.[96] It would suffice if Mr Kuru and Mr Runga had agreed on this course. From that point, and in conformity with their roles, it could be left to Mr Runga to determine how and when the next confrontation would take place. Party liability did not require planning meetings, electronic messaging, or Mr Kuru's personal involvement in assembling a group of members.[97] A gang leader is unlikely to be in the thick of the fray, but Mr Kuru put himself closely on the margins.

54. Two uncontroversial aspects of the Scott evidence may have helped in concluding that Mr Kuru was part of the common purpose: a president had overall control of gang business, and a sergeant's function was to enforce the president's orders. The proposition that a serious attack on another would likely occur with a president's sanction may not have added much in the circumstances here, where there were strong signs that the president expected the confrontation and was present at the fringes. The sergeant had done his bidding, save that the death of Mr Ratana was not the desired outcome. There were, of course, the predictable adverse consequences, which serve to demonstrate why such actions demand a president's sanction.

55. The trial directions gave a five-strand summary of the Crown case. That statement, necessarily compressed, is not a sufficient platform for assessing the evidence on appeal. There is more analysis in the post-trial decision on

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[96] In opening, the prosecutor said: "the Crown says, the [un]lawful purpose was these Black Power members going to confront Mr Ratana, threaten him and damage his property" (**CA COA 209**). Crimes Act s 2. "assault".

[97] Cf *Kuru v R* [2023] NZCA 150 at [88]: **SC COA 35**. Mr Friesen's evidence showed that important communications could occur by face-to-face conversation – e.g. Mr Runga telling him that the Mongrel Mob "could get it", or Mr Kuru waving him down to summon him to the meeting.

the s 147 application, but this is not exhaustive either. The trial Judge concluded that "viewed holistically", the evidence was "capable of supporting the inference that Mr Kuru knew about the plan and sanctioned it."[98] Three features were noted, the second of which was: "Mr Runga's involvement in the confrontation and his relationship with Mr Kuru and their respective roles in the gang".[99] This was indeed a plank of the Crown's case (one of the first matters stressed in closing), though it did not feature in the five-strand summary in the summing up, or the assessment at sentencing.

56. The manslaughter verdict was unsurprising on these facts. It was far from unreasonable in *Owen* terms, allowing that reasonable minds may differ on matters of fact.[100]

Ground 2: whether the Scott evidence caused a miscarriage

The Evidence of Detective Inspector Scott

57. Detective Inspector Scott acquired his expertise over a 34-year career in the New Zealand Police. He spent many years in the Gisborne CIB, where "the vast majority of our time and resources were spent investigating gang related offending".[101] He became very familiar with the Mongrel Mob and Black Power gangs, especially in Gisborne, Wairoa and the East Coast.[102] His duties have included debriefing senior gang members and others connected with gangs. He has managed undercover officers and informants, conducted electronic surveillance and analysed intelligence. It is safe to say that police at the national and local levels intensively study the gang phenomenon.[103] Detective Inspector Scott has been at the heart of this and tapped many sources of information.

58. A brief of the Scott evidence was originally deployed in opposition to bail.[104] The defence at that stage obtained an opinion from Dr Gilbert, who

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98 *R v Kuru* [2023] NZHC 129 at [11]: **SC COA 50**.

99 At [11].

100 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13] and [17]: "… a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.": **Appellant's BOA at 85-87**.

101 **NOE 1554**, line 34.

102 **NOE 1554**.

103 The appellant's submissions at [88] rely on a comment that police training sessions in the United States were "cursory", "outdated" and "unhelpful". The American article referred to was discussing training programmes in the 1960s (see p 18 of the article).

104 Detective Inspector Scott's Brief of Evidence: **Supplementary Material**.

responded to four questions, including: "What structure do gangs have and what is the role of the president?" and "It has been said that a 'traditional view of gangs hold[s] that the president is in control of all major decisions, how much can we [rely] on this idea?"[105]

59. Dr Gilbert observed that the Mongrel Mob and Black Power had copied the formal hierarchical structure of the Hells Angels, which included a president, vice president, sergeant at arms and treasurer/secretary.[106] He did not dissent from Detective Inspector Scott's description of gang structures and the roles of office holders. He noted the statement that the gang president has "final authority over all chapter business and its members" and said he broadly agreed.[107] The so-called 'traditional' view of a gang president required caution. Some presidents might have a more dictatorial style and "lead with an 'iron fist' or be so hugely charismatic that they take the lead on most if not all important matters and members rarely operate without the president's knowledge (or face the consequences formal or informal)."[108] Other presidents might seek consensus and adopt majority rule. Some events might "occur quickly and with little or no planning and therefore with no knowledge of the president" (this was not the case here, as the Ratana situation had developed over weeks). The "generalities" should be used as a guide and it is important to make assessments "on the basis of corroborating or conflicting facts and information".[109]

60. Thomas J considered the two opinions in determining a s 147 application in 2019.[110] Ellis J ruled on the admissibility of the Scott evidence shortly before the trial began. The Court noted that Detective Inspector Scott's expertise was apparently not in issue and counsel were thinking that much of his evidence could be admitted as a s 9 statement.[111] The Court of Appeal held in *Thacker* that evidence of gang structures and obligations would be

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105 **Court of Appeal Additional Materials ("CA AM") 7**.
106 **CA AM 10**.
107 **CA AM 10**.
108 **CA AM 11**.
109 **CA AM 12**.
110 *R v Kuru* [2019] NZHC 2317 at [36]: **SC COA 78**:
111 *R v Fantham-Baker* [2021] NZHC 2631 at [15]: **CA COA 158**.

substantially helpful to the jury.[112] Ellis J likewise considered the Scott evidence met the "substantial help" test.[113] It was undisputed that "gang structures and obligations were relevant in this case and were matters with which jurors were unlikely to be familiar."[114]

61. Objection was made to the statement: "An organised gang crime against another gang would only occur with the sanction of the president". The Court considered this would suggest an expert view that the attack on Mr Ratana was an organised gang crime and that Mr Kuru authorised it. The statement was inadmissible in that form but could be "reframed in a more contingent way, and by reference to his experience ('in my experience it is unlikely that…')."[115] The content of the evidence was reviewed again mid-trial, and a final version of the brief was settled in chambers.

62. Although other aspects of the Scott evidence were relevant[116] the most important passage read (with the amendments italicised):

> He [the president] has the final authority over all chapter business and its members. *In my experience a (serious)* organised gang crime against another gang *would likely* occur with the sanction of the president. *This is* due to the obvious risks and consequences that the particular gang would be exposed to which would likely include intense scrutiny by Police and serious retaliation by the opposing gang. Another consideration would be the risk of a number of the members being sentenced to periods of imprisonment depending on the particular crime committed… There is usually a Vice President who is the second in command, a Treasurer who manages the finances, a Secretary who holds the minutes of the gang meetings and a Sergeant of Arms who enforces the President's orders.

63. There was no cross-examination. The Scott evidence was briefly foreshadowed in the Crown opening.[117] It featured at the start of the Crown closing where it was proposed as the "lens" through which the episode could be viewed – putting events into the "gang context".[118] The prosecutor used

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112 At [12]: **CA COA 156**.

113 Substantial helpfulness is an amalgam of relevance, reliability and probative value. Expert evidence assists the fact-finder to "understand something of consequence to the case." *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] NZLR 750 at [4] and [94].

114 *R v Fantham-Baker* [2021] NZHC 2632 at [15]: **CA COA 158.**

115 At [18]: **CA COA 158–159**.

116 For example, the adoption of a community-focused and family focused persona, the use of weapons, spontaneous violence when rival gangs meet, territory, and motives to confront other gangs.

117 **CA COA 225**.

118 **CA COA 267**.

it as an overarching framework, or scene-setting device to link various themes or features of the evidence, which he then developed: gang culture and the patch, territoriality, the motivations for inter-gang conflict, Mr Ratana's "cardinal sins", the use of weapons in gang confrontations, and patterns of authority. The Crown case was grounded in the events in Whanganui. The generalities of the expert evidence did not overwhelm analysis of the specific facts of the case.

64. Later in the closing, the evidence was relied on in two contexts. These illustrate its probative value:

64.1 *The significance that the Ratana problem assumed over time and the seriousness of nearly half the Black Power membership confronting a senior Mongrel Mob figure in this way.* This made it "top of the agenda" for the Whanganui Chapter – i.e. the kind of "serious" confrontation which required reference to the president. Mr Kuru's behaviour on the day reinforced the inference that he did have that oversight. Adding a high-level perspective, the Scott evidence suggested that a "serious" matter of that kind would "likely" occur with a president's sanction. It was a general opinion about probability with an explanation of why that pattern existed.

64.2 *Mr Runga's role as sergeant-at-arms.* The Scott evidence was that usually a Black Power or Mongrel Mob chapter has such an officer, who "enforces the President's orders". Mr Runga's conduct conformed with that general picture: he rounded up the participants and terminated the operation in front of his president – neither man thought it necessary to make or seek an explanation.

65. It is a matter of inference, but the decision not to call Dr Gilbert or cross-examine (and consideration of a s 9 statement) was probably made because the Scott evidence was unexceptional. Dr Gilbert was unlikely to dissent from the general propositions and calling him would merely reinforce

them.[119] His caution about the limits of such generalities was reflected in the defence submission:

> [The Scott] evidence is not specific to this case in any way. It's mostly just common sense. A president is likely to have ordered a serious organised action against another crime [sic], but that doesn't mean for a moment that this one has in this case. That detective has not sat through six weeks of detailed evidence as you have.[120]

66. The Scott evidence helped to resist the murder charge. The defence portrayed it as militating against a planned assassination, rather than intimidation which had gone wrong:

> Detective Scott said a president will be likely to order an organised crime against another gang because he says all of these repercussions associated with that are contemplated. Do all of the repercussions of the visit to Kevin Ratana's place that morning seem to you as though they were contemplated?[121]
>
> …
>
> Remember that Detective Scott said to you that it's likely a president's authorisation would be required for a serious organised crime against another gang member because of the attendant repercussions from the other gang and the law. Well does this seem to you like a situation where Damien had been mindful of those serious repercussions as he charges back to Whanganui… The response, this aftermath, these things that he is doing are as cobbled together as the event itself is.
>
> Detective Scott's evidence suggests that a president's mindfulness of retaliation would occur at the point of authorising prior to authorisation. Here we see Damien Kuru being mindful of retaliation after the incident.[122]

67. The defence thus saw advantage in the evidence now impugned: if a killing had been intended, there would not have been a rush to take precautions afterwards – the fallout would have been anticipated. This point has reduced force when applied to a lesser foray to intimidate and deliver an

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119 By email on 16 August 2021, Mr Waugh confirmed "that Mr Kuru intends to call Dr Jarrod Gilbert as an expert witness at his upcoming trial. Dr Gilbert's brief has been filed with respect to pre-trial matters. It is not envisaged that his evidence will depart dramatically from what is included in that brief." Criminal Disclosure Act s 23(1).

120 **CA COA 389**.

121 **CA COA 359**. The context was a point about "Assassination versus intimidation", starting at **CA COA 357**. See also the defence position summarised at [181] of the summing up (**CA COA 444**). The aftermath of the shooting showed "exactly why Mr Kuru as president would not have authorised or ordered that confrontation with Mr Ratana. The cost to the gang and to Mr Kuru personally if things went wrong, and perhaps even if they didn't, was very high. And the fact that all this activity was required to occur so quickly, almost in a frantic way, after the shooting, supports the defence contention, you might think, that there was never a proper plan and certainly not one that Mr Kuru had sanctioned."

122 **CA COA 381**.

ultimatum. From a Mongrel Mob perspective, it might be understood that Mr Ratana had brought that kind of trouble on himself. For Black Power, there was the harm to reputation if they could not prevail in what should have been their bastion. Both considerations made the risk of further action well worth taking. But the unexpected killing of Mr Ratana raised the matter to another level of seriousness.

68. The defence did not directly reply to the second way in which Mr Kuru could be joined to the common purpose, through the relationship with Mr Runga. This left an exposed flank. The prosecution submitted: [123]

> … that relationship between himself and Mr Runga is important because it's the relationship of the president with his sergeant-at-arms and is as is said by the evidence of Detective Inspector Scott: "Sergeant-at-arms enforces what the president wants." He enforces the orders. So that is significant that it's Mr Runga who's approaching patched members and rounding them up. He tells Josiah to meet up at Matipo.

69. The summing up correctly limited how the jury could use the Scott evidence:[124]

> [46] You might want to think about what I've just said [about expert evidence] particularly in relation to the gang expert, Detective Scott. His evidence is quite an important plank of the Crown case against Mr Kuru in particular. But when deciding what use you can make or weight you can place on it, you need to think about what Mr Keegan said about that too. Detective Scott was giving generalised evidence based on his [experience] as a police officer of working with – and as Mr Keegan would put it, against – gangs in New Zealand. He did not say anything specific about Black Power Wanganui, and he did not say anything specific about Mr Kuru or, indeed, Mr Runga. His evidence was not based on or specifically related to the facts of this case. You are the ones who know about those. So, *despite* Detective Scott's general expertise, you need to think about what weight his evidence can carry, the extent to which his generalised evidence can help you draw any specific conclusions about Mr Kuru's role in the events relevant to this case.

A general perspective on Police as experts

70. As the Privy Council observed in *Myers*, a person's status as police officer does not bar them from giving expert evidence.[125] Evidence concerning

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123 **CA COA 314**.

124 **CA COA 409**.

125 *Myers v R* [2015] UKPC 40 at [57]-[60]: **Appellant's BOA, Tab 5, at 187–190**.

gangs is but one subject on which a police officer may be qualified to give expert evidence. Often their evidence relates to aspects of drug offending, including the use of coded language in offenders' communications.

> Evidence of the practices, mores and associations of gangs, is in a similar category. It has been received in several jurisdictions and there can in principle be no objection to it being given by a police officer, providing that the ordinary threshold requirements for expertise are established, and providing that the ordinary rules as to the giving of expert evidence are observed.[126]

71. Parties may legitimately call evidence "to explain certain patterns of criminal activity so that the jury can appreciate how the other evidence in the case fits that pattern."[127] Further:[128]

> The best-informed witnesses about such matters will often be people who have gained expertise not primarily through academic study or professional training but because their work often brings them into contact with the relevant kind of criminal activity. Police officers, and others who investigate crimes in an official capacity, are prominent among those who claim this kind of expertise…. English law with its "characteristically pragmatic" approach to expertise, accepts that people without formal credentials may be "competent to provide the court with information likely to be outside the court's own knowledge and experience, given [their] experience and professional background".

72. A witness can be qualified as an expert: [129]

> … whether his or her expertise was acquired through on-the-job experience or through formal education (or a combination thereof). Just because that specialized knowledge is gained on the job, sometimes developed through the "accumulated wisdom" of a group of people does not, on its own, diminish its value (assuming it otherwise meets the other criteria for admission)

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126 At [57]: **Appellant's BOA, Tab 5, at 187**.

127 Tony Ward & Shahrzad Fouladvand, *Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking*: **Appellant's BOA, Tab 6, at 196**. The report referred to at [93] of the appellant's submissions (Tackling Racial Injustice: Children and the Youth Justice System) commented on police experts and "drill music". The learned authors distinguish this remark and conclude that those whose work involves investigating a certain type of crime may build up knowledge of such activities that "enables them to understand the circumstances surrounding a particular crime in a way that would not be possible for someone without that knowledge."

128 Tony Ward & Shahrzad Fouladvand, *Bodies of Knowledge and Robes of Expertise: Expert Evidence about Drugs, Gangs and Human Trafficking*: **Appellant's Authorities, Tab 6, at 196.**

129 *R v Mills* 2019 ONCA 940, 382 CCC (3d) 377 at [52]: **Respondent's BOA, Tab 6 at 154**. Leave to appeal refused *Mills v R* 2022 CanLII 700 (SCC). See also *United States v Holguin* 51 F.4th 841 (9th Cir. 2022) at [24]-[26]: **Respondent's BOA, Tab 15 at 412–413.** *United States v Mejia* 545 F.3d 179 (2nd Cir. 2008) at 190: **Respondent's BOA, Tab 17, at 487.** *R v Sandham* [2009] OJ No 4602 at [14]: **Respondent's BOA, Tab 7, at 213.**

73. Reliability may be based on such experience rather than any particular methodology or underlying theory, or factors such as peer review and publication.[130] Scientific evidence is only one category of expert evidence: the opinion of a police officer (e.g. on the customs and practices of the drug trade) "is not measured by the logic and science behind it, but rather, is derived from knowledge and experience."[131]

74. An expert such as Detective Inspector Scott is entitled to draw upon the knowledge and experience of others in his field, including published and unpublished writings.[132] The rule against hearsay would be engaged if the expert's evidence "ceases to be expounding of general study (whether by the witness or others) and becomes the assertion if a particular fact in issue in the case."[133] It was emphasised at trial that the Scott evidence was not of this kind. Quite properly, the witness dealt in general terms with aspects of the two gangs.[134] He did not purport to comment on past behaviour of the Black Power gang in Whanganui or the personal characteristics of its members.[135] The categories of information source were identified; it was unnecessary to identify or call others before he could draw on what he learned from them.[136]

75. A risk of bias is not to be inferred from the expert's membership of the police (even their attachment to the branch of police where the offending

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130 *R v Gager* 2020 ONCA 274 at [3]: **Respondent's BOA, Tab 5, at 75**. Leave to appeal refused *Gager v R* 2021 CanLII 32437 (SCC).

131 *R v Violette* 2008 BCSC 920 at [34]: **Respondent's BOA, Tab 11, at 316–317**. Ian Freckleton "Police Evidence" in Ian Freckleton (ed) Expert Evidence (looseleaf, ed, Thomson Reuters) at 13.0.120: **Respondent's BOA, Tab 18, at 513–514**. *R v Abbey* 2009 ONCA 624, 246 CCC (3d) 301 at [113]-[117]: **Respondent's BOA, Tab 4, at 54–56.** Leave to appeal refused *Abbey v R* 2010 CanLII 37826 (SCC). *United States v Kamahele* 748 F.3d 984 (10th Cir. 2014) at [6]: **Respondent's BOA, Tab 16, at 450.**

132 *Myers v R*, above n 125, at [63] and [67]: **Appellant's BOA, Tab 5, at 190 and 192**; *R v Hodges* [2003] EWCA Crim 290; [2003] 2 Cr App R 15 at [13] and [27]: **Respondent's BOA, Tab 3, at 13–14 and 18.**

133 *Myers v R,* above n 125, at [66]: **Appellant's BOA, Tab 5, at 191**. *R v Sheriffe* 2015 ONCA 880, 333 CCC (3d) 330 at [107]-[116]: **Respondent's BOA, Tab 9, at 298–291**. Leave to appeal refused *Sheriffe v R* 2016 CanLII 82916 (SCC). *R v Cluse* [2014] SASCFC 97, (2014) 120 SASR 268 at [14]-[15] and [49]: **Respondent's BOA, Tab 12, at 363 and 369.**

134 It is therefore unsurprising that Mr Scott's evidence on the two gangs has been similar in other cases.

135 He only remarked about the tattoos of the victim and three Black Power members. Despite paras [62]-[63] of the Court of Appeal decision (**SC COA 29-30**), he did not comment on the Whanganui chapter. Certain remarks of the trial Judge also suggested he had done so: e.g. summing up of Ellis J at [172] (**CA COA at 441**), *R v Kuru* [2023] NZHC 129 at [8](b) (**SC COA 48**). Contrary to the appellant's submissions at [130](c), he did not say that Mr Kuru was likely to have sanctioned the attack.

136 Evidence Act 2006, s 25(3). *R v Hodges,* above n 132, at [31]: **Respondent's BOA, Tab 3, at 18–19.** Dr Gilbert has evidently drawn upon "anecdotal" sources in his research, including Police and undercover officers. See J Gilbert, *Patched: the history of gangs in New Zealand*, AUP, 2013, at x-xi.

occurred).[137] The defence suggested that Detective Inspector Scott was not well-disposed to gangs, but this was irrelevant given the nature of his evidence, the content of which was not disputed.[138] Nothing has been put forward to suggest his general propositions were at odds with academic thinking on the same matters.

Section 8 of the Evidence Act

76. The evidence was clearly not propensity evidence under s 40.[139] It passed the threshold for admissibility under s 25 (many of the appellant's criticisms concern weight rather than admissibility, yet there was no cross-examination).

77. The only real issue is whether the evidence was unfairly prejudicial under s 8. On this point, the decision of the Supreme Court of Canada in *Sekhon* is helpful.[140] Mr Sekhon was the trans-border courier of a large quantity of cocaine, worth between $1.5-1.75m. "The key issue at trial was whether Mr. Sekhon knew about the cocaine that was secreted in the pickup truck he was driving."[141] A police sergeant with 33 years' experience gave evidence about the customs and practices of the cocaine trade: chains of distribution, distribution routes, means of transportation, methods of concealment, packaging, value, cost and profit margins. He "explained that the recruitment of a drug courier takes time and that an organization will not typically entrust a first-time courier with a large shipment. Instead, the courier's reliability will be tested with smaller shipments".[142] The witness spoke about "typical methods of concealment, including the use of sophisticated hidden compartments."[143] It was "significant that Mr Sekhon

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137 *R v Mills,* above n 129, at [62]: **Respondent's BOA, Tab 6, at 156.** Leave to appeal refused *Mills v R* 2022 CanLII 700 (SCC). *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] NZLR 750 at [99] (distinguishing impartiality from independence).

138 The same applies to the appellant's suggestion at [110] that police evidence is accorded undue authority. The relevant passages in the American cases of *People v Keister* No 340931 (Mich. Ct. App. Oct. 29, 2020) (dissent of Gleicher J) and *People v Carver* (Mich. Ct. App. Aug 29, 2017) concern expert evidence in child sexual abuse cases.

139 Cf appellant's submissions at [107]. Detective Inspector Scott said nothing about events or circumstances with which the defendant was alleged to be involved.

140 *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272: **Respondent's BOA, Tab 8**.

141 At [1]: **Respondent's BOA, Tab 8 at 225**.

142 The appellant's story was that he was asked to drive the truck by an acquaintance he only knew as "Chris", as a one-off favour. *R v Sekhon* 2012 BCCA 512 at [3]-[4].

143 *R v Sekhon*, above n 140, at [77]: **Respondent's BOA, Tab 8, at 249**.

had been given a fob that could open the hidden compartment; the fact that he 'actually [ha]d hands-on access to the shipment itself' showed that he had 'a lot more trust … within the group'".[144]

78. This was admissible. It attracted no criticism in the majority and minority judgments (there was no dissent on this point). The Privy Council in *Myers* called it "perfectly permissible expert evidence as to drug practices".[145]

79. The problem lay with further evidence, led by the prosecutor, to the effect that the sergeant had been involved in 1,000 investigations and had never encountered a cocaine courier who did not know they were importing drugs. That evidence was: "equivalent to a statement that individuals in the appellant's position always know about the drugs. It is a short step from such evidence to an inference that the appellant must have known about the cocaine."[146] The evidence appeared relevant only because of an unacceptable and unfair inference: "Sgt. Arsenault's opinion that other individuals he has encountered in his investigations knew they were transporting illegal drugs does not logically establish that this accused possessed the *mens rea* for the offences with which he was charged".[147]

80. In other words, "the guilt of an accused cannot be determined by reference to the guilt of other, unrelated accused persons."[148] But it can be assessed by conformity or otherwise with behavioural patterns in a relevant category of criminal activity. In *Sekhon*, evidence concerning typical practices seen in cocaine importations was not unfairly prejudicial.[149]

81. The Scott evidence kept within the equivalent boundary. It explained the structure of the gangs and what the recognised roles of president and sergeant-at-arms signified in a practical sense. The rank structure might

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144 At [19]: **Respondent's BOA, Tab 8, at 229**. See also the summary given in the minority judgment at [77].

145 *Myers v R,* above n 125, at [58]: **Appellant's BOA, Tab 5, at 189**. See also *United States v Diaz* No. 21-50238 (9th Cir. 2023) at [4]: **Respondent's BOA, Tab 14, at 395–396.**

146 *R v Sekhon*, above n 140, at [79] per LeBel J: **Respondent's BOA, Tab 8, at 250**. As noted in the minority judgment in the Court of Appeal, the witness was not in a position to determine as a matter of fact whether in all 1,000 cases he had investigated, the courier had been blind or not: "Yet the officer effectively testified that in his experience, a 'blind' courier is simply never used. This evidence provided no assistance to the Court as to whether the accused had known what he was transporting." *R v Sekhon* 2012 BCCA at [26] per Newbury J.

147 *R v Sekhon*, above n 140, at [80] per LeBel J: **Respondent's BOA, Tab 8, at 250–251.**

148 At [49] per Moldaver J: **Respondent's BOA, Tab 8, at 239.**

149 Extending also to the significance of the fob and the appellant's access to the drug compartment.

differ from gang to gang, but "generally" involved the described roles. In "some" gangs the president was referred to using certain terms. It is "not unusual" for gangs to project a family or community-minded orientation. There was "usually" a vice president, a sergeant-at-arms etc.[150]

82. The original phrasing might have crossed the line of admissibility set by the Supreme Court by appearing to suggest that a serious attack on another gang would "only" (i.e. invariably) occur with a president's sanction – inviting the inference that, if this was a serious attack, Mr Kuru must have authorised it. But the modification required by the trial Judge removed that risk.

83. The proposition that something is "likely" logically means that it does not always occur, so it did not follow that the attack on Mr Ratana necessarily took place with Mr Kuru's blessing.[151] Instead, the jury was required to interpret Mr Kuru's conduct by reference to the evidence surrounding this event, in which exercise they might or might not be helped by the evidence of gang behaviour more generally. This was the ground on which the defence chose to attack the Crown case and the summing up reinforced the message. It was similarly relevant whether Mr Runga was acting within the usual sergeant-at-arms function of enforcing the president's will, or had, as the Crown put it, engaged in "rogue" conduct in front of the president's face.[152]

84. In the Court of Appeal, Cull J considered that the Scott evidence and its use by the prosecutor:[153]

> [106] …led the jury into impermissible deductive reasoning, namely: 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

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150 **NOE 1555–1556**.

151 See defence closing (**CA COA 353**), where it was said that a gang president "will be likely, not certainly, not absolutely, but likely to know about any organised gang attack on a rival gang member". This was a "generalised and somewhat common sense opinion".

152 Cf *Thacker v R* [2019] NZCA 182 at [21]: **Appellant's BOA at 424-425**. If it was relevant in that case to understand the relationship of authority between members and prospects, it was relevant here to understand the relationship between the president and sergeant-at-arms: "… Lay persons are unlikely to be familiar with gang structures and obligations. In particular, they may not be aware that persons having the status of prospects much obey all instructions given by patched members of the gang even if this involves the commission of an offence. Furthermore, if the jury accepts the complainant's evidence as to what occurred, the evidence will assist the jury to understand why the defendants were prepared to engage in sexual activity even though they knew the complainant was not consenting."

153 **SC COA at 40**.

> is a gang President; and therefore, he must have known and sanctioned this rival gang attack.
>
> [107] With the combined circumstantial strands not being enough to convict Mr Kuru of manslaughter as a party, Detective Inspector Scott's expert evidence that the President *would likely have known and sanctioned* a rival gang attack assumed critical importance. It provided a basis for the proposition that Mr Kuru *must have been involved* in the shooting, which the jury were invited to accept.

85. The Judge's view that party liability could not arise on the other evidence in the case partly informs this conclusion about impermissible reasoning. Yet that other evidence, it is submitted, provided a strong basis for inferring guilt. If Mr Kuru had been in the same position as his vice president – invisible until the post-event meeting – he could not have been liable because of his office alone. Here, the prosecutor could fairly submit he was part of the common purpose because of his observed conduct on 21-22 August 2018. He could fairly submit that this conduct, and that of Mr Runga, was also consistent with the general pattern of internal and external gang relationships, which the expert described. Such evidence of behavioural pattern was admissible in *Sekhon* and other cases. It was not misused here.

Ground 3: direction on party liability

86. Mr Kuru was charged with murder as a party. The prosecutor offered a narrative aimed at proving that offence. The Judge directed that, to convict on manslaughter:

> [166] … you would need first to be sure that Mr Kuru knew about the plan and about all of it – the plan to go to Puriri Street, the plan to threaten Mr Ratana, the plan to damage his property and the plan to take guns along. You will need to be sure that he participated or helped prosecute the plan by doing that – by authorising it or sanctioning it or ordering it.

87. The manslaughter question trail was tailored accordingly. The jury needed to be sure of Mr Kuru's involvement in a common plan to take firearms, damage Mr Ratana's property and threaten him. It must find he participated by authorising that plan, and foresaw an unlawful shooting.[154]

[154] **CA COA 458-460**. The jury appears to have questioned whether it was bound by this formulation of the common plan and was directed that it was. **CA COA 237**ff.

88. The tendency was to piggy-back upon the murder narrative for the purpose of considering manslaughter. Conceivably, a stand-alone manslaughter charge may have changed the focus. On the Crown theory, Mr Runga enforced his president's wishes. They may have agreed the time had come to deliver a decisive shock to Mr Ratana – something bigger than before, which he dare not ignore. From there, Mr Runga might have some licence to decide how the intimidation would be accomplished, though the mobilising of more members and use of guns could be expected. How expertly Mr Runga went about this task is beside the point.

89. The agreed unlawful purpose need not mirror what later occurred. Mr Kuru need not know "about all of it" when it came to details of the intimidation: for example, that damage to property would be an element or guns would be taken. The choice of timing might also be left to Mr Runga. (As it happened, of course, Mr Kuru was not surprised by anything on the morning of the 21st, and gave his imprimatur to what unfolded before him. It was almost axiomatic that guns would be present at the confrontation.)

90. A "knowledge-of-the-weapon" direction was given; "an unlawful shooting" needed to be foreseen as a probable consequence. This makes it academic to consider whether the mens rea could have been pitched at a lower level (as the majority held in the Court of Appeal).[155]

91. The appellant submits that even this direction was inadequate and a party to manslaughter under s 66(2) must foresee death as the probable consequence.[156] It suffices to note three problems with this argument:

    91.1 It leaves little distinction between the mens rea for a party to murder under s 167(b) or (d) (and s 168), and party to manslaughter. This would "defeat the scheme of culpability

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155 *R v Smith* 2009 ONCA 454 indicates how gang intimidation would fit the requirements of common purpose liability for manslaughter under the comparable Canadian provision: "A reasonable jury, properly instructed and acting judicially, could find that the appellant was part of the MEW group, that he formed an intention in common with other members of the group to assault and intimidate persons believed to be rival gang members… and to assist each other therein and that in carrying out the common unlawful purpose, he knew or should have known, that bodily harm of a more than transient or trifling nature was likely to result, having regard to the dangerous activity the MEW group was engaged in.": **Respondent's BOA, Tab 10, at 299.**

156 Appellant's submissions at [145](b).

provided by the murder/manslaughter distinction".[157] In any event, there is little practical difference between foresight of an unlawful shooting and foresight of death.

91.2 Section 66 engages with the legal definitions of offences but does not change them. The legal definition of manslaughter does not require foresight of death. In subsection (1)(a), the party who commits "the offence" of manslaughter does not need to foresee death. The parties in (1)(b), (c), (d), who aid/counsel etc that person to commit "the offence", do not need to foresee death either. There is no ground for attributing a different meaning to the "offence" in subsection (2). According to "the ordinary rules of interpretation", the content of the "offence" must be consistent across s 66(1) and (2).[158]

91.3 It is contrary to the way in which materially similar provisions are construed in other jurisdictions.[159]

31 January 2024

F Sinclair/L C Hay
Counsel for the respondent

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

AND TO: The appellant

[157] *R v Rapira* [2003] 3 NZLR 794 (CA) at [29].

[158] As indicated in *The Queen v Barlow* (1997) 188 CLR 1 (HCA) at 11-12.

[159] In particular, *R v Jackson* [1993] 4 SCR 573, construing s 21 of the Canadian Criminal Code. Under s 21(2) a person is liable as a party if they "knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose". The inclusion of an objective knowledge standard makes no comparative difference. For instance, if an assault was the probable consequence of the common purpose, it remains the probable consequence whether the party knew that subjectively (as 66(2) requires, or ought to have known it (which s 21(2) also allows)).

***Kuru v R*: Appendix of relevant exhibits with annotations by counsel**

Image 1: Map showing addresses of various relevant people (**Court of Appeal ("CA") exhibits bundle at 10**)
Image 2: Aerial map of the relevant sections of Matipo Street, Tiki Street and Puriri Street (enlarged by counsel) (**CA exhibits bundle at 16**)
Image 3: Map showing 60 Matipo Street, 33 Matipo Street, Te Kura o Kokohuia and 144 Puriri Street (enlarged by counsel) (**CA exhibits bundle at 33**)
Image 4: Photograph of three Black Power members and Damien Kuru between Tiki Street and Matipo Street (**CA exhibits bundle at 113**)
Image 5: Photograph of four Black Power members and Damien Kuru between Tiki Street and Matipo Street (**CA exhibits bundle at 21**)
Image 6: Enlarged version of Image 5 (photograph of Damien Kuru on Matipo Street) (**CA exhibits bundle at 23**)
Image 7: Photograph of Waiora Herewini's house (144 Puriri Street) from the street (**CA exhibits bundle at 37**)

List of authorities to be cited by Respondent

Statutes

1. Evidence Act 2006, ss 7, 8 & 25

2. Crimes Act 1961, s 66

Cases

3. *R v Hodges* [2003] EWCA Crim 290; [2003] 2 Cr App R 15

4. *R v Abbey* 2009 ONCA 624, 246 CCC (3d) 301

5. *R v Gager* 2020 ONCA 274

6. *R v Mills* 2019 ONCA 940, 382 CCC (3d) 377

7. *R v Sandham* [2009] OJ No 4602

8. *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272

9. *R v Sheriffe* 2015 ONCA 880, 333 CCC (3d) 330

10. *R v Smith* 2009 ONCA 454

11. *R v Violette* 2008 BCSC 920

12. *R v Cluse* [2014] SASCFC 97, (2014) 120 SASR 268

13. *R v Hawi and Ors (No 1)* [2011] NSWSC 1647, (2011) 220 A Crim R 452

14. *United States v Diaz* No. 21-50238 (9th Cir. 2023)

15. *United States v Holguin* 51 F.4th 841 (9th Cir. 2022)

16. *United States v Kamahele* 748 F.3d 984 (10th Cir. 2014)

17. *United States v Mejia* 545 F.3d 179 (2nd Cir. 2008)

Texts

18. Ian Freckleton "Police Evidence" in Ian Freckleton (ed) Expert Evidence (looseleaf, ed, Thomson Reuters)