IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA **SC82/2024**

BETWEEN	**DAVID WAYNE TAMIHERE**
	Appellant
AND	**THE KING**
	Respondent

Appellant's submissions

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Counsel for the appellant certify that, to the best of their knowledge, these submissions contain no suppressed information and are suitable for publication.

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Introduction

1. Mr Tamihere was tried and convicted 35 years ago of the murders of Ms Paakkonen and Mr Höglin. In the decades since, various aspects of the Crown case have been discredited or abandoned: Mr Höglin's body was discovered 70 kilometres from where the Crown said the murders were committed;[1] the watch the Crown said Mr Tamihere had taken from him and given to his son was found with it; the vivid and detailed confession a prison informant (Mr Harris) claimed to have received from Mr Tamihere, which seemed to corroborate other key but hotly disputed features of the Crown case, turned out to be a fabrication; and the Crown has now fundamentally altered its theory of the case.

2. Despite all this, and its inevitable conclusion that justice had miscarried, the Court of Appeal recently upheld Mr Tamihere's convictions on application of the proviso.[2] It did so in reliance on the Crown's third and latest theory of the case and the new blend of evidence and propositions on which it turns, all of which emerged for the first time shortly before the hearing. In other words, the Court upheld Mr Tamihere's convictions on a basis materially different to that on which he had been tried. That approach ran counter to appellate authority from here and overseas. As Lord Bingham wrote for the Privy Council in *Bain v R*:[3]

> Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts.

3. Mr Tamihere sought and was granted leave to appeal to this Court[4] on several grounds which relate to the Court of Appeal's application of the proviso. This Court also admitted *de bene esse* an affidavit sworn by Sir Robert Jones, which recounted a conversation he had with the Officer in Charge, Inspector Hughes, who admitted to fabricating evidence.

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1 Crown opening, SC Casebook p 318: "The case for the prosecution is that the accused on the weekend of 8/9 April 1989 murdered both these young persons in an area of dense bushland a few kilometres north of the township of Thames".

2 *Tamihere v R* [2024] NZCA 300 ("CA 2024 judgment"), SC Casebook p 24.

3 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [119], **Tab 1**.

4 *Tamihere v R* [2024] NZSC 185, SC Casebook p 22.

Summary of argument

4. In respect of several key issues at trial,[5] the Crown case was strengthened and the defence case hindered by the perjurous evidence of a prison informant and what the Crown now considers to be an incorrect account of the Swedes' and Mr Tamihere's movements. Both constitute fundamental errors sufficient to render the trial unfair and preclude the application of the proviso. Sir Robert Jones' credible evidence only adds to the concern.

5. Having secured convictions on that tainted basis, the Crown then sought to have them upheld on a different basis which had never been the subject of a jury trial. In applying the proviso in those circumstances, the Court of Appeal deprived Mr Tamihere of his right to contest in that time-honoured forum what the Crown now considers to be the true case it can make against him.

Some background

6. Helpful background to these proceedings can be found in various transcripts and decisions.[6] Rather than rehearse that background here, it is taken as read and folded into the submissions as and when relevant. That is due to both the sheer volume of material and the fact that the present appeal turns in a large part on developments since Mr Tamihere was tried. These, and some other landmarks, are summarised below.

The basic cases at trial

7. The Crown's original theory of the case, which it advanced at trial, ran broadly as follows. The Swedes[7] made their way to Thames on 6 April. They told people in Thames they wanted to explore the track up Tararu Creek Road,[8] which is a few minutes north of the township, and that is what they did. They drove their car to the top of that road on the evening of 7 April or the

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5 As identified by Tompkins J, namely the trampers' identifications of Mr Tamihere, the Crown's argument that the woman with him was Ms Paakkonen, the movements of the protagonists, the confessional evidence of the prison informants: see Tompkins J's summing up, Casebook (42890) pp 948-949, 957-958, 976.

6 *R v Tamihere* HC Auckland T99/00, 7 September 1990, Tompkins J, Casebook (27590) p 127 ("HC pre-trial judgment"); *R v Tamihere* CA275/90, 19 October 1990, Casebook (GG) p 66 ("CA pre-trial judgment"); Crown opening address, SC Casebook p 318; Crown closing address, Add Mat 20420 p 24; Tompkins J summing up, Casebook (42890) p 941; *R v Tamihere* CA428/90, 21 May 1992, Casebook (GG), p 407 ("CA 1992 judgment"); *Harris v Taylor* [2018] NZCA 393, Witness C Court of Appeal Judgment (66717) ("*Harris*"); CA 2024 judgment, SC Casebook p 24.

7 This term is used for convenience and because it is the term the Court of Appeal used in its 1992 judgment and the Crown used in its recent Court of Appeal submissions.

8 Casebook (42890) pp 148-149, 152: "…this couple were so certain that they wanted to do the Tararu walk… [they seemed] positive they wanted to go up the Tararu Creek"; Tompkins J's summing up, Casebook (42890) p 949.

morning of 8 April,[9] left it in their customarily tidy and secure manner,[10] and entered the bush. There they encountered and were abducted by Mr Tamihere, who had made his way to the area from Wentworth,[11] where he was seen some three to six days earlier.[12] He took them to Crosbies Clearing ("Crosbies") on the afternoon of 8 April, which is where two trampers came across he and Ms Paakkonen, before murdering them somewhere nearby.[13]

8. The defence case at trial was that the Swedes travelled further up the west coast of the Coromandel on 7 or 8 April before doubling back to Tararu Creek Road on the evening of 8 April or the morning of 9 April.[14] That being so, Ms Paakkonen could not have been the woman the trampers saw at Crosbies. The man the trampers saw could not have been Mr Tamihere either, as he had passed through the area a few days earlier after making his own way up from Wentworth.[15] He continued up the spine of the Coromandel before doubling back down the coast and, on the morning of 10 April, walking up Tararu Creek Road.[16] There he came across the Swedes' car, which he rummaged through, converted, and drove to Thames.[17]

The trampers' evidence is ruled inadmissible and reinstated

9. At the heart of the Crown's case against Mr Tamihere lay the evidence of the two trampers who came across a man and a woman at Crosbies midway through the afternoon on 8 April. They eventually identified the man – in

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9 Tompkins J's summing up, Casebook (42890) pp 947, 957: "The Crown case is they were really on a day trip, the packs and the mattresses were still in the car … Well, the Crown case on this issue. The Swedish couple were at the top of Tararu Creek Road at least by Saturday morning, maybe Friday night. At no time, or at least at no relevant time to the events we are concerned with, were they in the northern Coromandel areas as described."

10 People in Thames and up Tararu Creek Road commented on the tidy state of the car: see Casebook (42890) pp 151, 163, 166, 174, 176. As to it being left securely, see: Crown opening, SC Casebook pp 345-346: "Certainly [the car] being locked is consistent with what you will hear of the manner in which Höglin and Paakkonen normally left their car"; Crown closing, Add Mat 20420 p 44: "Is that what the evidence shows? Did they leave [the car] in an insecure state where someone could break in and drive away?"

11 As Tompkins J advised the jury, "it is part of the Crown case that the accused's accounts of his movements from the Saturday to the Monday should be rejected" – i.e. after he had made his way from Wentworth to Thames and into the bush.: Tompkins J's summing up, Casebook (42890) p 957. There was no challenge to Mr Tamihere's evidence that he made his way from Wentworth to Thames.

12 CA 2024 judgment at [66], SC Casebook p 46; Tompkins J's summing up, Casebook (42890) p 955.

13 Crown opening, SC Casebook pp 318, 340. See also the cross-examination of Mr Tamihere, Casebook (42890) p 851: "If you had killed them up there on the Saturday would you agree you'd have plenty of time between then and Sunday afternoon, Monday afternoon to make a couple of trips to get their valuables and dispose of their bodies."

14 Tompkins J's summing up, Casebook (42890) pp 950-954, 957: "The Swedish couple … probably arrived at the top of the Tararu Creek Road on the Saturday night, or maybe the Sunday morning."

15 Tompkins J's summing up, Casebook (42890) pp 955-956.

16 Tompkins J's summing up, Casebook (42890) pp 955-956.

17 Tompkins J's summing-up, Casebook (42890) pp 956-957.

rather problematic circumstances[18] – as Mr Tamihere, and, although they were unable to identify her from photographs, the description they gave of the woman had a loose resemblance to Ms Paakkonen.

10. After hearing the trampers' evidence pre-trial, Tompkins J ruled inadmissible their identifications of Mr Tamihere[19] – identifications that even the Officer in Charge regarded as tainted.[20] On appeal, however, and while acknowledging the circumstances were such as would often render identification evidence inadmissible, the Court of Appeal reinstated them.[21] In doing so, it noted the comfort it drew from confessions Mr Tamihere had allegedly made to fellow inmates, one of which – as explained below – dovetailed nicely with the trampers' evidence.[22]

11. It is unsurprising that, as well as being the most important evidence against Mr Tamihere at trial,[23] the trampers' identifications of him were the most keenly contested.

Mr Höglin's body is discovered along with his watch

12. Almost a year after trial but before Mr Tamihere's first conviction appeal, Mr Höglin's body was discovered poorly concealed in bush in Parakiwai Valley on the east coast of the Coromandel.[24] This was some 70 kilometres by road from where the Crown said, in its opening breath at trial,[25] the murders were committed. Expert evidence suggested Mr Höglin was killed where his body was discovered, a point largely lost on the parties and the Court at the original

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18 See: HC pre-trial judgment, Casebook (27590) p 127, and CA pre-trial judgment, Casebook (GG) p 66. In short, the trampers failed to identify Mr Tamihere from a photo-board or extensive media coverage and gave lukewarm responses when they were shown individual photographs of him (Casebook (42890) pp 542, 564-565, 592). They only positively identified him when the Officer in Charge took them to see him appear in the Thames District Court on charges of converting the Swedes' car. It is, with respect, difficult to imagine more prejudicial circumstances. As the Court of Appeal observed in its recent decision: "… the circumstances in which the trampers identified Mr Tamihere at Thames and in court at trial were not apt to produce reliable identifications.": CA 2024 judgment at [228], SC Casebook p 95.

19 HC pre-trial judgment, Casebook (27590) p 127.

20 Casebook (42890) pp 781-782: "… they had viewed the montage, they had been working very closely with police at headquarters there in the capacity as search co-ordinators, there were an abundance of photos of Tamihere around at that stage and even the wanted notice, they would have had no difficulty picking Mr Tamihere out at the Thames D.C. or anywhere else for that matter. It was a non-event."; Tompkins J's summing up, Casebook (42890) p 967.

21 CA pre-trial judgment, Casebook (GG) pp 69-71.

22 CA pre-trial judgment, Casebook (GG) pp 68, 83.

23 Tompkins J's summing up, Casebook (42890) pp 957-958.

24 Affidavit of Darren Old, 16 March 1992, Casebook (GG) p 124; Affidavit of Melissa Andzue, 20 March 1992, Casebook (GG) p 108; CA 2024 judgment at [166]-[170], SC Casebook pp 75-76.

25 Crown opening, SC Casebook p 318.

appeal,[26] but which has since forced the Crown to re-think its theory of the case.

13. Found with Mr Höglin's body was his watch. This was significant because the Crown argued at trial that Mr Tamihere had taken Mr Höglin's watch and given it to his son.[27] The apparent source of this patently false claim was a boarder who lived for a time at Mr Tamihere's house, Mr Davenport. He eventually claimed to have seen Mr Tamihere give his son a watch very similar to that which Mr Höglin was known to have worn[28] – "eventually" because, as Tompkins J described his evidence following a voir dire:[29]

> … Mr Davenport acknowledged that when he was interviewed by a detective in August of last year he had said to the detective that he had no knowledge of any watch given to John by the accused. However, he was later seen and, as he put it, his memory was jogged so that when he made a further statement in September he said that he could recall the events concerning the watch, although he was not positive at that time whether it was a silver watch. Now he is positive.

The Court of Appeal dismisses Mr Tamihere's appeal

14. These two developments were advanced, among other issues, as grounds of appeal against conviction back in 1992. The Court of Appeal dismissed them rather summarily, reasoning that, as he had access to the Swedes' car, Mr Tamihere could easily have driven Mr Höglin from Thames to Wentworth, and that the Crown's claims as to the watch cannot have assumed much importance in the jury's deliberations.[30]

Mr Harris is convicted of perjury

15. At trial the Crown called three prison informants to give evidence of confessions they claimed to have received from Mr Tamihere. One of them, Mr Harris, said Mr Tamihere told him that he and Ms Paakkonen were almost "sprung" by a couple walking through the bush and that he had taken Mr Höglin's watch and given it to his son.[31] The marriage between this evidence and that given by the trampers and Mr Davenport is obvious, and the Crown

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26 CA 2024 judgment at [168] and [179], SC Casebook pp 76, 79. The conclusion that Mr Hoglin was killed where his body was found was based on the following affidavits: Dr Harry Harding, 18 March 1992, Casebook (GG) p 127; Dr Robert Winchester, 13 March 1992, Casebook (GG) p 183.

27 Crown closing, Add Mat 20420 pp 58-59; Tompkins J's summing up, Casebook (42890) pp 981-982.

28 Casebook (42890) pp 281-282.

29 *R v Tamihere* HC Auckland T99/90, 7 November 1990, Casebook (42890) p 930.

30 CA 1992 judgment, Casebook (GG) pp 418-420.

31 Casebook (42890) pp 726-729.

drew on it in its opening and closing addresses.[32] Indeed, the Crown appears to have cited Mr Harris' evidence at length in its closing address when advocating for the reliability of the trampers' identifications of Mr Tamihere, assuring the jury as it did that Mr Harris was not clever enough to have fabricated such a story.[33]

16. But he had. Some 25 years after giving evidence at Mr Tamihere's trial, Mr Harris was (in a privately brought prosecution) found guilty of perjury in relation to exactly that evidence.[34] Mr Tamihere never told Mr Harris that he had killed the Swedes, or that he and Ms Paakkonen were almost "sprung" by a couple walking through the bush, or that he had taken Mr Höglin's watch and given it to his son. In circumstances unknown, Mr Harris had made up each of those – and other – claims.[35]

17. The trial Judge, Whata J, noted at sentencing:[36]

> [39] Returning to the facts of your offending, Witness C, there are several aggravating features. First, Mr Tamihere's trial involved the most serious charge within the criminal jurisdiction – two murder charges, attracting a sentence of life imprisonment. Second, there was a high level of premeditation given the scope and detail of your false evidence. Third, your evidence materially implicated Mr Tamihere in the offending – it was evidence of a cell-mate confession and corroborated other evidence described by the Court of Appeal in Mr Tamihere's [conviction] appeal as crucial to the Crown case, namely the identification evidence of the two trampers, Mr Cassidy and Mr Knauf. Fourth, your evidence was used to support, in fact, the application for the admission of Mr Cassidy and Mr Knauf's identification evidence. The Court of Appeal, in concluding the trampers' identification evidence should be admitted, noted its conclusion was "strengthened" by the cumulative effect of the evidence against Mr Tamihere, including the cell mate confession evidence.

18. In dismissing Mr Harris' appeal against sentence, the Court of Appeal commented of his offending:[37]

> [23] … the evidence given by Mr Harris materially implicated Mr Tamihere in the offending for which he was charged and was intended by him to do so. … This evidence was graphic in its detail, with content obviously calculated to shock. It was evidence that seemed to tie into other aspects of the Crown case, including evidence that Mr Tamihere had given his son a watch to wear,

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32 Crown opening, SC Casebook pp 360-361, 367; Crown closing, Add Mat pp 54.

33 Crown closing, Add Mat pp 54, 56.

34 *Taylor v Witness C* [2017] NZHC 2610, Witness C Casebook (66717) p 170 ("*Witness C*").

35 *Witness C* at [6], Witness C Casebook (66717) p 172; Question Trail, Witness C Add Mat 1 (66717) p 130.

36 *Witness C*, Witness C Casebook (66717) p 179.

37 *Harris*, Witness C Court of Appeal judgment (66717) p 8.

> and evidence of the trampers coming across a man they believed to be Mr Tamihere with a blond woman.
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> …
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> [25] We do not know how it came to be that Mr Harris' evidence also tied with the evidence of the two eyewitnesses, Mr Cassidy and Mr Knauf. But for whatever reason, it did link with their evidence and on the face of things at least, each appeared to lend credibility to the other. Mr Simperingham argued that the Judge was wrong to say that the Court of Appeal relied upon Mr Harris' evidence when ruling the identification evidence admissible. But that submission is insupportable in the face of … the Court of Appeal judgment.

Mr Tamihere's convictions are referred back to the Court of Appeal

19. Owing to Mr Harris' convictions and a concern that the Court of Appeal had not, at Mr Tamihere's original conviction appeal, properly dealt with implications of the discovery of Mr Höglin's body, Mr Tamihere's convictions were referred back to the Court for reconsideration.[38]

The Crown changes its case

20. As noted, the discovery of Mr Höglin's body near Wentworth and the expert evidence that that is where he was killed eventually forced the Crown to re-think and re-cast its case against Mr Tamihere. It fashioned a new theory as to what had happened, which it revealed for the first time in the written submissions it filed just weeks before the further appeal hearing,[39] and it sought to support that theory with new evidence it had obtained and filed in the months prior.[40]

21. According to the Crown's new theory,[41] rather than do as they said they would and head a few minutes north to Tararu Creek Road,[42] the Swedes left Thames on the evening of 7 April and drove back across the Peninsula to Wentworth, an area in which they were never seen and had not expressed any interest. There they met Mr Tamihere, who, rather than making his own way to Thames, was camping out by a stream. He swiftly befriended the Swedes, murdered Mr Höglin, and, apparently to coincide with their now abandoned

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38 Order in Council, Casebook (GG) p 3.

39 The Crown filed its submissions in the Court of Appeal ("Crown CA submissions") on 10 November 2023.

40 The affidavit evidence on which the Crown relied was filed between August and November 2023. The Crown's application to adduce the evidence and the evidence itself can be found in: SC Casebook pp 166-292.

41 Crown CA submissions, paras 75-85; CA 2024 judgment at [35], [260], SC Casebook pp 35, 105. It is important to note that, at the first appeal, neither the Crown nor the Court departed from the idea that the Swedes had left their car at the top of Tararu Creek Road and from there entered the bush. Rather, they said Mr Tamihere drove Mr Höglin from there to Wentworth: CA 2024 judgment at [34]-[35], [179], SC Casebook pp 35, 79.

42 As the Crown pointed out in opening, Tararu Creek Road is just a few kilometres north of Thames: Crown opening, SC Casebook p 24.

plans,[43] drove Ms Paakkonen back across the Peninsula, through the township she had just been in, and up Tararu Creek Road.[44] He then marched her to Crosbies[45] just in time to be seen by the two trampers before presumably murdering her somewhere nearby.

22. Needless to say, neither this new theory nor the new blend of evidence and propositions on which it turns featured at Mr Tamihere's trial. Mr Tamihere had no chance to confront it in that conventional setting; it was not put to him or any other witnesses when they gave evidence; his counsel had no chance to explore and exploit its (many and varied) implications in cross-examination and closing; and the jury was not asked to consider it. Nonetheless, if it came to it, the Crown asked the Court of Appeal to uphold Mr Tamihere's convictions on the basis that its new theory was unimpeachable.[46]

The Court of Appeal again dismisses Mr Tamihere's appeal

23. After finding that Mr Harris' perjurous evidence had occasioned a miscarriage of justice,[47] the Court of Appeal proceeded – over Mr Tamihere's objection[48] – to consider the proviso. Untroubled by the fact that the Crown was onto its third (and a largely untested) theory of the case,[49] the Court admitted the further evidence and accepted the new propositions on which it sought to rely,[50] found itself sure of Mr Tamihere's guilt, and dismissed his appeal.

Sir Robert Jones recounts his conversations with the Officer in Charge

24. In support of his application for leave to appeal to this Court, Mr Tamihere filed an affidvait sworn by Sir Robert Jones,[51] who had known Inspector Hughes. Sir Robert deposed that, having met and become friends through boxing circles, he and the Inspector fell out following an argument about underhand tactics the police had employed in the Arthur Allan Thomas

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43 Crown CA submissions, paras 81-83.

44 CA 2024 judgment at [245], [260], SC Casebook pp 101, 105.

45 A popular spot which attracted thousands of people annually: Casebook (42890) pp 522-523.

46 Crown CA submissions para 146.

47 CA 2024 judgment at [54]-[56], SC Casebook pp 43.

48 Counsel objected to the admission of the further evidence and submitted the application of the proviso would be inappropriate given the significant shift in the evidential landscape and the Crown's theory of the case.

49 The Court simply said that was understandable and did not mean it was impossible to prove Mr Tamihere's guilt: CA 2024 judgment at [256]-[257], SC Casebook pp 104-105.

50 CA 2024 judgment at [192]-[201], [233], [237]-[239], 260 SC Casebook pp 82-85, 97-99, 105.

51 Affidavit of Sir Robert Jones, 18 September 2024, SC Casebook p 19.

case.[52] Inspector Hughes thought them justified; he did not. They next met at a function shortly after Mr Tamihere had been found guilty. Of that encounter, Sir Robert deposed:[53]

> I was dancing with a girl at a large party in Auckland when I was grabbed from behind. It was John. He was very drunk. He pulled me towards him and said I was "just the bastard he wanted to talk to". He told me he'd nailed Tamihere yesterday. I replied, "Well done" and added that from the newspaper reports I didn't thik he'd had much on him. He replied that he didn't and told me to listen. Jabbing me in the chest, he said, "I'm telling you the bastard did it. I got him on three points. I made them all up. But", he repeated, "the bastard did it." … John didn't elaborate on what the three points were and I didn't doubt what he was telling me.

25. This Court admitted the evidence *de bene esse*. The Crown advised counsel, prior to Sir Robert's death, that it did not require him for cross-examination because it considered his evidence irrelevant.[54]

Legal principles

26. Broadly speaking, the legal issue in this appeal is whether the proviso was properly available to the Court of Appeal or whether it was rendered unavailable on account of the trial having been unfair or tainted by a fundamental error. The below discussion sketches the prevailing approach to these doctrines before exploring in more detail the relevance of the Crown having relied at trial on perjurous evidence and the approach taken by appellate courts when the evidential landscape and, at times, the Crown's theory of the case have shifted significantly since trial.

The proviso, unfair trial, and fundamental error

27. The proviso to s 385(1) of the Crimes Act 1961 allows an appellate court to uphold a conviction despite there having been an error at trial that was capable of affecting the jury's verdict.[55] This Court in *Matenga v R*[56] set out the modern approach to the proviso as follows:

> [29] Following conviction, after a fair trial by jury, Parliament has given the appeal courts an ability to uphold the conviction despite there being a miscarriage of justice in some respect. While the jury is in general terms the arbiter of guilt in our system of criminal justice, the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal to be the final arbiters of guilt in circumstances in which the proviso

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52 Affidavit of Sir Robert Jones at 2-5, SC Casebook p 20.

53 Affidavit of Sir Robert Jones at 6-7, SC Casebook p 20.

54 The Crown advised this via email on 17 March 2025.

55 Crimes Act 1961, s 385(1), **Tab 44**; Criminal Procedure Act 2011, s 232(4)(a).

56 *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145, **Tab 2**.

> applies. The general rule that guilt is determined by a jury rather than by Judges does, however, mean that the proviso should be applied only if there is no room for doubt about the guilt of the appellant; and, as we will mention again below, considerable caution is necessary before resorting to the proviso when the ultimate issues depend, as they frequently will, on the assessment of witnesses.
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> …
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> [31] …[H]aving identified a true miscarriage, that is, something which has gone wrong and which was *capable* of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may *actually*, that is, in reality, have occurred. The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence [including any new evidence], it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence… In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused. Before applying the proviso the Court must also be satisfied that the trial was fair…

28. This Court has since confirmed that approach on several occasions, one being *Lundy v R*.[57] There the Court noted two overlapping circumstances in which resort to the proviso is precluded, specifically where the trial was unfair or marred by a fundamental error. As it summarised the position:[58]

> [25] Some errors are so serious that they cannot be saved by the proviso; put another way, in such a case the appeal will be allowed even if the appellate court is satisfied of the defendant's guilt. Such errors are characterised as "fundamental" or "radical" or said to go to "the root of the proceedings" or to "undermine the integrity of the trial" so that it has lost the character of a fair trial according to law." The High Court of Australia explained in *Wilde v R* that:
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> > It is one thing to apply the proviso to prevent the administration of the criminal law being "plunged into outworn technicality" … it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so

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57 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1, **Tab 3**, on appeal from *Lundy v R* [2018] NZCA 410, **Tab 4** citing *Wilde v R* (1988) 164 CLR 365, **Tab 5**, and *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28], **Tab 6**.

58 See also *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]-[78], **Tab 7**, citing Deane J's judgment in *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 56-57, **Tab 8**: "The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law…"; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [33]-[52], **Tab 9**.

> radical or fundamental that by their very nature they exclude application of the proviso.
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> [26] There exists no taxonomy of errors that are classified as fundamental; rather, incurability depends on the appellant court's assessment of the significance of the error in the context of the trial. In *Randall v R*, Lord Bingham, delivering the judgment of the Privy Council, explained that:
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> > There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.

29. Around the same time as this Court's decision in *Lundy*, the High Court of Australia in *Lane v R*[59] offered the following definition of "fundamental error":

> [46] … While conclusionary labels such as "fundamental defect" may not be particularly useful as tools of analysis, to say that some errors at trial can be seen to breach the "presuppositions of the trial" so as to be beyond the reach of the proviso does serve to focus attention upon the effect of the error in question upon the trial in order to determine whether a substantial miscarriage of justice has actually occurred.

30. As foreshadowed, the discussion below explores what the appellant submits are two examples of errors which should preclude application of the proviso, because they either render a trial unfair or constitute breaches of the fundamental presuppositions of a trial.

Reliance on perjury

31. In understanding why the proviso should be unavailable to uphold convictions procured in part by perjurous evidence, it is worth starting with this Court's decision in *Thompson v R*.[60] That appeal concerned irrelevant and prejudicial evidence given by a Crown witness while under cross-examination by defence counsel, the argument being that admission of the evidence had, despite the Judge's firm warning, caused a miscarriage of justice. In dismissing the appeal, this Court distinguished the circumstances from those in the worst cases of the kind, which it described as follows:

> [19] This is not a case in which a prosecution witness has for her own purposes gratuitously introduced significant illegitimately prejudicial material. It is readily distinguishable from those cases … in which highly prejudicial and irrelevant evidence was unexpectedly introduced by a prosecution witness, seemingly for the purpose of damaging an accused … It was not a

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59 *Lane v R* [2018] HCA 28, (2018) 265 CLR 196, **Tab 10**.

60 *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577, **Tab 11**.

> situation in which the witness has taken matters into her own hands by introducing damaging and irrelevant material and has thereby affected the fairness of the trial so that the guilty verdict cannot be allowed to stand.

32. If the intentional introduction by a Crown witness of damaging but irrelevant evidence can affect the fairness of a trial such that a guilty verdict cannot be allowed to stand, then the intentional introduction by a Crown witness of what purports to be highly relevant and probative evidence but is in fact perjury will almost certainly vitiate the fairness of a trial. Whereas all parties can at least attempt to gloss over evidence of the former sort, the Crown is likely – as it did here – to fold evidence of the latter sort into its case and urge the jury to accept and rely on it. In that way, perjury carries the potential to infect a jury's deliberations from the inside out.[61]

33. This is especially so when perjurous evidence is given by prison informants, a particularly problematic class of witness to whose evidence juries are known to be unduly receptive, notwithstanding searching cross-examination by defence counsel and firm cautions from trial judges.[62] As some commentators and a minority of this Court have observed, the dangers posed by prison informants are arguably amplified by the fact that they are called by the Crown, a relationship which "clothes them with respectability."[63] Knowing the risk it is running in calling such witnesses but eager to exploit the influence they have, it is only fair that the Crown shoulder the consequences when that risk is realised.

34. Another indication of the corrupting effect perjury has on the integrity of trials is found in the recently enacted exceptions to the longstanding rule against double jeopardy. By s 151(2) of the Criminal Procedure Act 2011, an acquitted person may be re-tried if, *inter alia*, he or she is later convicted of an offence against the administration of justice and that offence was a significant contributing factor in the earlier acquittal.[64] This exception was enacted on recommendation of the Law Commission, which reviewed the position in the wake of a case in which a defendant appeared to have secured an acquittal on

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61 *Toia v R* [2020] NZCA 416, **Tab 12**, is one of the few cases where such perjury has been uncovered. There, a neighbour who gave evidence of seeing injuries to the complainant consistent with the assault she said she had suffered admitted years after trial that she had made it all up. On referral back to the Court of Appeal under s 406 of the Crimes Act, the Crown offered no opposition and the Court quashed the appellant's convictions.

62 See the extensive discussion in *W(SC38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382, **Tab 13**.

63 *W(SC38/2019)* at [245] per Winkelmann CJ and Williams J.

64 Criminal Procedure Act 2011, s 151(2)(a)-(c), **Tab 45**. The definition of "administration of justice offence" includes perjury: Criminal Procedure Act, s 151(1).

a murder charge by way of a conspiracy to pervert the course of justice.[65] In making its recommendation, the Law Commission wrote:

> 19. … The reason for particular concern about this case is that Mr Moore appears to have secured his acquittal by a further crime and so exacerbated his affront of one of society's most fundamental laws … by infringing another. That is the rule, critical to the integrity of our judicial processes, that witnesses must give honest evidence and everyone must refrain from interfering with the procedures established for the honest administration of justice…
>
> …
>
> 27. … Such an offender is in a very different position from an accused who, although guilty, has secured an acquittal without resorting to an administration of justice crime … In our view such conduct, if established, warrants a departure from the safeguard of the double jeopardy rule despite the disadvantage entailed…
>
> …
>
> 32. … It was argued that a trial is itself designed to expose perjury, in particular through cross-examination, and that perjury is thus different from other external attacks on the trial process. But this does not meet the point that the perjury is itself corrosive of the trial process…

35. These observations apply with greater force in circumstances such as the present, where the Crown relied at trial to a meaningful degree on evidence cynically fabricated to implicate a defendant; or, putting it another way, where there is a real risk that a criminal offence committed in the course of the trial by a Crown witness materially influenced the jury's verdict. It is difficult to conceive of a circumstance more "corrosive of the trial process", more at odds with "the honest administration of justice", or more deserving of the label "fundamental error" – except where the Crown later abandons the basis on which it advanced its case at trial.

Change in the evidential landscape and Crown case

36. As the Court of Appeal acknowledged, the Crown is now onto its third theory of the case against Mr Tamihere,[66] quite different to those it ran at trial and on the original appeal against conviction, and reliant on a fresh blend of evidence and propositions. Neither the Court of Appeal nor the Crown appears to have considered the implications that such a shift in focus might

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65 *Acquittal Following Perversion of the Course of Justice*, Law Commission, NZLC R70, March 2001, **Tab 46**.

66 CA 2024 judgment at [34]-[35], [256], SC Casebook pp 35, 104.

have for the application of the proviso,[67] but other appellate courts have. Below is a summary of some relevant decisions from New Zealand, England and Wales, and Australia.

New Zealand

37. The first three decisions – the Privy Council's in *Bain v R*[68] and *Lundy v R*[69] and this Court's in *Haunui v R*[70] – arise out of New Zealand. In *Bain*, the appellant appealed to the Privy Council on the grounds, *inter alia*, that, in upholding his convictions, the Court of Appeal:

> [38] … had not given practical recognition to the primacy of the jury as the arbiter of guilt but had taken upon itself the task of deciding where the truth lay; … had done so in relation to matters which the jury had had no opportunity to consider; … and had failed to appreciate the extent to which the case had changed from that on which the jury had based their verdict.

38. In allowing the appeal, the Privy Council noted that several points on which the Court of Appeal relied had not received much attention at trial and one had not been mentioned at all.[71] It then observed:[72]

> [117] … Whatever the merits of the point may be, it can hardly be fair to rely on it for the first time 8 ½ years after the trial …
>
> …
>
> [119] …Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts…

39. The *Lundy* decision, though not a case of the Crown attempting to alter its theory on appeal, is notable for the view the Board expressed in response to a concern raised by trial counsel that, had he adopted a certain tactic at trial, the Crown might have changed its theory of the case mid-trial and alleged that the appellant had not made the rapid dash north and back but had rather killed the deceased much later on.[73] Of that concern, the Board commented:[74]

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67 See above note 49. The Court of Appeal said the Crown's shift in position was natural and did not mean it was impossible to prove Mr Tamihere's guilt beyond reasonable doubt. It did not consider whether it was appropriate to apply the proviso when there had been such a shift.

68 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71.

69 *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699, **Tab 14**.

70 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189, **Tab 15**.

71 *Bain* at [117]-[118].

72 *Bain* at [117] and [119].

73 *Lundy* at [105]-[107].

74 See to similar effect: *R v Shaw* CA159/05, 22 November 2005, **Tab 16**, where the Crown changed its position in closing from principal liability to party liability. The Court said at [43]: "It is of the essence that an accused person

> [108] Indeed, quite apart from the inherent unlikelihood of its wishing to do so, it is highly questionable that the prosecution would have been permitted to advance an alternative theory to one which it had earlier so firmly espoused. The Crown had committed its case unequivocally to a time of death at about 7 to 7:15pm and that was the case which the defendant had to meet. It is at least strongly arguable that the defence could not be required, at a late stage, to answer a case which was quite dramatically different from that which had been presented against him.

40. Finally, in *Haunui*, with the appellant's conviction for possession of methamphetamine for supply in jeopardy, the Crown sought to have it upheld on the basis that she was almost certainly in joint possession.[75] The difficulty this Court saw with that argument, and the reason it swiftly rejected it, is that the Crown had all but eschewed joint possession at trial, which meant the appellant had not had a fair opportunity to address it.[76]

England and Wales

41. The next two decisions come from the England and Wales Court of Appeal. In the first, *McNamee v R*,[77] the appellant was found guilty of conspiracy to cause explosions likely to endanger life. Over the next ten years, several central features of the case the Crown had presented against him at trial fell away. These developments formed the basis of a second appeal against conviction. Seeking to have the convictions upheld, the Crown pointed to the strength of the case that remained against the appellant.[78] While acknowledging that, the Court nonetheless quashed the convictions, observing:[79]

> … The case as presented to us is a different case to that presented to the jury. Mr Lawson accepts that he cannot prove that the Appellant was the designer of the artwork on the circuit boards for the explosive devices, that it is no longer possible to say that the Hyde Park bomb or the "fingerprint" bore "the stamp" of the Appellant by a comparison with the Salcey Forest device, or, that it proved that the Appellant was the manufacturer of the Hyde Park bomb. Mr Lawson says that none of these factors is essential to prove the prosecution case and the Judge made that clear to the jury in his summing up. However, each or all of them may well have had a real impact on the minds of the jury…

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shall have fair notice of the allegations against him. That simply never occurred in this case. The alternatives being put to the jury were separated by place and time and involved wholly different acts on the part of the appellant. The basis upon which the jury found the appellant guilty was simply not the part of the case the appellant had to meet at trial. The defect in what occurred is so fundamental that it cannot be corrected other than by quashing the conviction…". See also *Fraser v R* [2009] NZCA 520 at [31]-[34], **Tab 17**.

75 *Haunui* at [78].

76 *Haunui* at [78]-[82].

77 *McNamee v R* [1998] EWCA Crim 3524, **Tab 18**.

78 *McNamee* at 38.

79 *McNamee* at 39-40.

42. In *Fitzgerald v R*[80] the appellant was found guilty of the manslaughter of an elderly woman. Following the trial, evidence emerged which undermined the theory the Crown had run as to causation and the appellant appealed his conviction. In the hope of satisfying the Court that it remained safe, the Crown sought leave to adduce evidence of an alternative theory of causation.[81] The Court declined to receive it and allowed the appeal, observing that:

> [35] … such an argument about this mechanism of causation [did not] play any part in the prosecution's case at trial. It was clear to us, therefore, that the prosecution was now seeking to advance a wholly new basis for the causation element in the manslaughter charge, a basis which had never been put before the jury. While this Court can receive fresh evidence from the Crown, not only in rebuttal of the appellant's fresh evidence but also to demonstrate the safety of the conviction generally … it is not open to the Crown to seek to put in fresh evidence so as to enable it to advance an entirely new basis for a conviction which was never put before the jury. That would require this court to act as if it were the jury … and usurp the role of the jury.

Australia

43. Several decisions of the High Court of Australia deserve a mention. The first is *Lane*.[82] The Court emphasised the importance – when deciding whether there had been a fundamental error and whether to invoke the proviso – of considering the case that was actually put to the jury. The majority noted:[83]

> [41] … In deciding whether the trial process miscarried in a way that, without more, will result in a substantial miscarriage of justice, one cannot leap from the evidence to the verdict of the jury, ignoring the Crown's case and the directions of the trial judge. How the case is left to the jury is apt to have a critical bearing on the performance by the jury of its task; and as Gleeson CJ said in *Doggett v The Queen*:
>
> > The manner in which a trial is conducted, and in which the issues are shaped, … has a major influence upon the way in which the case is ultimately left to the jury.
>
> …
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> [48] … The proviso is cast in terms which permit the appellate court to dismiss an appeal from a judgment of the court which gives effect to the verdict of the jury: the proviso does not permit the appellate court to exercise the function of the jury…

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80 *Fitzgerald v R* [2006] EWCA Crim 1655, **Tab 19**.

81 *Fitzgerald* at [33]-[34].

82 *Lane* above note 59.

83 Citing *Doggett v R* [2001] HCA 46, 208 CLR 343, **Tab 20**.

44. This echoes the Court's observations in *Kalbasi v R* that, in applying the proviso, "the appellate court is … deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence *at the trial that was had*";[84] and in *Wilde v R* that "the proviso was not intended to provide, in effect, a retrial before the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all."[85]

45. In *Osland v R*[86] the appellant and her son were charged with murder. The jury found the appellant guilty but could not decide on a verdict in respect of her son. Her appeal made its way to the High Court on various grounds, the primary ones being party liability and the consistency of the verdicts. Before addressing those grounds, the minority dealt with an argument advanced by the Crown that the appellant's conviction could be upheld on the basis that her son was her innocent agent. The minority gave that short shrift:[87]

> [20] If a trial has miscarried, a guilty verdict cannot be upheld on a basis not left to the jury because that would be to trespass on the constitutional function of the jury… If her conviction is to be upheld, it can only be upheld on the basis that was left to the jury…

46. The final decision is *Mallard v R*.[88] The appellant was found guilty of murder but in the years afterwards aspects of the case the Crown had presented against him were found wanting. The Court of Appeal saw little in the developments and explained them away summarily.[89] The High Court saw things differently:[90]

> It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for

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84 *Kalbasi v R* [2018] HCA 7 at [12], **Tab 21**, per Kiefel CJ, Bell, Keane and Gordon JJ. See also *Guy* above note 58 at [33] per Elias CJ and Glazebrook J: "… The assessments of miscarriage and application of the proviso are undertaken by the appellate court in the context of all the evidence *and conduct of the trial*….".

85 *Wilde* above note 57 at [10].

86 *Osland v R* [1998] HCA 75, 197 CLR 316, **Tab 22**.

87 Per Gaudron and Gummow JJ.

88 *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 ("*Mallard* HCA"), **Tab 23**.

89 *Mallard v R* [2003] WASCA 296; (2003) 28 WAR 1, **Tab 24**.

90 *Mallard* HCA at [23] per Gummow, Hayne, Callinan and Heydon JJ.

> the strength of that case was heavily dependent on the reliability of the confessional evidence…

Stafford v R

47. The principles encapsulated in many of the above decisions are on full display in *Stafford v R*,[91] a decision of the Queensland Court of Appeal. As it is the most factually analogous case to the present case, discussion of it will be rather more extensive.

48. The appellant was found guilty of murdering his partner's sister. The Crown alleged that he had killed her at home in the bathroom on a Monday morning, immediately bundled her body into the boot of his car, and driven her to a secluded location two days later.[92] Among other features, its case turned on opportunity and proximity, the presence of human blood in the bathroom and the deceased's blood in the boot of the car, the presence of a maggot in the boot of the car which matched maggots found on the deceased's body, and a missing tool said to mirror the murder weapon.[93]

49. The appellant appealed his conviction unsuccessfully.[94] Years later, however, further evidence cast serious doubt on key strands of the Crown's case. There was, for example, too little blood in the bathroom for it to have been the murder scene and almost no evidentiary value in the comparison of the maggots found in the boot of the appellant's car and on the deceased's body.[95] The developments rendered "inherently unlikely" the narrative the Crown had advanced at trial.[96] Put simply, it could no longer be said that the appellant had killed the deceased in the bathroom on the Monday morning and then stored her body in the boot of his car.[97]

50. The appellant's conviction was referred back to the Court of Appeal. In a split decision, the Court upheld it.[98] While acknowledging that the Crown's theory of the case had unravelled, the majority said it still had a formidable case that the appellant killed the deceased somewhere at some time, which is

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91 *Stafford v R* [2009] QCA 407 ("*Stafford* 2009"), **Tab 25**.

92 *Stafford* 2009 at [7]-[12], [16]-[39].

93 *Stafford* 2009 at [7]-[12], [16]-[39].

94 *Stafford v R* [1992] QCA 269, **Tab 26**.

95 *Stafford* 2009 at [40].

96 *Stafford* 2009 at [40].

97 *Stafford* 2009 at [40].

98 *Stafford v R* [1997] QCA 333 ("*Stafford* 1997"), **Tab 27**.

all it ever had to prove.[99] The minority, by contrast, considered the Crown's theory to have been an integral part of the case the appellant had been asked to meet and the jury had been asked to accept.[100] The Judge was, in other words, concerned less with the soundness of the appellant's conviction than with the fairness of upholding it on a basis substantially different to that on which he had been tried. As he put it:[101]

> [The prosecution and the majority] confuse the theoretical legal position with the actual manner in which the prosecution case against the appellant was conducted at his trial…

51. The appellant's convictions were referred back to the Court of Appeal a second time following the High Court's decision in *Mallard*,[102] and in particular its criticism of the Court of Criminal Appeal's readiness in that case to explain away troublesome developments which the appellant had been denied the opportunity to explore and exploit forensically. This time the Court of Appeal adopted the approach previously taken by the minority and allowed the appeal. The obvious strength of (what remained of) the Crown's case came a distant second to the fact that the appellant had been tried and convicted on a faulty theory. As Keane JA observed in the lead judgment:

> [138] … The evidence which has subsequently emerged shows that the jury should not have been invited to regard central aspects of [the scenario presented by the Crown] as fairly open on the evidence … It is inconceivable that the scenario would have been advocated to the jury by the Crown … or presented by the learned trial judge as a view of the facts which was open to the jury, if the new evidence had been led at trial. The question is whether this irregularity in the course of the trial is sufficient to warrant the quashing of Mr Stafford's conviction and the making of an order for a new trial even if the Court were itself satisfied of Mr Stafford's guilt beyond reasonable doubt.
>
> …
>
> [149] In this case the jury were … misled (albeit unintentionally) by the Crown … and the learned trial judge as to the case which the Crown could fairly make against Mr Stafford. It must now be accepted that where there has been an irregularity of this kind in a criminal trial, the issue for the appellate court is not merely whether that irregularity deprived Mr Stafford of a significant possibility of an acquittal. That is because the kind of miscarriage of justice which has occurred is not a miscarriage of justice in the substantive sense … [I]t is a miscarriage of justice in the procedural sense that there has been a failure of process which departs from the essential requirements of a fair trial…

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99 *Stafford* 1997 per Davies JA and McPherson JA.

100 *Stafford* 1997 per Fitzgerald P.

101 *Stafford* 1997 at 24-25.

102 *Mallard* HCA above note 88.

…

> [152] The trial was unfair in a way which was apt to deprive Mr Stafford of the consideration of the real case which could fairly be made against him rather than a theoretical case important aspects of which were not sustainable on a fair view of the evidence…

52. As to the unfairness which drove this conclusion, Keane JA referred to the fact that the Crown had presented to the jury what appeared to be a coherent and logical circumstantial case, the attraction of which might have overcome any doubts the jury entertained on account of arguments made by the defence.[103]

Relevant principles

53. As these cases demonstrate, appellate courts in relevant jurisdictions have been reluctant to uphold convictions when doing so would require them to depart from the framework around which the Crown built and presented its case at trial. This approach safeguards two principles of longstanding and fundamental importance to the criminal justice system: the right to a jury trial, and the constitutional role of the jury as fact-finder.[104] It does so by ensuring defendants have the ability to challenge the true case against them in the time-honoured setting of a jury trial; and by ensuring that, when applying the proviso, appellate courts are in a meaningful sense upholding the verdicts juries deliver.

54. This approach is consistent with this Court's decisions in *Matenga* and *Lundy*. In both those decisions, this Court acknowledged that the proviso cannot be invoked if the trial was unfair of marred by a fundamental error. Those concepts naturally capture trials in which the theory the Crown advanced and some of the evidence and propositions from which it drew support are subsequently discredited or abandoned. To hold otherwise would be to allow appellate courts to uphold convictions on a basis the appellant was never asked or given the opportunity to meet at trial and the jury was never asked to consider. That would undermine both the right to a jury trial and the jury's

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103 *Stafford* 2009 at [139]-[145].

104 As to which, see: *R v H* [1995] 2 AC 596 at 613, **Tab 28**, per Lord Griffiths: "our society prefers to trust the collective judgment of 12 men and women drawn from different backgrounds to decide the facts of the case rather than accept the view of a single professional judge."; and *Hoang v R* [2022] HCA 14, (2022) 96 AJLR 453, **Tab 29**, at [12]: "The jury is the fundamental institution in our traditional system of administering criminal justice. It is, in a criminal trial, the method by which laypeople selected by lot perform, under the guidance of a judge, the fact-finding function of ascertaining guilt or innocence." See also: *S v R* [2018] NZSC 124, [2019] 1 NZLR 408 at [74]-[78], **Tab 30**.

constitutional role as arbiter of guilt or innocence; indeed, it would cut across the very principles of natural justice that jury trials are designed to preserve. As Elias CJ and Glazebrook J observed in *Guy v R*:[105]

> [51] …[T]he observance of the rules of procedure and natural justice which were breached in the present case are essential to fair trial and just outcomes. …
>
> [52] In *Ridge v Baldwin*, Lord Morris said of the principles of natural justice: "here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case." In addition to the denial of a fundamental human right to the accused, the breach deprives the community of the assurance that the verdict has been reached on a basis that is fair…

Discussion

Unfair trial and fundamental error

55. Marred by several fundamental errors, Mr Tamihere's trial was unfair.

Perjury and a faulty premise

56. It is important to consider the significance of the Court of Appeal's finding that Mr Harris' evidence caused a miscarriage of justice. For there to have been a miscarriage of justice, there must have been a real risk that whatever error occurred affected the outcome of the trial.[106] The error here was Mr Harris' perjurous evidence, a serious criminal offence in its own right. There was, accordingly, a real risk that a serious criminal offence committed in the course of the trial by a Crown witness influenced the jury's decision to find Mr Tamihere guilty of murder. Put another way, there is a compelling argument that Mr Harris succeeded in his attempt to corrupt Mr Tamihere's trial and to pervert the course of justice against him.

57. The extent of that perversion and the fundamental defect it entails become apparent when the potential reach of Mr Harris' evidence is considered. It was evidence of a confession from Mr Tamihere, the details of which appeared to corroborate the trampers' identifications of him as the man they saw at Crosbies, the Crown's contention as to the Swedes' movements, and its fallacious claim regarding Mr Höglin's watch. Because of this close

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105 *Guy* above note 58. See also: *Wilde* above note 57 at [10]; and (albeit under a different approach to the proviso) *R v McI* [1998] 1 NZLR 696, **Tab 31**, per Tipping and Keith JJ: "People accused of serious crimes are entitled, under our system of justice, to trial by jury. If there has been an error, or series of errors, in the trial process which could have affected the jury's verdict, the accused person has not had the benefit of due process."

106 Criminal Procedure Act 2011, s 232(4)(a); *Matenga* above note 55 at [31]; *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85, **Tab 32**.

alignment, Mr Harris' evidence drew support from, and provided support to, these important yet hotly contested strands of the Crown's case, thereby helping to tighten the net of circumstantial evidence around Mr Tamihere. But it was all an illusion.[107]

58. To compound matters, the Crown drew attention to this confluence in its opening and closing addresses.[108] Indeed, the following lengthy passage from Mr Harris' evidence appears to have been one of the few from the entire trial which the Crown quoted in its final pitch:[109]

> The ultimate question is the worth of the identification amongst the other circumstantial evidence. When you are looking at this all don't forget Harris who was told by Tamihere:
>
> "Did he say anything about seeing anybody else up in the bush"
>
> "Yes he said that he had Heidi at some stage in the bush and that a couple came across them and that he almost got sprung due to this couple coming across them."
>
> "Say anything to you about this couple whether they were man and woman or what they were"
>
> "No just referred to them as a couple. I just assumed it was a man and a woman"
>
> "When describing that incident to you did he say anything as to where the young Swedish man was"
>
> "I think that stage he said that he'd almost disposed of the guy"
>
> "Did he say what the Swedish girl was doing when this couple nearly sprung them"
>
> "Yes, that's right I recall he said the guy was still tied up at that stage and she was too terrified to say anything"
>
> "Did he say what she was doing at the time the couple nearly sprung them"
>
> "I think sitting down"

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107 There are hallmarks here of *Hall v R* [2022] 1 NZSC 71, [2022] 1 NZLR 131, **Tab 33**, where this Court observed at [24]: "The Crown accepts that, if the statement had not been inappropriately and deliberately altered in the way it was then the jury would have heard evidence that a man who, on Mr Turner's evidence could not have been Mr Hall, was seen leaving the location of the fatality at the relevant time. Moreover the statement would not have linked Mr Hall to the scene through the identification of a sweatshirt seized from Mr Hall's home as the sweatshirt worn by the man fleeing the scene. Instead, the evidence that was before the jury misleadingly conformed with the Crown case. A substantial miscarriage of justice has resulted on this ground alone and there is no possibility, as is conceded, that any resort could be made to the proviso to s 385(1) of the Crimes Act 1961 or to other evidence at trial to remedy the omission."

108 See above note 32.

109 Crown's closing, Add Mat 20420 p 54.

59. Mr Harris' evidence alone was sufficiently corrosive of the integrity of the trial to constitute a fundamental error and render the trial unfair. But it does not stand alone. As is apparent from the significant changes the Crown recently made to its case, the case it advanced against Mr Tamihere at trial was advanced on what it now regards as a faulty premise.

60. The Crown no longer contends that the Swedes did as they said they would and explored the track five minutes north of the township they were in, leaving their car in a tidy and secure state at the top of Tararu Creek Road. Nor does the Crown contend that that is where they encountered Mr Tamihere, who had himself gravitating in that direction of his own accord. Rather, the Crown now contends that the Swedes headed 70 kilometres across the Peninsula in the opposite direction and met Mr Tamihere in Wentworth. It also now contends that it was Mr Tamihere who left the Swedes' car at the top of Tararu Creek Road, having driven Ms Paakkonen back across the Peninsula and through Thames.

61. As with Mr Harris' evidence, the Crown's original theory and the evidence on which it relied to substantiate it provided meaningful support for its case on the key issue at trial, namely who it was the trampers had come across at Crosbies. The Crown's case that it was Mr Tamihere and Ms Paakkonen was supported by Mr Tamihere's account of his movements[110] and the seemingly logical and attractive inference that the Swedes did as they said they would and explored the bush just north of Thames. That inference was reinforced by the fact that their car was seen in that area just two days after they had spoken of those plans and displayed no signs of foul play.

62. The Crown no longer relies on any of that. Just as Mr Harris' evidence has been discredited, the Crown has abandoned its original theory in favour of a radically different one. What this effectively means is that, on the most important issue at trial, the Crown's case drew illusory support from both the perjurous evidence of a prison informant and what it now regards as a faulty premise.[111] It necessarily follows that the many and varied arguments the

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110 The Crown did not challenge Mr Tamihere's evidence that he made his way from Wentworth to Thames: Tompkins J's summing up, Casebook (42890) p 957.

111 This goes one step further than the concern Tompkins J expressed in ruling the trampers' identifications inadmissible, namely the risk of unreliable prison informant evidence being used to prop up unreliable identification evidence: HC pre-trial judgment, Casebook (27590) p 134.

defence made on these crucial issues encountered hurdles which should not have been there. That, in turn, means that when the jury came to consider those arguments and determine those issues, it did not do so on their true merits.

63. And there was considerable substance to the arguments the defence made. The trampers, for example, were almost unique in their inability to identify Mr Tamihere from photographs or media coverage, despite having apparently spent 13 minutes in his presence in broad daylight.[112] It was only when the Officer in Charge escorted them into the District Court on the day Mr Tamihere pleaded guilty to converting the Swedes' car that they made what were effectively dock identifications. Take away the support those identifications drew from Mr Harris' cynical concoction, and the cracks in their foundations are difficult to ignore.

64. As for the woman the trampers saw, not only were they unable to identify her as Ms Paakkonen from photographs, they were adamant she was wearing lipstick, nail polish, eyeliner, and tramping boots,[113] products Ms Paakkonen was not known to own or wear.[114] Subtract the support the Crown's case drew from the logical inference as to the Swedes' movements and the confession Mr Harris claimed to have received from Mr Tamihere, and suddenly these frailties loom large. As the Court of Appeal frankly acknowledged, for example, if the trampers were correct that the woman they came across was wearing make-up (and no one at trial suggested they were mistaken[115]), then the woman probably was not Ms Paakkonen and the man was not Mr Tamihere.[116]

65. By way of a final example, the defence also called a witness, Mr Waters, who claimed to have seen Ms Paakkonen at Fletcher Bay around the time the Crown said she was at Crosbies.[117] Unlike the trampers, Mr Waters was able to identify Ms Paakkonen and her car from photographs, and details he

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112 Many others identified him almost immediately, citing his distinctive eyes.

113 Casebook (42890) pp 533, 557, 578-579, 589.

114 CA 2024 judgment at [77]-[78], [224]-[225], SC Casebook pp 49, 94; Casebook (42890) pp 125, 154-155.

115 This point is discussed further below.

116 CA 2024 judgment at [224], SC Casebook p 94. This acknowledgment contrasts with the claim the Court of Appeal made in its pre-trial judgment that the trampers' description of the woman "strongly suggests that she was Heidi Paakkonen.": see CA pre-trial judgment, Casebook (GG) p 67.

117 Casebook (42890) pp 911.

seemed to recall about clothing she was wearing and items she had in her possession actually matched what was known about her.[118] In putting this evidence to one side, the jury may well have found (false) comfort in both Mr Harris' evidence and the Crown's tidy theory as to the Swedes' movements.

66. These are just some illustrations of the way in which Mr Harris' perjurous evidence and the now abandoned premise on which the Crown advanced its case favoured the Crown and, at the same time, hindered the defence and the jury. Both constitute fundamental errors and, individually or together, are sufficient to render the trial unfair. Indeed, it would seem to be an elementary component of the right to a fair trial that the case against a defendant be free of potentially very damaging perjury and advanced on a basis which is not later abandoned.

Judicial directions

67. Compounding these issues is the fact that, when addressing the trampers' identifications of Mr Tamihere during his summing up, Tompkins J omitted to mention what this Court has since held is – and always has been – the most important feature of the warning about identification evidence.[119] While His Honour told the jury to take care with the trampers' identifications because of the possibility that one or more credible witnesses can be mistaken, he did not sheet home the risk that comes with such evidence by advising the jury that mistaken identifications have resulted in miscarriages of justice.[120]

68. Tompkins J arguably erred in his tripartite direction, too. After advising the jury that acceptance of Mr Tamihere's evidence on essential issues would necessarily lead to a verdict of not guilty, His Honour said that uncertainty in that respect would lead to consideration of the whole of the evidence to decide whether the Crown had proved its case.[121] But as the Court of Appeal

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118 Casebook (42890) pp 911-914, 918.

119 *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [25]-[33], **Tab 34**, citing *R v Turnbull* [1977] QB 224 (CA), **Tab 35**. See also: *R v Ormsby* [1985] 1 NZLR 311, **Tab 36**, *R v Wilson* CA280/84, 12 November 1984, **Tab 37**, *Reid v R* [1989] 3 WLR 771, **Tab 38**, *R v Dickson* [1983] 1 VR 227, **Tab 39**, and *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, Rt. Hon. Lord Devlin, 26 April 1976, **Tab 47**. As this Court observed in *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 at [65], **Tab 40**, by s 45(2) of the Criminal Procedure Act 2011 it is now more difficult to secure admission of identification evidence when a formal procedure has not been followed.

120 Tompkins J's summing up, Casebook (42890) pp 958, 966.

121 Tompkins J's summing up, Casebook (42890) p 944.

has acknowledged several times now, and most recently in quashing convictions for serious sexual and violent offending:[122]

> Logically, if the jury were unsure whether to accept or reject the accused's evidence, this must … have left them with a reasonable doubt leading to a not guilty verdict.

Sir Robert Jones' evidence

69. Finally, there is Sir Robert Jones' evidence about his conversation with Inspector Hughes. There is no reason to question the accuracy of Sir Robert's recollection; the narrative arc, beginning with a dispute over police misconduct in the Arthur Allan Thomas case, makes sense and, together with the subject-matter, would have made the encounter a memorable one. The real issue is whether, in admitting to having 'made up' evidence against Mr Tamihere, Inspector Hughes might have been telling the truth. If so, that too would constitute a fundamental defect in the proceedings.[123]

70. Several possibilities come to mind. First there is Mr Harris' evidence, a proven fabrication which emerged shortly before the pre-trial hearing about the admissibility of the trampers' identifications of Mr Tamihere.[124] Inspector Hughes, who was Mr Harris' first point of contact,[125] had concerns about the quality of those identifications, describing them as tainted. Mr Harris' evidence seemed designed to corroborate them and that is how it was used.

71. Next there is Mr Davenport's evidence regarding the watch, which came about following six visits from the police.[126] It is unclear how the topic arose, but Mr Davenport initially told Detective Ravlich he had no recollection of seeing Mr Tamihere give his son a watch.[127] The circumstances in which he later came to recall both that and that the watch bore resemblance to the watch Mr Höglin was known to have worn are difficult to accept.[128] The fact

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122 *F(CA37/2024) v R* [2024] NZCA 478 at [25], **Tab 41**. The Crown conceded the error in that case.

123 The issue can also be considered from a fresh evidence perspective. Had the defence been able to lead at trial evidence that Inspector Hughes had admitted to making up evidence, that Mr Harris had committed perjury, and that Mr Hoglin's watch was still on his body, the impact on the jury could have been significant.

124 Casebook (27590) pp 110-111, 116.

125 As Mr Harris said in evidence at the pre-trial, Casebook (27590) p 115: "When I made the decision to bring it to the notice of the police I spoke to a prison officer in Paremoremo and asked if he would contact Mr Hughes, which he did. He phoned me and I said to Hughes that certain particulars in regard to the Swedish case had been revealed to me…"

126 Casebook (42890) pp 281-282.

127 Casebook (42890) pp 281-282.

128 Casebook (42890) pp 281-282.

that his evidence was also mentioned by Mr Harris' evidence only adds to the concern.

72. Further troubling evidence includes the evidence of one of the other prison informants, Witness A, whom the Crown had already called once that year to give confessional evidence in a murder prosecution[129] where a defendant's statement was ruled inadmissible due to Police misconduct. Witness A assisted in securing a conviction. There is also the surprising and timely appearance of items in areas that had already been searched, developments that appeared to puzzle both Tompkins J and the police.[130]

Encroaching on the right to a jury trial and the constitutional role of the jury

73. The differences between the case on which the Crown asked the jury to find Mr Tamihere guilty and the case on which it asked the Court of Appeal to uphold his convictions are stark. The latter was shorn of patently false and misleading evidence, proceeded on a fundamentally different premise, and turned on newly obtained evidence and newly devised propositions. These developments gave rise to new issues and required others to be considered in a new light. The Court of Appeal's decision to resolve all this via application of the proviso wrongly deprived Mr Tamihere of the opportunity of challenging what the Crown considers to be the true case that can be made against him in the reliable setting of a jury trial.

The Swedes' and Mr Tamihere's movements[131]

74. Beginning with Mr Tamihere's account of his movements in the days preceding his arrival in Thames on 10 April, prior to trial he gave the police an account in which – broadly speaking – he started around Thames, headed through Crosbies and up the spine of the Peninsula, before coming back down the coast and up Tararu Creek Road.[132] He gave a different account at trial, likely because the disclosure included statements from people who had

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129 *R v Cullen & Waa* (1990) 6 CRNZ 28, **Tab 42**; *Waa v R* [2021] NZCA 172, **Tab 43**.

130 Ms Paakkonen's jacket and Mr Hoglin's wallet were found in an area that had already been thoroughly searched, prompting Tompkins J to comment when summing up (Casebook (42890) p 980): "I don't suppose we will ever know how the jacket and wallet came to be at Jam Tins"; and the Swedes' tent was found in a shed at the top of Tararu Creek Road that had already been searched, a development for which, according to Tompkins J, there was no explanation, and which officers involved in the case considered an enduring mystery. Indeed, in its recent judgment the Court of Appeal said the tent, which was not hidden, "ought to have been [found] and there is nothing to explain why police searches did not find it." CA 2024 judgment at [159] and footnote 102, SC Casebook p 74.

131 This was, as Tompkins J told the jury, one of the six key issues at trial: Casebook (42890) pp 948-957.

132 CA 2024 judgment at [193]-[195], SC Casebook pp 82-83.

seen him around Wentworth early in April.[133] In that account, Mr Tamihere said he started further south and passed through Wentworth before making his way to Crosbies, up the spine of the Peninsula, and so on.[134]

75. Despite some of Mr Tamihere's movements being in issue at trial,[135] the Crown did not test the feasibility of the account he gave the police or press him on the differences between that account and the one he gave in evidence. Indeed, those differences were not even put to him, let alone advanced as evidence that he was lying.[136] Nor did the Crown challenge Mr Tamihere's evidence that he had made his own way from Wentworth to Crosbies, no doubt because it fit neatly with its theory at the time, which had the Swedes doing as they said they would and heading to the bush just north of Thames.[137]

76. Now that Mr Tamihere's account no longer fits with its theory,[138] the Crown seeks to characterise it – in its entirety – as a lie indicative of guilt.[139] Mr Tamihere never went anywhere, it says. Rather, he remained in Wentworth until the Swedes arrived there – contrary to their stated plans – on 7 April and drove to Tararu Creek Road in their car either that night or the following morning. In support, the Crown now places substantial weight on the differences between Mr Tamihere's accounts[140] and relies on evidence from half-a-dozen new witnesses, including an officer in his mid-50s who attempted in July 2023 to complete the trek Mr Tamihere told the jury he had completed in April 1989.[141]

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133 CA 2024 judgment at [196]-[197], SC Casebook p 83.

134 Tompkins J's summing up, Casebook (42890) pp 955-957; CA 2024 judgment at [196]-[197], SC Casebook p 83.

135 As Tompkins J advised the jury, the Crown did not accept the latter part of Mr Tamihere's account, which had him passing through Crosbies and heading further up the Peninsula before coming back down the coast: Tompkins J's summing up Casebook (42890) p 957.

136 The Crown was represented at trial by the Crown Solicitor, Mr Davison, and Mr Hollister-Jones. They (and the police) must have been across any differences but decided against exploring them.

137 As Tompkins J told the jury: "… it is part of the Crown case that the accused's accounts of his movements from the Saturday to the Monday should be rejected" – that is, after Mr Tamihere had made his way from Wentworth to Thames: Casebook (42890) p 957.

138 If the Swedes drove to Wentworth, and Mr Tamihere was making his way to Thames, they would have passed like ships in the night. Equally, if Mr Tamihere made his own way to Thames, it is difficult to explain how he managed to murder Mr Hoglin in Wentworth. Did he separate him from Ms Paakkonen after murdering her first? If so, how did he keep Mr Hoglin under control, let alone avoid detection, while marching him through difficult bush, bundling him into the car, and driving him back through Thames to Wentworth?

139 CA 2024 judgment at [192], [207]-[209], [239], SC Casebook pp 82, 86-87, 99; Crown CA submissions, para 84.

140 Crown CA submissions, para 67.

141 CA 2024 judgment at [198]-[200], SC Casebook p 84.

77. This new theory and the evidence and propositions on which it relies emerged shortly before the recent appeal hearing. None of it had been put to Mr Tamihere at trial, nor had his counsel had the chance to explore it or the jury been asked to consider it. Over Mr Tamihere's objection, the Court of Appeal adopted the Crown's new theory, admitted the evidence on which it sought to rely in support, and accepted it all wholesale, concluding that Mr Tamihere – whose evidence it had not heard – had never left Wentworth and had lied at trial in a manner indicative of guilt.[142] Given the importance and as yet unexplored nature of the point, this was a profoundly unfair approach to take.

78. The same goes for the Court of Appeal's approach to the change in the Crown's case as to the Swedes' movements. It was common ground at trial that the Swedes left their car at the top of Tararu Creek Road. The only issue was whether they did so on the evening of 7 April or the morning of 8 April as the Crown alleged, or on the evening of 8 April or the morning of 9 April as the defence alleged.[143] The reason it was common ground that the Swedes left their car at the top of Tararu Creek Road is that the evidence to that effect is compelling: having been in Thames and expressed a desire to explore the bush just north of the township, the presence of their car in that precise location and displaying no sign of foul play strongly suggests that is what they did.

79. Now, however, the Crown's case runs contrary to that compelling evidence; indeed, it turns on propositions for which there is comparatively little evidence. The Crown now has the Swedes abandoning their plans to head just up the road in favour of travelling back across the Peninsula to Wentworth, a location in which they were never seen and never expressed any interest; and it has Mr Tamihere leaving their car at the top of Tararu Creek Road, despite it being seen there in a state in which the Swedes were known to keep it. Needless to say, none of these propositions was advanced or explored at trial.

80. Notwithstanding the common ground between the parties at trial, the fact it had not heard the evidence that produced that common ground, or the new

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142 CA 2024 judgment at [209], [238]-[239], SC Casebook pp 87, 98-99.

143 As Tompkins J advised the jury when summing up: Casebook (42890) p 957. Indeed, there is no hint in His Honour's discussion of the point that someone else might have left the Swedes' car there. All discussion proceeds on the common basis that the Swedes left it there: Casebook (42890) pp 947-948, 955, 957.

and unexplored nature of the propositions the Crown was advancing, the Court of Appeal decided that the Swedes abandoned their plans in favour of Wentworth and, it seems, that Mr Tamihere drove Ms Paakkonen in her car back through Thames to Tararu Creek Road.[144] Given the importance of the point and the previously untested nature of these propositions, they were not for the Court of Appeal to determine on its contestable interpretation of the record.

Further implications for issues at trial[145]

81. The Crown's change in position has implications for several important issues. By arguing that the Swedes encountered Mr Tamihere in Wentworth, the Crown has resurrected the prospect – advanced by the defence at trial – that the Swedes travelled elsewhere before heading to Tararu Creek Road, and significantly narrowed the window of time for Ms Paakkonen and Mr Tamihere to make it to Crosbies before the trampers. This breathes new life into three important features of the defence case: Mr Waters' identification of Ms Paakkonen at Fletcher Bay; the discrepancies between the description the trampers gave of the woman they saw and what was known of Ms Paakkonen; and the trampers' struggle to identify Mr Tamihere.

82. The Crown no longer contests the notion – advanced by the defence at trial[146] – that the Swedes did not head directly from Thames to Tararu Creek Road. Rather, they travelled elsewhere in the Coromandel. This demands reconsideration of Mr Waters' identification of Ms Paakkonen and her car further north in the Coromandel when the Crown said she was at Crosbies. Perhaps Mr Waters did see Ms Paakkonen, which would explain why, unlike the trampers, he was able to identify her from photographs and gave a description, in terms clothing she was wearing and items she had in her possession, which sat comfortably with what was known of her.[147]

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144 CA 2024 judgment at [260], SC Casebook p 105. The Court said the Swedes' car "was driven" but not by whom. Given it found Mr Tamihere had the key and took it from Mr Hoglin when killing him, it could only have been Mr Tamihere: CA 2024 judgment at [248], SC Casebook p 102.

145 As demonstrated in the previous section, the Crown's original – but now abandoned – premise as to the Swedes' and Mr Tamihere's movements helped to shape crucial issues in its favour at trial.

146 See Tompkins J's summing up, Casebook (42890) pp 950-954.

147 The Court mentioned Mr Waters' evidence in passing when recounting the background but never returned to it: CA 2024 judgment at [82], SC Casebook p 51.

83. Insisting the Swedes travelled a significant distance from Thames also narrows the scope for Ms Paakkonen to have made it to Crosbies before the trampers. This focuses attention on the trampers' evidence about the woman they encountered. As well as being unable to identify her as Ms Paakkonen from photographs, the trampers said she was wearing make-up and tramping boots, products Ms Paakkonen was not known to own or wear. The awkward reality is that, if Ms Paakkonen did not own or wear those products and the trampers were correct in what they saw, then the woman probably was not Ms Paakkonen. As the Court of Appeal demonstrated, these were not easy issues to circumvent.

84. Beginning with the make-up, both trampers were clear that the woman was wearing it – lipstick, nail polish, eyeliner and powder.[148] They noticed that because it was such an unusual sight so deep in the bush.[149] Unsurprisingly, neither party at trial suggested they were mistaken.[150] To have suggested they were independently mistaken about such an unusual detail would have been implausible. That, however, is effectively what the Court of Appeal found. After acknowledging the crucial importance of the point,[151] and without having seen or heard their evidence, the Court decided both trampers had, independently of one-another, made the same implausible mistake.[152]

85. As for the tramping boots, the potential significance of this appears to have escaped the Crown at trial given it closed categorically on the basis that Ms Paakkonen did not own any.[153] The Crown acknowledged she was in need of new footwear following a fateful tramp in Nelson, but insisted she had bought sports shoes.[154] It appears to have referred the jury to photographs of

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148 Casebook (42890) pp 533, 557, 578-579, 589.

149 Casebook (42890) pp 578-579: "I do remember having seen her hands because the one thing I really remember about this was that she was wearing nail varnish. … The reason I remember the painted nails is that it is not the sort of thing you expect to see in the middle of the bush … [I]t is very rare to see a woman tramper wearing makeup and nail varnish in that situation and that's what stuck in my mind."

150 A psychologist who later gave evidence about the woman's behaviour was questioned on the basis that she had been wearing make-up: Casebook (42890) pp 762-763.

151 CA 2024 judgment at [224], SC Casebook p 94: "If [the trampers] were correct, the woman probably was not Ms Paakkonen … And if she was not the woman, then they were mistaken about Mr Tamihere."

152 CA 2024 judgment at [224], [231], SC Casebook pp 94, 96. This mistake might be thought a much unlikelier coincidence than that to which the Court referred at [177], [216] and [229](c). Or, if the trampers were mistaken about the woman wearing make-up, it is difficult to be confident that they were right about the man being Mr Tamihere.

153 Crown closing, Add Mat 20420 p 32. The Crown made this point to discredit the evidence of a defence witness, Mrs Novis, who claimed to have seen Ms Paakkonen (wearing boots) further north in the Coromandel when the Crown had her at Crosbies.

154 Crown closing, Add Mat 20420 p 32.

those shoes and proof of their purchase, before emphasising that there was no such evidence in respect of any tramping boots.[155] The defence sought to exploit this, pointing out that on the Crown's own case the woman the trampers saw cannot have been Ms Paakkonen.[156] The Court of Appeal found otherwise.[157]

86. Finally, insisting the Swedes encountered Mr Tamihere in Wentworth likewise narrows the scope for him to have made it to Crosbies before the trampers. It also invites one to ask why he would have taken Ms Paakkonen back through the township she had just been in and up to one of the most popular tracks and campsites in the Coromandel.[158] This focuses attention on the difficulty the trampers had identifying Mr Tamihere, not to mention their failure to notice his trademark handlebar moustache.[159] In short, it seems less likely, on the Crown's amended theory, that the man the trampers encountered at Crosbies was Mr Tamihere.

Conclusion

87. The Crown is onto its third theory of the case. The Court of Appeal said that was natural and does not mean it is impossible to prove beyond reasonable doubt that Mr Tamihere murdered the Swedes. With respect, the point is not whether it is possible to prove that Mr Tamihere murdered the Swedes, but whether, in circumstances where the evidential landscape and the Crown's theory of the case have changed significantly since trial, that is an issue for an appellate court to determine on a blended and largely untested record or for a jury to determine at a re-trial.

88. The reasons canvassed above demonstrate why appellate courts in relevant jurisdictions have emphatically said such cases are unsuitable for the application of the proviso. There is something intuitively unfair about upholding convictions on a basis which a defendant never had a chance to contest or exploit at trial and the jury was never asked to consider at trial.

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155 Crown closing, Add Mat 20420 p 32.

156 CA 2024 judgment at [78], [225], SC Casebook pp 49, 94.

157 CA 2024 judgment at [78]-[79], [225], SC Casebook pp 49, 94. The Court decided that Ms Paakkonen had – at a time and place unspecified – bought tramping boots. The basis on which it did so was, with respect, rather thin: the Swedes had withdrawn cash after their tramp in Nelson and told a shopkeeper in Thames that they were equipped for a tramp, and a hairdresser in Thames had noticed Mr Höglin wearing boots.

158 Casebook (42890) pp 522-523.

159 Which was in full bloom when he arrived in Thames two days later: Casebook (42890) p 371. See also Casebook (42890) pp 284, 422.

Such an approach conflicts sharply with the deep and longstanding significance the criminal justice system has placed in both the right to a jury trial and the jury's constitutional role as fact-finder.

Conclusion

89. It is respectfully submitted that Mr Tamihere's convictions ought to be quashed.

3 June 2025

M S Gibson / J E L Carruthers
Counsel for Mr Tamihere

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