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

RESPONDENT SUBMISSIONS ON APPEAL AGAINST CONVICTION

30 June 2025

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION

CONTENTS

Introduction

Leave granted

1. The leave decision focuses on whether the trial was unfair, whether in the light of new evidence or otherwise there had been a fundamental error at trial, and whether the proviso could be applied in light of changes to the Crown case and the constitutional role of the jury.

The Reference

2. The Governor-General referred this case to the Court of Appeal because of two post-trial developments. First, the body of Mr Höglin was found on the ridge separating the Parakiwai and Wentworth Valleys. Second, in 2017 Mr Harris was convicted on perjury charges for the evidence he gave at the trial. The reference saw these matters as potentially undermining the trampers' evidence. They "could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred."[1]

3. These issues should be approached in sequence. In 1992, the appellant applied to have evidence about the body's discovery admitted as fresh evidence; the Crown also provided further evidence. The Court of Appeal held the fresh evidence did not provide any reason to quash the convictions, because it was consistent with Mr Tamihere's guilt. In 2018, Mr Tamihere sought to reopen that inquiry by his referral application. He now advanced a new theory: the trampers' evidence was undermined "because it was implausible that [he] could have both disposed of the remains there [Wentworth] and been at Crosbies Clearing with Ms Paakkonen on the afternoon of Saturday 8 April 1989."[2] This argument could have been raised before the Court of Appeal and Privy Council but was not. In effect, the reference directed the Court of Appeal to extend the 1992 appellate exercise and reconsider the implications of the body's location (which raises the associated question of

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1 Reference to the Court of Appeal of the Question of the Convictions of David Wayne Tamihere for Murder (undated), at [6](b) (CoA 4 at 5).

2 Reference to the Court of Appeal of the Question of the Convictions of David Wayne Tamihere for Murder (undated), at [5](2)(a) (CoA 4 at 5).

where Mr Tamihere had been in the days before victims were last seen together).

4. The post-appeal perjury convictions raise a different consideration. They establish that something went wrong *within* the trial: "the jury heard evidence from Mr Harris which we now know was false".[3] As well as re-examining issues associated with the body – that is, the significance of post-trial evidence – the Court had to consider the proviso.

5. This explains the structure of these submissions. Part A concerns the issues of body location and movements. The body's location does not help Mr Tamihere. It reinforces the conclusion that he is guilty. An appeal court is properly able to make that assessment without a retrial before a jury.

6. Part B considers the proviso and perjury issues. Unwittingly adducing perjured evidence did not cause an unfair trial. A post-trial discovery that inadmissible evidence had been led does not prevent an appeal court from applying the proviso, and does not do so here. The Court of Appeal was right to be satisfied beyond reasonable doubt of Mr Tamihere's guilt.

A. Re-examining the fresh evidence from the 1992 appeal, as required by the Reference, shows that Mr Tamihere's movements strengthen the Crown case

Knowledge of where Mr Höglin's body lay is the only explanation for Mr Tamihere's two sets of lies about his movements

7. The reference directed the Court of Appeal to look again at the body location and its implications. This "second look" reveals the contrast between Mr Tamihere's account of his movements as given to Police and the trip he described at trial. On the map attached at Appendix B, this is the contrast between the blue and red journeys.[4]

8. Both journeys were fictions. The initial lies to Police were told to divert their attention from a place where Mr Tamihere had been on his last two trips. He formerly lived there and was seen there a few days before the murders. And it is very close to the body site, another familiar place. It is likely he met the

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3 *Tamihere v R* [2024] NZCA 300 at [55] (CoA 00 at 43).

4 Also produced as Exhibit B to Affidavit of Benjamin Norman, affirmed 29 August 2023 (CoA 00 at 280).

victims on the eastern side of the peninsula. He killed Mr Höglin close to the body site, drove over to Tararu Creek and was next seen with his distinctive gear and Ms Paakkonen.

9. These matters require a summary of the evidence and reference to the Appendix B map. A detailed evidential narrative, with references to the Case on Appeal, is provided in the Chronology and in the Crown's submissions filed for the Court of Appeal.[5]

10. The conclusion that Mr Tamihere knew where Mr Höglin's body lay naturally means that the post-trial discovery of the body has not caused a miscarriage. It can also be used in the appellate assessment of guilt under the proviso, which is a separate exercise triggered by the Harris perjury.

Geographical anchor points of the Crown case

11. The victims were in Thames on Thursday 6 and Friday 7 April 1989. They spoke to several people about plans for their last few days in New Zealand. One idea was to walk a circuit starting from Tararu Creek and on to Table Mountain. Mr Manning advised against this. They also spoke of "the Cape" (apparently Colville)[6] and of touring the peninsula.[7] Justice Tompkins remarked in summing up:[8]

> Now the general accounts of their discussions can easily be reconciled. It may well be that they intended to do both, we don't know in what order, that they intended to go up Tararu Creek Road and up towards, to Table Mountain. They also intended to tour the Coromandel.

12. After their disappearance, there are two geographical anchor points in the evidence. On the eastern side of the peninsula, we now know of Mr Höglin's body on the low ridge between Parakiwai and the Wentworth Valley.[9] It lay a short distance from a 4WD track, across a grassy flat area, on the edge of some scrub. Possibly a few branches had been thrown over, but this was otherwise a

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5 Respondent's Bundle, Tab 1.

6 Evidence of Graham Manning (CoA 2 at 148–149)

7 Evidence of Merilyn Round (CoA 2 at 155 and 156). This contains no reference to going on a long tramp beforehand.

8 Summing Up at 9 (CoA 2 at 949). Cape Colville is at the northern extremity of the Coromandel Peninsula.

9 See the map reproduced in Affidavit of Benjamin Norman, affirmed 29 August 2023, Exhibit C (CoA 00 at 279).

poor attempt at concealment. The person who put the body there was working in a hurry. It is not hard to find a body left in that way, and the body was found, less than a year after the trial. A pig hunter walked by, looked down, and saw the skull.[10] This is the eastern anchor point.

13. At Tararu Creek carpark behind Thames, there were the victims' car (seen on Sunday) and scattered belongings. Ms Paakkonen's jacket and wallet were placed off the track at Jam Tins, an hour's walk up from the carpark,[11] and a plate and cup were found higher up the track.[12] To this, the Crown would add the trampers' sighting of Ms Paakkonen at Crosbies Clearing on Saturday 8 April. This is the western anchor point.

14. As the investigation proceeded, the case understandably developed a western Thames/Tararu/Crosbies focus. Mr Tamihere's statements to Police and Mr Pickering encouraged that focus. The perspective changes with the finding of a body in the east. Mr Tamihere's greater attachment to that side of the peninsula becomes important. He spent most of 1987 in a comfortable bivouac on whānau land near Whiritoa. A Crimewatch episode made it unwise to remain, but he was next associated with another bivouac not far away, at the start of the Wentworth track behind Whangamatā.

15. Just six weeks before the murders, Mr Tamihere stayed at the Sunkist Lodge in Thames for the first time. In the month before the victims disappeared, Mr Tamihere's last two trips from the Sunkist involved hitching south to the Marototo Valley (the Wires Camp) and crossing west to east into the Wentworth. These journeys took him back towards his accustomed haunts and are covered in detail at Appendix C of the Crown Submissions in the Court of Appeal.[13]

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10 See the scene photographs taken and admitted for the 1992 appeal: Affidavit of Benjamin Norman, affirmed 29 August 2023, exhibit A (CoA 00 at 275).

11 Evidence of Derek Read (CoA 2 at 212).

12 Evidence of Derek Read (CoA 2 at 217). These items were found at the junction towards Table Mountain, 20 minutes' walk south of Crosbies.

13 Respondent's Bundle at Tab 1.

16. On the penultimate trip, Mr Tamihere hitched to the Maratoto Valley, stayed at the Wires Camp for a while, and crossed east over the divide. A week later he returned the same way. Mr Patchett and Ms McClenaghan spoke to him as he came back on 26 March, at Wentworth Falls, part way up the Wentworth River. He indicated he had crossed the ridge in the direction of Whiritoa, which, one can now see, would have him passing near where the body was later put.

17. Betraying a sensitivity about where he had been on that occasion, Mr Tamihere's trial evidence described a route which concealed the time he spent on the eastern side, and his return over the Parakiwai ridge.[14]

18. On the last trip before the victims disappeared, he again hitched from Thames, camped three or four days in the Maratoto Valley and crossed into the Wentworth. He met three mountain-bikers at Wentworth Falls. They spoke to him again, mid-afternoon, at the start of the track. He had stowed his pack in the bush and got supplies in Whangamatā. One of the bikers, Mr Thorp, thought he was going to spend the night.

19. The victims were last seen in Thames two or three days after the mountain biker meeting, four at the most. The last sighting of Mr Tamihere (before Crosbies) places him at the start of the Wentworth track, apparently in no hurry, very close to his former bivouac and a short distance from the future body site.

20. These movements stand in contrast with Mr Tamihere's several explanations to Police. Every time, he told them he went north from Thames towards the 309 Road – never going south and crossing into the Wentworth, which is what he really did. The last page of his 12 July interview was adopted in his alibi statement.[15] This locked in a week spent in the 309 Road area to the north, and a further two nights walking the coastal road to Thames.

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14 Instead, he said he went directly north from the Wentworth, rehearsing the exit route he went on to describe for his final trip (CoA 2 at 798).

15 Notice of Alibi, 23 May 1990, CoA 00 at 317 (referring to the last page of exhibit DT 6, CoA 12 at 121).

21. By the time of trial in November 1990, Mr Tamihere knew that Crown witnesses would place him in the Maratoto and Wentworth Valleys, far further south than his Police statements; and there was no longer a risk of the Police attention turning to the Whangamatā hinterland and the body being found. He now had a choice of lies:

    21.1 maintain his original stories to Police – that he had only ever gone north from Thames and back down the main road. This would easily be exposed as false by witnesses who met him in the Maratoto and Wentworth Valleys; or

    21.2 gloss over his Police accounts of starting behind Thames and stretch the original lie, so that the journey began in the Maratoto, crossed to the Wentworth, went far to the north and eventually connected to the alibi. In this version, the Wentworth was not a destination or even a stopover, but a place he flitted through and swiftly exited. Rather than spending a week in the 309 Road area, he turned south before even reaching that point.

22. At trial, Mr Tamihere swore to two irreconcilable things: (i) that once he admitted stealing the car,[16] everything he told the police was true;[17] and (ii) the inconsistent admission that he was in the Maratoto, crossed to Wentworth and met the mountain bikers (a few days before the murders).[18] The false stories to police were not inadvertent slips. He tried on 12 July to connect a Tararu Creek starting point with meeting PEP workers there and having smoko.[19] He did not try to connect himself with the people he met in the Maratoto Valley, or his two conversations with the mountain bikers in the Wentworth.[20]

23. The journey he described at trial had a leisurely start and finish. He lingered at the start in the Maratoto before crossing over and meeting the mountain bikers. The unhurried end was dictated by his stories to police, which involved easy days walking along the western coast. The distance between would need

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16 Mr Tamihere initially tried to avoid any connection with the Subaru and Tararu Creek Road and told Police he found the jacket and packs (seized in Auckland) at Booms Flat in the Kauaeranga Valley some distance east of Tararu.

17 Evidence of Mr Tamihere (CoA 2 at 811 and 813).

18 Evidence of Mr Tamihere (CoA 2 at 799–780).

19 See Crown Submissions in the Court of Appeal, Appendix D at [40]–[46] (Respondent's Bundle at Tab 1).

20 Which would be the obvious thing to do if he wished to distance himself from Tararu Creek Road.

to be covered with inexplicable haste and exertion. This means a departure from his usual behaviour: camping for several days at a time, using two tents and shuttling gear to cope with his heavy loads. He told witnesses in 1987 that a similar route had taken him three months and he had been forced into towns to reprovision.[21] Given the exceptional nature of the 1989 journey, it would be impossible to forget he had gone some 94km elsewhere before connecting with the tracks he adopted in his Police interviews.[22] And at the end of this exertion, having nearly reached Thames, he strangely swerved inland at Tararu Creek Road, not stopping to stay at the Sunkist, collect his second tent and resupply. Yet he supposedly had the money to do these things and headed straight to the Sunkist after stealing the Subaru. The journey he described at trial was 117km of walking, but the Connors affidavit adduced by the Crown in the Court of Appeal lends some reality to what this country is like and what the distances mean when translated to the difficulty of moving through it with a heavy pack.[23] It involves implausible combinations of the ground covered and the time spent in doing it: particularly the first two days (46kms), the days spent between Maumaupaki and Rocky Face, and the exit through dangerous terrain into the Te Mata Valley.[24]

24. The lies told to Police were purposeful. They might have been noticed at the trial but at that time it was sufficient that Mr Tamihere had got to Tararu Creek Road and Crosbies – how he got there seemed less significant. That said, the

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21 Evidence of Geoffrey Williams (CoA 2 at 301 and 303) (this account had a more northerly starting point at Kennedy Bay).

22 That is, 30km driving from Thames to the Wires campsite in the Maratoto and 54km to tramp through to the start of the Wentworth track and then north to Crosbies Clearing, plus 10km hitching a ride along the Kopu-Hikuwai road.

23 Mr Tamihere described his pack as "70 to 80 pounds" and was also carrying a second canvas bag on this trip: see Crown Submissions in the Court of Appeal at [108] (Respondent's Bundle at Tab 1).

24 The terrain in the northern section is difficult, if not dangerous, yet Mr Tamihere said he found the Urewera ranges "too rugged" for his liking (DT 6, CoA 12 at 119). Senior Constable Connors said of the Maumaupaki-Rocky Face section: "There are severe height gains and losses and the sheer ruggedness of the country makes it hard to safely traverse" (Affidavit of Brian Connors, sworn 29 August 2023, at [45]; CoA 00 at 255) and an exit from near Maumaupaki into the Te Mata valley would involve "very gnarly, dirty country, which an experienced person would not lightly go into", when one could easily use the Tapu-Coroglen Road instead (at [49]; CoA 00 at 257).

Crown challenged him on the fact that no one had seen him walking down the main road for three days.[25] Justice Tompkins was:[26]

> … struck … by the number of people who saw him in the days preceding [the Crosbies meeting], and nobody has come forward as having seen him when he emerged at Tapu and was down the coast road spending two nights there and going up the Tararu Creek Road.

25. The *purpose* of these lies became apparent after the body was discovered. The Court of Appeal in 2024 concluded the only explanation for the lies is that Mr Tamihere wanted to disguise his presence in the Wentworth Valley area. And the only explanation for that is his knowledge the body was nearby and would easily be found if the search effort shifted there.[27]

26. The anchor points in the evidence are at Taruru/Crosbies in the west and the body site in the east. Mr Höglin was almost certainly killed near the Parakiwai ridge where his remains were found.[28] After his death the Subaru, the victims' belongings, and Ms Paakkonen, must have moved from east to west. It is not conceivable that Mr Tamihere would proceed in the other direction, driving a long way to dump the body near a place where he had recently been seen – then, having gone to such lengths, to conceal the body so inadequately. Nor is it realistic to propose that another person, the real killer, coincidentally chose to do likewise and put the body on a ridge which Mr Tamihere had crossed on 26 March – close to where he was seen again, two weeks later, a few days before the victims disappeared. Attributing this to sheer chance does not explain Mr Tamihere's desire to hide his movements in that area. An innocent man would have no reason to do that – it is the conduct of someone who knew where the body lay. Further, Mr Tamihere took the only car seen at the Taruru Creek carpark. If a different person had been with Ms Paakkonen at Crosbies,

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25 Cross-examination of Mr Tamihere (CoA 2 at 858–589).

26 Summing Up at 16 (CoA 2 at 956).

27 *Tamihere v R* [2024] NZCA 300 at [239] (CoA 00 at 99).

28 No blood stains were found in the Subaru: CoA 2 at 627. It is unlikely, though not impossible, that transporting a body with the injuries suffered by Mr Höglin would leave no forensic trace. It is therefore more plausible that Mr Höglin was killed in the east, at or close to the place where his body was found.

and left her items up the track, that person would not have been able to transport a body east to Parakiwai.[29]

27. Recognising this east to west movement highlights the extraordinary coincidence that Mr Tamihere was last seen near where the body of the male victim was found, and next seen where there is strong evidence to connect him with Ms Paakkonen.

28. The appellant submits that this east to west movement involved Mr Tamihere taking the risk of driving through Thames. To the extent that passing through a small town involved any risk (it could easily have happened in darkness), it was also a purposeful step, as he might have chosen other locations to take Ms Paakkonen.[30] The victims readily shared their plans with people in Thames. The transfer from Parakiwai to the west suggests that Mr Tamihere knew they were contemplating Tararu-Table Mountain. Other witnesses found him knowledgeable about Coromandel geography, and it would be natural to talk to him about Tararu and Table Mountain if the couple was mulling over Mr Manning's advice against going there. Advertising the victims' connection with that location and hinting at a tramping mishap served its intended purpose. The scattered gear at the Tararu carpark became connected with the missing couple and the search effort was then entirely focused on the western side of the peninsula, where more evidence was found.[31]

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29 *Tamihere v R* [2024] NZCA 300 at [236 (CoA 00 at 98). Furthermore, none of Mr Höglin's items were found up the track, which is consistent with him being dead already at another location.

30 And it is comparable to other risks he was prepared to take, such as driving the stolen car into Thames, then to Cathedral Cave and back, without worrying about being stopped and arrested on the bench warrant.

31 If the couple had not gone directly to Tararu, it does not breathe "new life" into the alleged northern sightings relied on the by the defence. They retain their original infirmities: the Stony Bay sighting is inconsistent with the time the victims were in Thames, or the time the Subaru was at Tararu Creek Road, and in either case inconsistent with other sightings (see Summing Up at 10 and 13–14 (CoA 2 at 950 and 953–954)). The Fletcher Bay witness gave the victims' the wrong hair length and colour and implausibly recalled Subaru's numberplate and the couple's clothing for the first time at trial. Defence counsel had shown him photographs shortly before his evidence (CoA 2 at 915–918). The sightings on the coastal road involved the wrong hair length (see Summing Up at 13 (CoA 2 at 953)). These difficulties are increased by the body location, which places Mr Höglin's body the length of the peninsula away from the northern sightings. The Crown Solicitor's reliance at trial on Ms Paakkonen not owning boots as a reason to discount the Novis sightings at Stoney Bay was misplaced. That error was manifest at the time: as Tompkins J pointed out to the jury, Mr Cassidy also described the woman at Crosbies wearing boots (Summing Up at 11–12, CoA 2 at 951–952). Mr Cassidy had also observed footprints from rubber soled boots when he and Mr Knauf came onto the track leading to Crosbies, near the junction where the victims' plate and cup were found (CoA 2 at 530). The Thames hairdresser said Mr Höglin was wearing "tramping boots" (CoA 2 at 157). As the Court of Appeal below concluded, the couple had probably acquired boots in their travels

29. The reference extended the examination of post-trial evidence. That exercise does not undermine the trampers' observations. Rather, it makes it much clearer that Mr Tamihere is the murderer. If this had been purely a matter of an appeal based on post-trial evidence, the appeal would certainly be dismissed. Four points remain:

The reference issue of timing and movements

30. The first reason for the reference assumed the body finding created a timing or logistical problem: how could Mr Tamihere be responsible for the body at Parakiwai and be seen by the trampers at Crosbies? There is no such problem. The movement is from east to west and Mr Tamihere did not walk 117km to get to Tararu Creek road; he drove there. The appellant now places only faint reliance on the timing question.[32]

Responding to a new defence theory under the reference

31. The "third theory" label is a distraction. In 1992, the appellant advanced his case on the ground that fresh evidence – the body discovery – pointed to a miscarriage. He sought the admission of fresh evidence about the body; the Crown added evidence on that subject and on Mr Tamihere's bivouac near the Wentworth Valley camping ground.[33] This is unsurprising: fresh evidence is admitted on appeal when it is in the interests of justice to do so[34] and the opportunity to submit fresh evidence is not one-sided.[35]

32. In 1992, the Crown had submitted the body's location was consistent with Mr Höglin having been murdered before Mr Tamihere was seen with

(*Tamihere v R* [2024] NZCA 300 at [225], CoA 00 at 94–95).

32 See Appellant's Submissions at [83] and [86], which merely suggest that an encounter on the eastern side "narrows the scope" for Ms Paakkonen and Mr Tamihere to be at Crosbies for the trampers to see them. In fact, Mr Tamihere had a timing problem at his trial. He was locked into to the story that he spent a week near the 309 Road, then made his way down the main road towards Thames. At trial, he tried to reconcile this with the now-accepted fact that his starting point was Maratoto and over to Wentworth. This turned the leisurely journey he described to Police into an improbable race. To give it a semblance of plausibility he cribbed time by purporting to have left the Wentworth before two of the mountain bikers had even arrived in the Coromandel, and cribbed distance by turning around at Rocky Face, well short of the 309 Road.

33 See "Application for admission of Further Evidence", 18 March 1992 (CoA 4 at 95); "Amended Grounds of Appeal", 9 March 1992 (CoA 3 at 87); and affidavits filed on the appeal (CoA 4 at 98–255) (in particular Affidavit of John Rex Hughes, sworn 23 March 1992, at [7] (CoA 4 at 164)).

34 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119] (Appellant's Bundle at 538).

35 Reflected in the Court of Appeal (Criminal) Rules 2001, r 12B(4). See also *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534 (Respondent's Bundle at Tab 2).

Ms Paakkonen at Crosbies.[36] In rejecting the fresh evidence ground of appeal, the Court agreed that Mr Tamihere had the necessary knowledge and means (the victims' car) to get the body to its Parakiwai location.[37]

33. In response to the new *defence* theory submitted to the Minister of Justice, the reference reopened the issue of movements. To meet that, the Crown added limited further evidence in 2024: some of it was graphical interpretation, other content had long ago been disclosed. The main advance in interpretation involves Mr Tamihere concealing his movements to divert Police attention from the Wentworth area. The main piece of new evidence was the Connors assessment of the route Mr Tamihere described at trial. This could not have been led at trial because the Crown did not know how Mr Tamihere would account for his movements.

34. The post-trial emergence of a new evidential anchor point reveals where Mr Höglin died and suggests the couple met Mr Tamihere near there, rather than in the west. None of this affects the conclusion drawn from the strands of the circumstantial case at [42] below – Mr Tamihere was the murderer.

35. Addressing the first limb of the reference involves no more than extending the fresh evidence exercise conducted in 1992. The fresh evidence does not mean that something went wrong at the trial. It merely requires an appellate assessment of whether things not known at trial establish a miscarriage. That was done in 1992 and done again in 2024 as part of the reference. Only the unrelated error of the Harris perjury tips this case into a proviso exercise.

Fresh evidence and "jury usurpation"

36. At paragraph [36]ff, the appellant submits that a post-trial "change in the evidential landscape" prevents the application of the proviso because an appellate court must not consider evidence and interpretation the jury did not hear. None of the appellant's authorities supports his proposition.[38] The

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36 Synopsis of Submissions for the Crown, 23 March 1992, at [12.3.5] and [12.3.6] (CoA 4 at 369–370).

37 *R v Tamihere* CA428/90, 21 May 1992 at 13 (CoA 4 at 419).

38 In the cases which involved truly fresh evidence (*Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 (Appellant's Bundle at Tab 1); *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 (Appellant's Bundle at Tab 14); *Stafford v R* [2009] QCA 407 (Appellant's Bundle at Tab 25)), the fresh evidence contradicted rather than strengthened the Crown case: if the fresh evidence creates a reasonable doubt that the appellant is guilty,

submission avoids a structured approach to the reference in which the post-trial evidence is first examined in the usual way and found strongly to support a conclusion of guilt. That step does not rely on the proviso at all, though the conclusion may be added to the appellate consideration of guilt overall, when the proviso is engaged for other reasons.

37. A fresh evidence appeal necessarily involves considering a case that the jury did not hear. New evidence implies the possibility of reinterpretation. The appellate court may determine that the absence of that evidence at trial has not caused a miscarriage. That is the effect of the Court of Appeal finding that Mr Tamihere knew about the body, and that finding is not seriously challenged. The appellant's case on jury usurpation is that another jury must consider the new evidence and interpretation, despite the appellate conclusion that it does not disclose a miscarriage.[39] This is illogical and in conflict with the principles of fresh evidence appeals.

All admissible evidence is used in the proviso exercise

38. All admissible evidence, original or fresh, must be considered in applying the proviso.[40] *Matenga* explained that:[41]

> … the decision to confirm a jury verdict despite something having gone wrong, depends upon whether the appellate court considers a guilty verdict was inevitable on the basis of the whole of the admissible evidence *(including any new evidence)*. (emphasis added)

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the proviso cannot be applied. In several of the cases (*McNamee v R* [1998] EWCA Crim 3524 (Appellant's Bundle at Tab 18), *Fitzgerald v R* [2006] EWCA Crim 1655 (Appellant's Bundle at Tab 19), *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 (Appellant's Bundle at Tab 23)) the "fresh" evidence arose from failures to disclose crucial evidence (that is, process errors) by the Crown and the Crown case had created a false impression. The trials were unfair, and so the proviso was unavailable. These failures had caused unfairness at trial. *Mallard* was the only case of the three from a proviso jurisdiction, and the proviso was not applied when the undisclosed evidence could discredit the Crown case, "perhaps explosively so" (at [23], Appellant's Bundle at 872). In *Lane v R* [2018] HCA 28, (2018) 265 CLR 196 (Appellant's Bundle at Tab 10) and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 (Appellant's Bundle at Tab 15), the Crown had chosen to run its case at trial on one basis (that is, told the jury that it could be sure of guilt on alternative bases of causation in *Lane*, and on sole possession in *Haunui*), then sought to change its approach to those elements of the offence on appeal (by relying on one basis of causation only in *Lane*, and joint possession in *Haunui*). It would be unfair to permit the Crown to ask the appeal court to make a factual determination on a basis which it deliberately chose not to leave open to the jury. This is not the equivalent of evidence discovered post-trial adding strands to a circumstantial Crown case.

39 See Appellant's Submissions at [73] and [87] ("the point is not whether it is possible to prove that Mr Tamihere murdered the Swedes …").

40 *Tamihere v R* [2024] NZCA 300 at [46] (CoA 00 at 40).

41 *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 (Appellant's Bundle at 49) [*Matenga*].

39. The goal of the proviso is to prevent needless retrial of criminal proceedings.[42] This goal is frustrated if the appeal court cannot consider evidence that helps to prove guilt, merely because the new facts emerged after the trial.[43] And it would be frustrated if the appeal court were not free to reinterpret the facts in light of the whole of the admissible evidence. The High Court of Australia said in *Mallard*, a reference case:[44]

> The answer to that question [of miscarriage] may only be given after a consideration of the facts, not only as they emerged at the trial, but also as they emerged in the Court of Criminal Appeal, no matter what descriptive term the evidence adduced might be given. *It is elementary that some matters may assume an entirely different complexion in the light of other matters and facts either ignored or previously unknown*. (emphasis added)

40. It is "fundamental" that applying the proviso is an objective appellate task "not materially different from other appellate tasks".[45] In a circumstantial case, the appeal court does not "parse each item of evidence in search of a possible innocent explanation."[46] Obviously the parties' interpretations of events may evolve to address any newly admitted evidence. The Court of Appeal found that unremarkable.[47]

41. The Court of Appeal concluded that Mr Tamihere lied about his movements because he knew about the Höglin body.[48] This is the logical and chronological starting point for considering the evidence from Tararu Creek and onwards. It makes it far more likely that the trampers saw Mr Tamihere at Crosbies, and that Mr Cassidy recognised him from an earlier occasion.

42. The Crown case now fits together in this chronological order:

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42 *Weiss v R* [2005] HCA 81, (2005) 224 CLR 300 [*Weiss*] at [47] (Respondent's Bundle at Tab 4).

43 In *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534 at [102]–[103] (Respondent's Bundle at Tab 2) the Court noted that that to exclude on appeal evidence from the prosecution in support of a conviction would "undermine the public's confidence in the justice system".

44 *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 (Appellant's Bundle at 869).

45 *Weiss* at [39] (Respondent's Bundle at Tab 4).

46 If the appeal court were required to do so, "it would be virtually impossible to ever satisfy the second branch of the proviso in a circumstantial case" (*R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272 at [56] (Respondent's Bundle at Tab 10)).

47 *Tamihere v R* [2024] NZCA 300 at [256] (CoA 00 at 104): "At trial much was unknown … It is to be expected that the Crown's theory would evolve, if and when new evidence emerged, as happened with the discovery of Mr Höglin's body."

48 *Tamihere v R* [2024] NZCA 300 at [239] (CoA 00 at 99).

42.1 Mr Tamihere knew of the Höglin body. This follows from the circumstances noted above: his presence at the start of the Wentworth track several days before the victims disappeared, his previous use of Wentworth as a base, his recent crossing of the Parakiwai ridge where the body was found, and his lies to Police which can only be explained as diverting their attention from the Wentworth area.

42.2 He drove the Subaru to Tararu Creek carpark with Ms Paakkonen. This is the only reasonable way to connect the eastern and western anchor points.

42.3 He did not walk to Tararu Creek via the improbable route described at trial from the Wires Camp to Rocky Face.

42.4 Because he drove there, he made the mistake of saying he felt a warm exhaust pipe on the Subaru despite no car passing him as he walked the 7km up Tararu Creek Road.[49] Expert evidence was given that the exhaust would be cool within 20 to 30 minutes.[50]

42.5 He gave a false explanation of unlocking the car using a wire through a partly open window.[51] He already had the key and did not need to break in. He struggled to explain a replicable method of using wire.[52]

42.6 Ms Paakkonen's belongings were found along the track to Crosbies. At Crosbies, the trampers met a man and a woman who appearance aligned with Mr Tamihere and Ms Paakkonen. They observed some of Mr Tamihere's distinctive gear: blue igloo tent, poncho, tomahawk worn at the belt. Despite widespread publicity, no-one ever came forward as the man and the woman.[53]

42.7 Mr Cassidy later realised he had met the same man at Crosbies before, and the details of their earlier conversation point inexorably to that man being Mr Tamihere.[54]

42.8 Mr Tamihere said he thought he had the luxury of time when he saw the Subaru. He could safely break into the car with a piece of wire (rather than smash a window) and sort through the victims' property.

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49 Evidence of Mr Tamihere (CoA 2 at 803 and 830–834).

50 Evidence of Graham Doggett (CoA 2 at 656–658).

51 The witnesses who saw the parked Subaru unanimously said its windows were rolled up: Evidence of Jennifer Gladwin (CoA 2 at 163), Harry Goodwin (CoA 2 at 168–169), Clement Cornish (CoA 2 at 173).

52 See the summary in Summing Up at 28–31 (CoA 2 at 968–972).

53 No cannabis was found in the search area, though drugs are sometimes suggested as a reason no other couple came forward.

54 See Court of Appeal Submissions at [114]–[116] (Respondent's Bundle at Tab 1).

He relied on the fiction of a warm exhaust to maintain the owners had recently left. But their packs, sleeping bags and camera were present, which could not suggest they had gone far.

42.9 It is beyond coincidence that Mr Tamihere "happened" to be stealing the car on Monday, when couple resembling him and Ms Paakkonen were seen at Crosbies on Saturday. Compounding this unlikelihood, he was last seen, a few days earlier, near the Höglin body site.

42.10 Mr Tamihere drove the car directly to the Sunkist Lodge in Thames. There was no evidence the Subaru had a second key, available to be found in the glovebox as he said.

42.11 Mr Tamihere had cash to spend in Thames on 10 April, which must have come from the victims' wallets.[55]

42.12 He parked the stolen Subaru outside the Sunkist Lodge hostel two nights in a row and drove it around Thames and the Coromandel. Yet he said he assumed its owners were tourists on a day hike.[56] If so, they would have gone to Thames to report the theft. Having no car or gear, they could well have gone to the Sunkist for accommodation. Such recklessness about being caught with a stolen vehicle and property was uncharacteristic for Mr Tamihere, a wanted man who had been careful to evade Police attention for over two years. It can only be explained by his knowledge that the victims were dead and would not raise the alarm.

B. Admitting Mr Harris's perjured evidence did not cause an unfair trial

43. Perjured evidence is by definition, false. It therefore cannot be relevant and is inadmissible.[57] Barring any intentional elicitation of perjured evidence by the prosecution, which would almost certainly render the trial unfair, perjury in a trial may cause a miscarriage in the same manner as any other inadmissible evidence would. It must be assessed in the context of the trial to determine whether it rendered the trial unfair. To hold that every instance of perjury has

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55 The victims withdrew $150 cash three days before they disappeared: Exhibit A11, CoA 00 at 398. Only Ms Paakkonen's wallet has been found (without any cash in it). Mr Tamihere claimed the cash came from selling possum skins in the bush, though he abandoned that position in cross-examination: CoA 2 at 842.

56 As Mr Tamihere said at trial, "I saw the packs I just thougt well whoever theyre probably not planning on to long a trip" (CoA 2 at 831).

57 Evidence Act 2006, s 7(2). Under s 49 of the Evidence Act, Mr Harris's perjury convictions are conclusive proof that his evidence was false. Ordinarily, though a witness's evidence may be suspected of being unreliable or not credible, it is not known to be false and the conclusion that it was in fact inadmissible is unavailable.

caused an unfair trial, rendering the proviso unavailable, would conflict with the thrust of proviso jurisprudence, which:

43.1 rejects the formalism of the Exchequer rule and discountenances the idea of rigid categories of errors which cause an unfair trial; and

43.2 looks instead at the significance of the error in the trial context.

The sequenced approach to criminal appeals

44. Section 385 of the Crimes Act 1961 provided:[58]

> **385 Determination of appeals in ordinary cases**
>
> (1) On any appeal [to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must] allow the appeal if it is of opinion—
>
> (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) That on any ground there was a miscarriage of justice; or
>
> (d) That the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal [or the Supreme Court] may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

45. This provision (and its predecessors and successors) invites a sequenced approach to appeals:

45.1 The appellant identifies an irregularity or error, the effect of which must be examined in context of the trial overall.

45.2 If that irregularity caused an unfair trial (or if the prosecution is a nullity, or the verdict unreasonable), the appeal must be allowed. The proviso is not available.

45.3 In every other case, the appellant must show there was a real risk that the irregularity affected the outcome of the trial.

45.4 If there is a real risk that a more favourable verdict might have been delivered had nothing gone wrong, the appeal court may consider

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58 It applies to this appeal under the Criminal Procedure Act 2011, s 397.

whether it is nevertheless satisfied beyond reasonable doubt of the appellant's guilt. That is, the court applies the proviso.

Applying the proviso is consistent with the jury's constitutional role

46. In *Matenga*, this Court explained:[59]

> [28] … The Bill of Rights Act guarantees of a trial by jury and an appeal do not require that a further jury trial should necessarily be ordered if a miscarriage at the first trial has been identified. Nothing in that Act prevents the appellate court from considering whether, despite the miscarriage, the verdict already rendered by a jury should stand.
>
> [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 ultimate arbiters of guilt in circumstances in which the proviso applies.* (emphasis added)

47. *Matenga* (which followed *Weiss*) represented a pivot in reasoning "from an 'effect-on-the-jury' conception of the appellate function to a 'determination-of-guilt' conception".[60] Historically, the courts viewed the proviso as impinging on the constitutional role of the jury.[61] When it came to apply it at all, the appeal court restricted itself to asking whether the jury would without doubt have convicted (absent the error).[62]

48. But the court's reasoning on the proviso is now more transparent. Rather than theorising what the jury (or another reasonable jury) would have done but for the error, the appeal court forms its own opinion of guilt.[63] If satisfied beyond reasonable doubt that the appellant is guilty, it cannot be a substantial miscarriage of justice to uphold their inevitable conviction.[64]

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59 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [36] [*Lundy [2019]*] conclusively declined to revisit this "now-settled approach" (Appellant's Bundle at 67).

60 *Hofer v R* [2021] HCA 36, (2021) 274 CLR 351 at [84], per Gageler J (Respondent's Bundle at Tab 3).

61 And it would have "startling consequences" to substitute the opinion of appellate judges for the jury's: *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC) at 69–70; followed in *R v Lawrence* (1905) 25 NZLR 129 (CA) at 138 and 142–143 (though note the separate reasons of Stout CJ and his concern that this did violence to the statutory language: at 134).

62 See the collection of various formulations of the test in *R v McI* [1998] 1 NZLR 686 (CA) at 711–712.

63 *Matenga* at [28], applying *Weiss* (Appellant's Bundle at 49); confirmed in *Barlow v R* [2009] UKPC 30 at [21] (Respondent's Bundle at Tab 5).

64 "Inevitable" in the sense that it it is the only reasonably possible verdict on the admissible evidence in the opinion of the appeal court: *Matenga* at [31] (Appellant's Bundle at 50); *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [57] (Appellant's Bundle at 568).

49. Applying the proviso does not usurp the jury's function. The appellate court is upholding a jury's verdict, against an appellant who seeks to escape it because of the possibility that it might have been different.[65] This is the opposite of usurpation. A defendant is entitled to a fair trial and appeal process according to law, and the proviso is part of that process. In cases where it is available, the proviso avoids "the needless retrial of criminal proceedings."[66] Asserting the right to another jury verdict whenever a miscarriage has occurred must invite a return to the Exchequer rule and departure from the enactment which overturned it.[67]

Identifying an unfair trial is always a context-specific exercise

50. Few criminal proceedings are perfect. Most imperfections are of no import. Some will have risked affecting the verdict and may be appealed. A smaller category still of those errors will be "fundamental": that is, "such a departure from the essential requirements of the law that it goes to the root of the proceedings",[68] "a serious breach of the presuppositions of the trial",[69] "in effect deprives an accused person of the protection given by essential steps in criminal procedure",[70] or "incurable".[71] A trial afflicted by that type of error will have been *unfair*.[72] In these cases, an appellate court cannot conclude that there was "no substantial miscarriage of justice": the proviso is unavailable.

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65 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [36], per Lord Hobhouse.

66 *Weiss* at [47] (Respondent's Bundle at Tab 4). In New Zealand the Exchequer rule was never part of the common law: the proviso was enacted purely prophylactically to prevent it taking root here (though that prophylactic was ineffective until after 1945).

67 See the discussion of the proviso's history in *Weiss* at [26]–[30] (Respondent's Bundle at Tab 4), adopted approvingly in *Matenga* at [20]–[22] (Appellant's Bundle at 47).

68 *Wilde v R* (1988) 164 CLR 365 at 373 (Appellant's Bundle at 226).

69 *Weiss* at [46] (Respondent's Bundle at Tab 4).

70 Robin Cooke, "Venire de Novo" (1955) 71 *LQR* 100 at 129 (Respondent's Bundle at Tab 6).

71 *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 [*Howse*] at [37] per Lord Hutton, Lord Carswell and Sir Swinton Thomas and [48] and [57] per Lord Rodger and Sir Andrew Leggatt (Respondent's Bundle at Tab 7); *Lundy [2019]* at [26], [29], and [37] (Appellant's Bundle at 64 and 67). "Incurable" is a term which obscures the work of the proviso. When the appeal court finds it is satisfied of an appellant's guilt and upholds their conviction, it is not 'curing' the miscarriage which marred the trial. Resort to the proviso prioritises certain values of the criminal justice system (substantive accuracy and finality) over another (upholding procedural standards). Confirming the verdict of guilt was substantively accurate does not "cure" errors at trial so much as override the acknowledged error in the interests of justice.

72 *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 (Appellant's Bundle at 254), adopted in *Howse* at [36] (Respondent's Bundle at Tab 7). Nullities and verdicts which are unreasonable or unsupported by the evidence may be thought of as separate categories, rather than causing the proceeding to be unfair: *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77] (Appellant's Bundle at 288) and *Matenga* at [9] (Appellant's Bundle at 43). These labels are now separated out from other forms of error in s 232(3)(a), (3)(b) and (4)(b) of the Criminal Procedure Act 2011.

51. Some errors may "be described as giving rise to unfairness" without constituting such a serious irregularity that it amounts to an unfair trial.[73] It is a particularly grave conclusion to find that a defendant has not had the "substance of a fair trial", because that "means that the administration of justice has entirely failed".[74] A high threshold of unfairness should be set so as not to stultify the operation of the statutory proviso.[75]

52. No abstract or categorical taxonomy of these errors is possible.[76] When determining whether an error is merely an error, or whether it has caused an unfair trial, the question must be on its effect in the *actual* trial "overall".[77] Some process errors are more likely to affect trial fairness without requiring much further enquiry (for example, an erroneous judicial direction which prevents the jury performing its function of reaching a unanimous verdict; or failing to discharge a juror who was required by law to be discharged before verdicts were delivered).[78] But finding unfairness due to other procedural errors is highly contextual: a judge who falls asleep during trial may not have affected its course and conduct,[79] or their snores may have distracted the jury from their task and the defendant from giving evidence.[80] A misdirection on the legal elements of the charge may have caused a substantial miscarriage of justice for one defendant, but not another, depending on the effect that error had on the conduct of their defence (and other aspects of the trial context).[81]

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73 *Howse* at [33] (Respondent's Bundle at Tab 7).

74 *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 (PC) (Respondent's Bundle at Tab 8).

75 *Lundy (2019)* at [28] (Appellant's Bundle at 64); *Howse* at [37] (Respondent's Bundle at Tab 7), citing *Driscoll v R* (1977) 137 CLR 517 at 527.

76 Because there can be "no taxonomy of errors that are classified as fundamental": *Lundy [2019]* at [26] (Appellant's Bundle at 64), citing *Gassy v R* [2008] HCA 18, (2008) 236 CLR 293 at [33]. See also *Hofer v R* [2021] HCA 36, (2021) 274 CLR 351 at [113] (Respondent's Bundle at Tab 3); *Kalbasi v State of Western Australia* [2018] HCA 7, 264 CLR 62 at [107] (Appellant's Bundle at 748); *Weiss* at [44]–[45] (Respondent's Bundle at Tab 4).

77 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78], citing *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 57 (Appellant's Bundle at 288).

78 *Lane v R* [2018] HCA 28, (2018) 265 CLR 196 at [48] (Appellant's Bundle at 388); *Hoang v R* [2022] HCA 14, 276 CLR 252.

79 *R v Betson* [2004] EWCA Crim 254 at [47].

80 *Cesan v R* [2008] HCA 52, 236 CLR 358.

81 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [99], cf. at [140]; *Kalbasi v State of Western Australia* [2018] HCA 7, 264 CLR 62 at [59] (Appellant's Bundle at 725).

A jury, or a Judge sitting alone, may consider material not presented at trial without it necessarily causing an unfair trial.[82]

Adducing inadmissible material does not, without more, render a trial unfair

53. As the above list suggests, most instances of unfair trials involve "serious failures of trial process".[83] What effect and importance a specific piece of evidence had at trial is context-driven. This Court in *Lundy* listed some of the factors by which to assess that effect, including:[84]

    53.1 how cogent or prejudicial the evidence was and whether it was met by defence evidence;

    53.2 what impact the inadmissible evidence had on the conduct of the defence case;

    53.3 how counsel handled the evidence; and

    53.4 whether the trial judge's directions mitigated or cured the irregularity.

54. Even very prejudicial evidence may be led without it causing an unfair trial, so long as it appeared genuinely admissible at the time: for example, the defendant's incestuous paedophilia in *Howse*, the officer in charge's anecdotal opinion that the defendant must have known about the drugs he was couriering in *Sekhon*, the misleading claim that Mr Barlow's gun fired the fatal bullets, or the victim's brain tissue on the defendant's shirt in *Lundy*.[85]

Perjured evidence is inadmissible, but does not necessarily render a trial unfair

55. The appellant's submissions at [31]–[32] suggest that a witness who deliberately gives prejudicial evidence will have invariably caused an unfair trial. But that is not the effect of the paragraph he cites from *Thompson*.[86]

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82 *Ogden v R* [2016] NZCA 214 (Respondent's Bundle at Tab 9); *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [79] and [80] per Wiliam Young and McGrath JJ (who did not find it necessary to resort to the proviso) and at [90] per O'Regan J (who did turn to the proviso, but found himself unable to be satisfied of guilt because the case turned on witness credibility and reliability) (Appellant's Bundle at Tab 9).

83 *Lundy [2019]* at [37] (Appellant's Bundle at 67).

84 *Lundy [2019]* at [42] (Appellant's Bundle at 68–69).

85 *Howse* at [38]–[39] (Respondent's Bundle at Tab 7); *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272 (Respondent's Bundle at Tab 10); *Barlow v R* [2009] UKPC 30 (Respondent's Bundle at Tab 5); *Lundy [2019]* (Appellant's Bundle at Tab 3). A rare case where inadmissible evidence did cause an unfair trial is *Patel*. The prosecution failed to clarify its case until the end of the trial, by which point the jury had heard weeks of emotionally charged but irrelevant evidence about the defendant's poor performance as a doctor: *Patel v R* [2012] HCA 29, (2012) 247 CLR 531 (Respondent's Bundle at Tab 11). Because inadmissible and prejudicial evidence was led due to "prosecution tactics" and the Judge had not cured the prejudice with firm directions, an unfair trial resulted: at [120]–[130] and [260].

86 *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577 at [19] (Appellant's Bundle at 411), partially quoted in

Neither case relied upon in that passage (*McLean*[87] and *Arthurton*[88]) stands for that proposition. There is no simple category of prejudicial evidence which invariably causes an unfair trial. Trials are the means of sifting truth from untruth, so sifting untruthful evidence cannot render a trial unfair. Rather, the court must always consider the evidence's prejudicial effect in the context of the trial to determine whether it caused an unfair trial.

56. When it analysed the effect of Mr Harris's perjured evidence, the Court of Appeal was correct that it could not exclude the possibility it influenced the jury (that is, there was a miscarriage).[89] But looking at its effect in the context of this trial shows that it did not cause an unfair trial.

The evidence of inmate informers is already subject to special treatment

57. First, evidence from a fellow inmate that a defendant confessed to them is always treated carefully by the court as potentially unreliable. These witnesses are likely to be "unscrupulous and dishonest" by character, with particularly strong incentives to co-operate with authorities.[90] Yet their evidence is not presumptively inadmissible, so long as appropriate protections are provided through judicial controls.[91] A structured admissibility assessment must be made, following the framework in *W (SC 38/2019)*.[92] But weaknesses such as the risk of fabrication from other sources, a motive to lie, and lack of

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the Appellant's Submissions at [31].

87 In *R v McLean (Colin)* [2001] 3 NZLR 794 (CA), despite the complainant disclosing a fact which had been explicitly excluded (because it was overly prejudicial propensity evidence), and the judge failing to adequately direct on how to treat that disclosure, the proviso *was* available. The Court of Appeal did not find the trial was unfair: rather, because the case was an essentially uncorroborated credibility contest, it could not be sure of guilt under the proviso (at [31]).

88 In *Arthurton v R* [2004] UKPC 25, [2005] 1 WLR 949, the defence was a denial of sex with a young person, calling upon the defendant's good character and lack of previous convictions. The officer in charge had been warned not to refer to the defendant's arrest and charge for similar sexual offending; but she nevertheless disclosed that information in cross-examination. Because the defendant's good character was a "fundamental plank in the defence" and it had been undermined by the knowing disclosure of inadmissible information, a "miscarriage of justice" had arisen and the trial was "unfair" (at [33]). The decision does not clearly distinguish between those two terms (likely because the test on appeal required only that the conviction be "unsafe"). Had the Court turned its mind to the proviso, it clearly could not have satisfactorily resolved the credibility contest between the complainant and defendant.

89 *Tamihere v R* [2024] NZCA 300 at [55] (CoA 00 at 44).

90 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33] (Respondent's Bundle at Tab 12).

91 An unreliability warning must be given (now under s 122 of the Evidence Act 2006, but at the time of Mr Tamihere's trial under s 12C of the Evidence Act 1908), explaining the need for caution in assessing the witness's evidence because of the reasons why, on the facts, it may not be reliable.

92 *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [88] (Respondent's Bundle at Tab 13).

corroboration, are matters for cross-examination rather than features which prevent the evidence being admitted at all.[93]

58. Through his subsequent perjury convictions, the Harris evidence has been proved false (though its falsity was already apparent in 1992, after the body's discovery).[94] The risk that his evidence was unreliable – the very risk the jury was warned about – has materialised. But that does not convert a procedurally fair trial into an unfair trial:

    58.1 Inmate evidence goes to juries despite this risk of unreliability. A fair trial will have been held, so long as the jury is made aware of the particular reasons it may be unreliable: for example, through cross-examination and judicial direction on the possibility the inmate witness constructed the supposed confession to cohere with facts gained from other sources.[95] The fact that evidence with a known risk of unreliability is later shown to be false does not fundamentally alter the nature and fairness of the trial at which it was led.

    58.2 Based on what was known in 1990, this was not inadmissible evidence and there was no barrier to it entering the trial.[96] In contrast, even trials where the evidence was inadmissible ab initio – in other words, its inadmissibility could and should have been recognised at the time and the evidence excluded – may not have been unfair.[97]

    58.3 Expert forensic evidence is another category of evidence which may later prove inadmissible, yet does not attract a reliability warning and may be especially influential because it comes from an apparently objective and authoritative source. For example, the expert evidence presented at trial in *Barlow* and *Lundy*.[98] In those cases the trial is not held to be unfair merely because that disproven evidence was admitted: its impact in the context of the trial overall must be considered.

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93 *Roigard v R* [2020] NZSC 94, [2020] 1 NZLR 338 at [54] (Respondent's Bundle at Tab 14).

94 Mr Höglin's watch was found with his skeleton, which refuted Mr Harris's claim that Mr Tamihere had spoken about giving the victim's watch to his son and confirmed the press reports of the preliminary hearing were the probable source of this detail.

95 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [43] (Respondent's Bundle at Tab 12); *Roigard v R* [2020] NZSC 94, [2020] 1 NZLR 338 at [54] (Respondent's Bundle at Tab 14).

96 Compare with the court's concern in *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577 at [19] (Appellant's Bundle at 411).

97 See, for example, *Howse* (Respondent's Bundle at Tab 7); *R v McLean (Colin)* [2001] 3 NZLR 794 (CA).

98 *Barlow v R* [2009] UKPC 30 and *Lundy [2019]*.

Treatment of the inmate evidence at Mr Tamihere's trial

59. A review of the contextual factors proposed in *Lundy* (see para [53] above) confirms that Mr Harris's evidence was not of such importance at trial, and was tempered by such firm judicial directions, that it could have caused an unfair trial. The correct process was followed at Mr Tamihere's trial; his trial was fair.

The powerful defence attack on Mr Harris

60. Putting to a prisoner witness that the defendant's alleged admission to them has been "constructed … to cohere with facts they have gained from other sources" is a strong line of cross-examination.[99] Logic required the jury, faced with an apparently detailed account of Mr Tamihere's confession, to "consider whether the witness could have learnt of those details in some other way",[100] and defence counsel set out precisely how Mr Harris could have learned those details. This weakened the reliance which could reasonably be placed on Mr Harris, particularly where it appeared to overlap with the trampers' evidence.

61. Mr Harris first approached Police in August 1990 with his account of Mr Tamihere's conversations. He was cross-examined on press reports from May 1990 of the depositions hearing as the real source of important details in his account:[101]

    61.1 The *New Zealand Herald* had reported the two trampers giving evidence of their encounter at Crosbies with a man and blond woman wearing a poncho and sitting down. Mr Harris had said Mr Tamihere told him "he almost got sprung due to this couple coming across thm … [the Swedish girl was] I think sitting down."[102]

    61.2 The *Herald* also reported Mr Davenport, a lodger at the Tamihere home in Auckland, telling the court in depositions "that a watch he saw David Tamihere's son wearing resembled one worn by Urban Höglin".

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99 And not not an issue going to admissibility: *Roigard v R* [2020] NZSC 94, [2020] 1 NZLR 338 at [54] (Respondent's Bundle at Tab 14).

100 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [43] (Respondent's Bundle at Tab 12).

101 The articles themselves were produced as defence exhibits by Mr Tamihere: CoA 00 at 307–309. Mr Tamihere also said he gave Mr Harris the Police statements of Mr Pickering and Mr Kapa, which might explain why Mr Harris, like Mr Pickering, referred to Mr Tamihere ejaculating on the face of the female victim: CoA 2 at 821.

102 CoA 2 at 726; cf cross-examination at CoA 2 at 733, line 19ff.

> Mr Harris said that Mr Tamihere told him "tht he hd given this Swedish guys watch to one of his sons."[103]

62. Mr Harris denied reading these articles. But Mr Tamihere gave evidence that he saw Mr Harris reading the *New Zealand Herald* at the time of the depositions hearing.[104]

The greater importance of Mr Pickering's evidence

63. Mr Pickering was the strongest of the prisoner witnesses. He made notes of all his conversations with Mr Tamihere, then relayed their content to his lawyer in a series of recorded meetings. It was not disputed that he became friendly with Mr Tamihere nor that Mr Tamihere had sketched him maps of Crosbies Clearing and Tararu Creek (for which Mr Tamihere had only flimsy explanations).[105] His evidence was the longest and most detailed, especially on the sexual acts and the killings. Reflecting his greater impact, Mr Pickering was singled out during the jury directions on prejudice and sympathy because "the enormity of what he related could not help but arouse the emotions."[106]

The firm judicial warnings about the prisoner witnesses' unreliability, and particularly Mr Harris obtaining details from publicly available sources

64. Justice Tompkins began the section of his summing up about the prisoner evidence with a direction to "treat with care evidence from persons who may normally not be regarded as reliable witnesses".[107] His Honour returned to that risk of unreliability after summarising the parties' cases on the three prisoner witnesses, noting that even if the jury found them of any weight they could not be taken as proof of murder.[108]

65. Again signifying his importance among the prisoner witnesses, Mr Pickering was the subject of the first, and longest, part of this section of the summing up. The Judge canvassed the defence points about the absence of independent corroboration for Mr Pickering's evidence and his motive to fabricate stories in

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103 CoA 2 at 728; cf cross-examination CoA 2 at 735, line 17. (Though in any case it might be thought implausible that Tamihere, even if he bragged to Harris, should make reference to this incriminating yet seemingly random detail.)

104 CoA 2 at 821.

105 CoA 2 at 819.

106 Summing Up at 3 (CoA 2 at 943).

107 Summing Up at 36 (CoA 2 at 976).

108 Summing Up at 39 (CoA 2 at 979).

exchange for the Police dropping his heroin importation charges.[109] There is no reason to suppose the jury would hear these warnings in relation to Mr Pickering, yet ignore them for Mr Harris.[110]

66. While still discussing Mr Pickering's evidence, Tompkins J highlighted the absence of corroboration by drawing on the defence strategy against Mr Harris. By necessary implication the direction suggested that Mr Harris's evidence, having come post-publicity, was worth very little:[111]

> And the defence makes a submission that *you will need to consider carefully, that is that there doesn't appear to be anything in that detailed account that Mr Pickering gave that can independently corroborate Mr Pickering's evidence that it came from the accused*. And I have already mentioned the fact that there is no reference from the detailed account to the accused being met by two persons at Crosbies when he was with Heidi. *Now if that had been in the Pickering account then you would have had to have considered it very carefully because there is no other way that Mr Pickering could have got it other than from the accused*. The fact that it is not there does not necessarily mean you reject his evidence, but *the defence is entitled to say to you, look there is really nothing in the whole of that account that he couldn't have simply made up from what he knew was going on about the searches in the Crosbie's area*, etc. So the defence case is that the evidence from Mr Pickering is patently unreliable and you should ignore it.

67. That same message came through in the Judge's earlier comments on the support for the trampers' identification evidence. After mentioning Mr Harris's evidence, his Honour reminded the jury of defence counsel's "striking" point "that there was nothing in that very detailed account that Mr Pickering gave [of] the accused being met by two persons at Crosbies. *There had been no publicity of that at the time Mr Pickering was talking about*."[112]

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109 Mr Harris's motive to lie had also featured in the defence closing. According to the Crown summary of the defence closing submissions before the 1992 Court of Appeal, "Counsel said Harris had a motive for lying, that he was serving a term of life imprisonment and eligible for parole so that by assisting the authorities he would get his reward. Counsel claimed that Harris had constructed his account of what Tamihere had told him and that that account was bizarre.": CoA 3 at 357. However, that submission had very little evidential basis: Mr Harris's evidence was that he did not expect to be paroled soon and that assisting the Police would not mean much to the Parole Board (CoA 2 at 736).

110 In *Hudson*, there was no explicit direction to consider "whether the prisoners … concerned might have obtained those details otherwise than via the admissions they attributed to the appellant" (*Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [42] (Respondent's Bundle at Tab 12)). Yet no miscarriage arose from the directions. There *was* such a warning for Mr Pickering (on that topic, and motive, lack of corroboration, and risk of fabrication), which applied equally to the other prisoners

111 Summing Up at 37 (CoA 00 at 977) (emphasis added).

112 Summing Up at 21 (CoA 2 at 961) (emphasis added).

68. Finally, the Judge's summing up of the excoriating defence case on Mr Harris reiterated the theme of alternative sources for the corroborative details in his account (and that the remainder was wholly unbelievable):[113]

> … on behalf of the accused it is put to you that the Harris account is a complete fabrication based on what he read in the "Herald", and the defence produced the "Herald" cuttings and you can have a look at them. And the defence case is that really everything that Harris said either could have from what had been reported in the newspapers, or was a clear fabrication. Mr Nicholson put it to you that the Harris version in any event is simply bizarre. The idea that he went down with one body to the coast in a borrowed dinghy and put that body into the sea, back again for two or three days and then came back again. It just doesn't make any sense at all, says Mr Nicholson. And as for the Mette reference, I am sure you will remember Mr Nicholson reading the letter about the Danish girl he simply would not have made the statement that Harris claims he did about wanting to do the same to her as he had done to the Swedish girl.

No discernible effect on the defence case

69. The Harris evidence did not knock the defence case off course. It did not hinder Mr Tamihere in advancing his alibi. The Crown thesis, that Mr Tamihere spoke to fellow inmates about the offending and revealed significant details, had to be addressed regardless of Mr Harris. Mr Pickering's more damaging evidence was the more pressing reason for Mr Tamihere to give evidence in response. Responding to evidence which later proved inadmissible can be a distraction for the defence but, as in *Lundy*, "there is nothing … to show that the defence case would have been any different had the evidence not been called."[114] The defence efficiently undermined Mr Harris's evidence in under six pages of cross-examination. Logically, the forceful defence attack and the judicial directions meant the evidence lacked cogency. Even in combination, the prisoner evidence could not add decisively to the Crown case. At best, the Judge suggested, it might "provide a bit of support".[115]

Other alleged errors are not significant

70. The appellant's submissions at [67]–[72] also point to the identification warning, tripartite direction, and Sir Bob Jones' proposed fresh evidence as

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113 Summing Up 38–39 (CoA 00 at 978–979).

114 *Lundy [2019]* at [79] (Appellant's Bundle at 77).

115 Summing Up at 39 (CoA 2 at 979).

other sources of error which might warrant a finding that the trial was unfair. None is of that character.

71. Though the identification warning was deficient,[116] that does not preclude the proviso being available. In *Fukofuka* this Court turned to the proviso despite the erroneous direction on identification, but found itself unable to be satisfied of the Crown case which turned on potentially unsound identification evidence.[117] The Crown's case against Mr Tamihere does not rely solely, nor even primarily, on the trampers' identification evidence.[118]

72. Justice Tompkin's direction on how to treat Mr Tamihere's evidence could ideally have made clear that if the jury were unsure about Mr Tamihere's account then they must acquit. But in the reasoning sequence the jury would need to take on this circumstantial case, the direction made sense. They were told:[119]

> You may accept his evidence, he may thereby have proved his innocence and, if so, you will find him not guilty. You may reject his evidence on the essential issues, or you may be unsure whether to accept or reject it. *In either of these cases* you still examine all the evidence to decide whether the Crown has proved the essential ingredients of this charge beyond reasonable doubt. (emphasis added)

73. This direction came at the start of the Judge's summing up, before he delved into the Crown case against Mr Tamihere. If the jury, considering Mr Tamihere's evidence first, accepted it, then there would be no need to move on to the rest of the Crown case. But if they rejected it, they would need to consider the Crown's case. Perhaps ideally there could have been a final instruction to return to Mr Tamihere's account after considering the Crown case to decide whether they remained unsure of it: but if they had by that point satisfied themselves of his guilt on the Crown case, logically they had rejected his explanation. The

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116 Though its deficiency did not trouble the Court of Appeal in 1992 (*R v Tamihere* CA428/90, 21 May 1992 at 10 (CoA 4 at 416)), nor was it raised by the appellant in his Privy Council application.

117 The appeal was allowed because the Crown case was based solely on identification evidence which potentially unsound: *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [38] (Appellant's Bundle at 1237).

118 When the Court of Appeal below applied the proviso, it reminded itself of the particular need for caution about identification evidence (*Tamihere v R* [2024] NZCA 300 at [214], CoA 00 at 89–90) and was only satisfied of the identification evidence's reliability because of the corroborative circumstantial evidence (at [228]–[231], CoA 00 at 95–97).

119 Summing Up at 4 (CoA 2 at 944).

direction given did not alter the burden of proof, on which the jury was directed immediately thereafter.[120]

74. Finally, the evidence of Sir Robert Jones is not admissible. It is irrelevant: it has no tendency to prove or disprove any particular fact that is of consequence to the determination of the proceeding.[121] That Detective Inspector Hughes had "got" Mr Tamihere on three "made up" points is unilluminating. This undetailed and belated hearsay statement adds nothing to the proceeding and should not be admitted on that basis; but furthermore, it is double hearsay which does not meet the test for admission in s 18 of the Evidence Act 2006.[122]

Mr Tamihere did not have an unfair trial

75. The Harris evidence was admissible in 1990. The defence response was forceful, and the judicial directions properly limited the reliance that could be placed on the evidence. That evidence was treated in a correct way, which addressed the known risk of fabrication. Subsequent proof that it was fabricated does not convert a procedurally fair trial into an unfair one. Nor do any of the other errors put forward by the appellant, singly or cumulatively, reach anything approaching an unfair trial. The proviso is available.

C. The Court of Appeal was correct to be sure of Mr Tamihere's guilt

76. This circumstantial case is well-suited to an assessment of guilt on the record, because (putting aside the inmate informants' evidence) there are no truly disputed issues of credibility which often impede that task.[123] Very little of the evidence which constitutes the Crown case is in question: only the inferences which may be drawn from the evidence.

77. The 1990 trial did not turn on any contest of oath against oath.[124] The defence case on the Crosbies meeting was that the victims were elsewhere and

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120 Summing Up at 4–5 (CoA 2 at 944–945).

121 Evidence Act 2006, s 7(3).

122 The circumstances relating to the statement do not provide reasonable assurance that it is reliable: this is a throwaway line at a party, thirty years ago, when the statement-maker was "very drunk" and the proposed witness was "dancing with a girl" in a raucous room (Affidavit of Sir Robert Jones, sworn 18 September 2024, at [6] (CoA 00 at 21)). Sir Robert gives no reason for not having reported Det Insp Hughes' statement during the last three decades during which Mr Tamihere continued to protest his innocence.

123 *Matenga* at [29] (Appellant's Bundle at 49).

124 As noted at n 29 above, the defence evidence of northern sightings was never very compelling.

Mr Tamihere never met them.[125] Clearly the trampers had met two people at Crosbies and the honesty of their accounts was not in question: the contest was what could be made of their observations.[126] As Tompkins J told the jury, when considering the feature of credible identification evidence:

> How do you assess the truthfulness of a witness. I don't think that's an issue here. I don't think anybody would question that Mr Cassidy and Mr Knauf are honestly telling you what they believe to be the case.

78. This surfaced again in the summing up on Mr Cassidy's earlier meeting with Mr Tamihere: "Mr Nicholson puts it to you it is perhaps a case of a perfectly honest, but, nevertheless, post-event reconstruction. You can gradually talk yourself into, quite honestly, into a state of affairs and become convinced that the two men were the same."[127] This idea of a "post-event reconstruction" is inadequate to meet the force of Mr Cassidy's memory of an earlier meeting (and its force was not fully considered by the Court of Appeal below).[128] A "few days" after his first statement to police, Mr Cassidy realised that in late 1987 he had met, at a tent pitched in the same part of Crosbies Clearing, the same man he saw with the woman on 8 April.[129] Mr Cassidy gave details about the man and his distinctive patter,[130] which echoes those given by six other witnesses who met and spoke with Mr Tamihere, and Tamihere's own statements to Police. The recollection of these details cannot be explained as Mr Cassidy gradually talking himself into a similarity between the two men. The trampers' observations of someone who shared many characteristics with Mr Tamihere at Crosbies Clearing on 8 April 1989 are substantially supplemented by

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125 Summing Up at 18 (CoA 2 at 958).

126 The trampers' honesty was a premise of the trial and remained so in Mr Tamihere's application for leave to appeal to the Privy Council.

127 Summing Up at 27 (CoA 2 at 967).

128 The point is fully expanded in the Crown Submissions in the Court of Appeal at [114]–[116].

129 Trial evidence of John Cassidy (CoA 2 at 545–548 and 568). Police were slow to record his account, but this recollection of the earlier meeting did not come to Mr Cassidy "months later", as the Court of Appeal thought in 1990: *R v Tamihere (No 2)* (1991) 7 CRNZ 594 at 600–601 (CoA 4 at 80). The summing up correctly noted that he remembered the incident in June 1989 (Summing Up at 26, CoA 2 at 966).

130 Including: the Hildreth book on bushcraft, his interest in testing features of that book, his occupation as a Marsden Point rigger (the income let him spend long periods in the bush), his two sons and his "fairly short, non-Maori" name (Mr Tamihere went by "Pat Kelly" at the time).

Mr Cassidy recognising from a previous meeting a person who must have been Mr Tamihere.[131]

79. The appeal court is entitled to reject a defendant's account that is "glaringly improbable".[132] It is "not usurping the function of the jury" to do so.[133] The Court of Appeal concluded that Mr Tamihere's alibi was false. That is a conclusion easily available on the record (as explained at para [42] above); a second jury is not required to reconsider the same point.

80. The Crown submits that the Court of Appeal was correct to find that, inexorably, Mr Tamihere is the only person who could have murdered Ms Paakkonen and Mr Höglin.

Conclusion

81. Considering evidence of Mr Höglin's remains and Mr Tamihere's association with nearby locations puts Mr Tamihere's statements before and during trial in a new light: one which, rather than exonerating Mr Tamihere, is more damning. Although one witness's evidence has now been exposed as perjury, the giving of false evidence does not mean a proceeding has lost the character of a trial according to law. The proviso is available. On the whole of the record, the court can be sure beyond reasonable doubt of Mr Tamihere's guilt.

30 June 2025

F Sinclair | RK Thomson
Counsel for the respondent

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

AND TO: The appellant.

131 The Court of Appeal in 2024 noted Mr Cassidy's evidence about the earlier meeting at [60]–[61] (CoA 00 at 44– 45) but, unlike the Court in 1990, did not connect this observation with the recognition evidence. At the 1990 pre-trial appeal, the Court noted: "Further, it will presumably have to be suggested that by another coincidence the other man, or another man closely resembling the accused was camping in the same place in December 1987 and that again Mr Cassidy has confused him with the accused" (*R v Tamihere* CA275/90, 19 October 1990 at 19; CoA 4 at 84).

132 *Hofer v R* [2021] HCA 36, (2021) 274 CLR 351 at [61] (Respondent's Bundle at Tab 3).

133 Ibid.

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6. *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534
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10. *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125
11. *Lane v R* [2018] HCA 28, (2018) 265 CLR 196
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16. *R v Lawrence* (1905) 25 NZLR 129 (CA)
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26. *Kalbasi v State of Western Australia* [2018] HCA 7, 264 CLR 62
27. *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237
28. *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 (PC)
29. *Driscoll v R* (1977) 137 CLR 517
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31. *Lane v R* [2018] HCA 28, (2018) 265 CLR 196
32. *Hoang v R* [2022] HCA 14, 276 CLR 252
33. *R v Betson* [2004] EWCA Crim 254
34. *Cesan v R* [2008] HCA 52, 236 CLR 358
35. *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161
36. *Ogden v R* [2016] NZCA 214
37. *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315
38. *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272
39. *Patel v R* [2012] HCA 29, (2012) 247 CLR 531
40. *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577
41. *R v McLean (Colin)* [2001] 3 NZLR 794 (CA)
42. *Arthurton v R* [2004] UKPC 25, [2005] 1 WLR 949
43. *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289
44. *W v R* [2020] NZSC 93, [2020] 1 NZLR 382
45. *Roigard v R* [2020] NZSC 94, [2020] 1 NZLR 338
46. *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1

Texts

47. Robin Cooke, “Venire de Novo” (1955) 71 *Law Quarterly Review* 100