In the Supreme Court of New Zealand
I te Kōti Mana Nui o Aotearoa

SC 19/2025

Between	**Manu Hori Iongi**
	Appellant
And	**The King**
	Respondent

Submissions on behalf of Mr Iongi in support of appeal

Date: 9 September 2025

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Submissions on behalf of Mr Iongi in support of appeal

1 Introduction

1.1 The Crown must prove all elements of the offence to the standard of "beyond reasonable doubt". If the defence case cannot be excluded as a reasonable possibility, then the standard of "beyond reasonable doubt" has not been met.[1]

1.2 Here, the Crown's case as to Manu Iongi's role and state of mind on the night of Mrs Fisi'ihoi's murder was entirely circumstantial, and that circumstantial evidence did not permit findings as to his role or state of mind.

1.3 The Crown proved that at about 2:45am on 15 January 2020 Falala Iongi's black BMW went to the scene of the murder (Calthorp Close). The Crown proved two men exited the car before the shooting. The Crown proved that shortly after the murder Manu Iongi was in the car with Falala Iongi and Viliami Iongi at their cousin Havea Iongi's address. The Crown proved that there Manu Iongi was sitting in the front passenger seat, uncharacteristically quiet.

1.4 That is it. The Crown did not prove, and was not able to prove, that Manu Iongi did any unlawful act or that he had or joined any unlawful purpose. It was a reasonable possibility that at Calthorp Close Manu Iongi remained in the front passenger seat of the car, merely a passive bystander to the criminal acts/purposes of the two older men. Since it could not be excluded as a reasonable possibility, the jury should have acquitted Manu Iongi not just of murder (as they did) but also of manslaughter. The verdict of manslaughter was unreasonable, and the appeal should be allowed under ss 240 and 232(2)(a) of the Criminal Procedure Act 2011 (**CPA**) (**Ground 1**).

1.5 The trial took place over four weeks and involved three defendants, 69 witnesses, 28 exhibits, 10 agreed facts documents, and a transcript of evidence that spanned 1609 pages.[2] The 12-page question trail included five pathways to liability for each defendant in respect of Mrs Fisi'ihoi's shooting – murder (principal, s 66(1), s 66(2)), manslaughter (s 66(1), s 66(2)). The jury had to make up to 11 discrete findings per defendant, in a case which relied entirely on circumstantial evidence, and where the

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1 *R v Wanhalla* [2007] 2 NZLR 573 at [50]-[51]; *R v McI* [1998] 1 NZLR 696 (CA) at 708. See also *Liberato v R* (1985) 159 CLR 507 (HCA); *R v W(D)* [1991] 1 S.C.R. 742 at 750.

2 Summarised at Crown closing at [1.9] [**Casebook 2:560**].

circumstantial evidence for each defendant differed. The jury needed more assistance than it in fact received.

1.6 When directing the jury on circumstantial evidence and inferences (and relatedly the burden and standard of proof) the trial judge needed to make it clear that, regardless of whether the jury decided the inferences the Crown contended for could be drawn, the jury could not convict unless it also discounted as a reasonable possibility the inferences the defence contended for.

1.7 The trial judge's failure in this regard was compounded when he presented the case regarding inferences to the jury as binary – accept the inferences the Crown contended for and convict; or accept the inferences Manu Iongi contended for and acquit.

1.8 Finally, the trial judge needed to sum up the defence case for Manu Iongi in much greater detail. His failure to summarise Manu Iongi's arguments as to why the Crown inferences could not be drawn and why the inferences he contended for could not be discounted further compounded the situation.

1.9 These irregularities created a real risk that the outcome of the trial was affected and so occasioned a miscarriage of justice. The appeal should also be allowed under s 232(2)(c) CPA (**Ground 2**).

Ground 1: verdict of manslaughter unreasonable

2 The evidence

2.1 Falala Iongi (**Falala**) and Viliami Iongi (**Viliami**) are brothers. They were raised together in Auckland and lived together at the time of the offending. Manu Iongi (**Manu**) was their first cousin. He was raised separately in Northland,[3] and lived separately from the brothers.[4] He was the youngest of the three men - 18 at the time of Mrs Fisi'ihoi's murder.[5] Falala was 27;[6] Viliami was one day shy of 21.[7] All three men were members of the Crips gang.

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3 NOE page 226 lines 6-11 [**Casebook 4:303**]: Manu spent most of his childhood up north with his Māori family near Moerewa.

4 NOE page 128 lines 29-33 [**Casebook 4:205**]: Manu lived at 40 Donegal Park Drive, Flatbush. NOE page 128:11-12 [**Casebook 4:205**]: Falala and Viliami lived at 15 Dunaff Place.

5 Agreed Facts: Defendants at [9] (Manu Iongi's date of birth is 16 July 2001) [**Casebook 2:397**].

6 Agreed Facts: Defendants at [2] (Falala Iongi's date of birth is 17 September 1992) [**Casebook 2:396**].

7 Agreed Facts: Defendants at [5] (Viliami Iongi's date of birth is 16 January 1999) [**Casebook 2:396**].

2.2 At about 2:45am on 15 January 2020, Meliame Fisi'ihoi was shot at her home address at 73 Calthorp Close. Manu, along with Falala and Viliami, were tried together for her murder in late 2023.[8]

2.3 Mrs Fisi'ihoi's eldest son, Stephen Fisi'ihoi, was also a Crips member. Between October and December 2019, Mr Fisi'ihoi fell out with Falala over a business deal gone wrong. Falala had exchanged methamphetamine for a firearm, then became unhappy with the quality of the firearm Mr Fisi'ihoi provided. Falala asked for the methamphetamine back. Mr Fisi'ihoi refused on the basis the methamphetamine was gone. There was an initial confrontation at 73 Calthorp Close between (*inter alia*) Falala and Viliami on the one hand and Mr Fisi'ihoi on the other, followed by an exchange of video messages stoking the animosity between them.[9]

2.4 Later, on 4 December 2019, Falala and Viliami armed themselves and went to 73 Calthorp Close. Viliami shot Mr Fisi'ihoi's associate, George Vuna, in the lower stomach and groin. Viliami also shot at Mr Fisi'ihoi but missed.

2.5 Manu had no involvement in the falling out between Falala and Mr Fisi'ihoi, the initial confrontation, or the December 2019 shooting. Mr Fisi'ihoi gave evidence he did not know Manu. There is no evidence of any association between the Fisi'ihois and Manu, prior to Mrs Fisi'ihoi's murder.[10]

2.6 The Crown case against Manu rested on three key planks – the evidence of the car journey to Calthorp Close; the neighbours' evidence; and Havea Iongi's evidence.

Car journey evidence

2.7 On 15 January 2020, Falala's black BMW went to Calthorp Close. CCTV showed the car travelling from Flatbush (the area where the defendants lived), towards Falala and Viliami's mother's gravesite in Manukau, then towards Calthorp Close. This journey took from 2:28am-2.42am.[11]

2.8 At 2:41am and 2:47am a cellphone attributed to Viliami connected to a cellphone tower near Calthorp Close.[12]

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8 An earlier trial was aborted after significant issues regarding Police improprieties in gathering evidence arose – see Court of Appeal judgment at [15]-[17] [**Casebook 1:13-14**].

9 Summarised in the sentencing notes, at [8] [**Casebook 2:912**].

10 Sentencing notes, at [7] [**Casebook 2:912**].

11 See the evidence of Detective Sergeant Faga [**Casebook 4:696-706, 983-1087, 1139-1169**] for primary evidence of the Police CCTV analysis. This evidence is summarised in the Crown closing address at [8.1]-[9.6] [**Casebook 2:576-580**].

12 This evidence is summarised in the Crown closing address at [10.1] [**Casebook 2:580**].

Neighbours' evidence

2.9 No one saw the car on Calthorp Close or the shooting. The evidence of the Calthorp Close neighbours was:

(a) 14-year-old Jacinta Niulevaea heard the car go past her house (#81 Calthorp Close) and park. The Crown considered the car likely parked outside #77 or #75 Calthorp Close.[13] Miss Niulevaea stated:

(i) She heard the handbrake of the car. She did not hear the car turn off.[14] Seconds later she heard a "big bang". She heard a man's voice say "hurry up". She described the man as sounding angry, though he was not loud or yelling: "[i]t sounded like he was close to the person he was talking to."[15]

(ii) After the man said "hurry up", she heard two car doors close, one after another.[16]

(iii) She did not hear the car start up, so she thought the car was still running.[17]

(b) Bertha Cooper (#46 Calthorp Close) heard two sets of footsteps running, after a loud bang.[18]

(c) Ali Nasilai (#50) heard somebody knock and call out "are you home" in the vicinity of the Portacom at the front of Mrs Fisi'ihoi's address (where Mr Fisi'ihoi slept).[19]

(d) Vivicah Aumua (#75, next door to #73) heard a loud bang at about 2:45am.[20] About 10 seconds afterwards, she heard someone running past her house.[21]

(e) Alfred Lilo (#77) heard a gunshot and called the Police at 2:48:29am.[22]

2.10 The car then departed Calthorp Close at speed, and soon after arrived at

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13 Crown closing address at [13.37] [**Casebook 2:603**].
14 Formal Statement of Jacinta Niulevaea at [15] [**Casebook 4:94**].
15 At [21]-[22] [**Casebook 4:94**].
16 At [26] [**Casebook 4:95**].
17 At [28] [**Casebook 4:95**].
18 NOE page 34 lines 13-19. [**Casebook 4:87**].
19 Formal Statement of Ali Nasilai at [11] [**Casebook 4:69**].
20 Formal Statement of Vivicah Aumua, page 1 [**Casebook 4:74**].
21 At page 2 [**Casebook 4:75**].
22 Agreed facts: fatal shooting at 73 Calthorp Close, Mangere on 15 January 2020, at [1] [**Casebook 2:399**].

Havea Iongi's house in 8 Tate Place, Otara.

Havea Iongi's evidence

2.11 Havea Iongi (**Havea**) was a cousin of the defendants. He gave evidence at trial that Falala, Viliami and Manu arrived in Falala's car outside Havea's address early on 15 January 2020.[23] He stated:

(a) Falala was the driver.[24] Manu was in the front passenger seat.[25] Viliami was in the backseat behind the driver, [26] holding the shotgun and ammunition.[27]

(b) Havea described Manu's demeanour as being uncharacteristically quiet,[28] whereas Falala and Viliami were fidgety and looking behind them.[29]

(c) Falala asked Havea to hold the shotgun and Viliami handed it to Havea.[30]

(d) Manu returned to Havea's address during the day on 15 January 2020, to collect the shotgun.[31]

2.12 Havea's evidence places Manu in the car, shortly after the shooting occurred. It is accepted that from Havea's evidence the jury could infer Manu was in the car when it was at Calthorp Close. (It is noted here that evidence placing Falala and Viliami in the car at Calthorp Close goes well beyond Havea's evidence.)[32]

2.13 However, the above evidence did not prove, and was not able to prove, that Manu did any unlawful act or that he had/joined any unlawful purpose. While it was a reasonable possibility:

(a) Manu was one of the two people who got out of the car at Calthorp

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23 NOE page 141 [**Casebook 4:218**].
24 NOE page 142 lines 23-24 [**Casebook 4:219**].
25 NOE page 142 lines 4-11 [**Casebook 4:219**].
26 NOE page 142, lines 25-28 [**Casebook 4:219**].
27 NOE page 143, lines 15-19 [**Casebook 4:220**].
28 NOE page 145 line 26 to page 146 line 1 [**Casebook 4:222-223**].
29 NOE page 146 lines 2-3, 11-29 [**Casebook 4:223**].
30 NOE page 143, lines 15-19 [**Casebook 4:220**].
31 NOE page 160 lines 12-16 [**Casebook 4:237**]. There were discrepancies between Havea and Ruta Lamkum's evidence and other evidence on this topic, such that Manu argued Havea and Ms Lamkum's evidence was not reliable. This is not pursued on appeal.
32 For example, Falala's ownership of the car, the proven animus between Falala and Viliami and Mr Fisi'ihoi, the route apparently including their mother's gravesite, the cellphone tower evidence, their evidence at trial admitting they were in the car.

Close and either shot Mrs Fisi'ihoi or assisted the shooter; or

(b) Manu remained in the car as a lookout or getaway driver;

it was also a reasonable possibility that Manu was a passive bystander to the criminal acts/purposes of the two older men.

2.14 Without accepting any burden of proof, Manu argues the latter is a more reasonable possibility because:

(a) Manu had no animus with Mr Fisi'ihoi;

(b) At Havea's house Manu was in the front passenger seat (which may indicate he was also there at Calthorp Close, and therefore not the getaway driver);

(c) The handbrake was activated at Calthorp Close (which may indicate the driver – Falala – exited the vehicle);

(d) At Havea's house Manu did not associate with the firearm (which may indicate that he also did not associate with it at Calthorp Close);

(e) At Havea's house, unlike Falala and Viliami who were fidgety and looking behind them, Manu was uncharacteristically quiet (which may indicate shock or distress);

(f) Manu made no inculpatory statements at all, let alone statements relevant to knowledge or intention;

(g) The only relevant statement Manu made was exculpatory: "no one's mum should be dead."[33]

2.15 The remainder of the Crown case against Manu comprised the following background "gangster" type evidence:

(a) Manu's collection of the shotgun from Havea's address during the day of 15 January 2020.[34] This act of an accessory is not probative of Manu committing murder/manslaughter the night before.

(b) A TikTok video showing Manu holding a shotgun prior to 23 December 2019.[35] Havea (not an armoury expert) unreliably opined the gun in the Tiktok video was the one Falala dropped off

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33 NOE 791 [**Casebook 4:886**].

34 See Crown closing address at [17.1]-17.21] [**Casebook 2:613-617**]; [28.1]-[35.13] [**Casebook 2:672- 692**]; [20.6]-[21.13] [**Casebook 2:623-629**]. Counsel have cited to the Crown closing where the characterisation of the evidence is irrelevant to this appeal.

35 At [31.3] [**Casebook 2:686**]; [43.13]-[45.15] [**Casebook 2:731**].

after the shooting.[36]

(c) A photograph of a common blue shotgun shell on a cellphone handset used by Manu.[37]

(d) Manu visiting 99 Hillside Road early in 2020, where other common blue shotgun shells were located.[38]

(e) Black and gold bullets (not shotgun shells) found in the laundry at Manu's address. Havea (not an armoury expert) considered these bullets were of the same type wrapped in the towel with the shotgun dropped off after the shooting.[39]

(f) Manu was sighted with Viliami in Falala's vehicle once in March 2020 (three months after the shooting).[40]

(g) Manu associated with people with a connection to firearms[41] and was a Crips member.[42]

2.16 The above evidence did nothing more than inform the jury about Manu's anti-social youth community. If anything, it showed that a firearm in Falala's car on 15 January 2020 would not have been unusual (a 'red flag') to Manu.[43]

3 The verdict was unreasonable – background

3.1 A jury's verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the defendant was guilty.[44]

3.2 Principles applicable to this ground of appeal include:[45]

(a) The appellate court performs a review function, not one of substituting its own view of the evidence;

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court.

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36 See Manu Iongi closing address at 19 [**Casebook 2:781-782**].
37 At [45.16] [**Casebook 2:732**].
38 At [45.4] [**Casebook 2:729**]; [45.18] [**Casebook 2:732**].
39 At [45.19] [**Casebook 2:732**].
40 At [45.3] [**Casebook 2:729**].
41 At [45.2]-[45.7] [**Casebook 2:729-730]**; at [45.18] [**Casebook 2:732**].
42 Agreed Facts: defendants, at [15]. [**Casebook 2:397**].
43 In addition to the above evidence, the Crown adduced evidence about Falala's propensity to have a firearm in his vehicle: see Crown closing at 37.11 [**Casebook 2:701**].
44 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37, (2007) 23 CRNZ 710 at [17].
45 At [13].

Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) The appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

3.3 These principles urge a level of appellate caution. In this case however, there remains no dispute regarding the strands of evidence that were available to the jury, discussed above. Once Havea's evidence was accepted (and the jury must have accepted his evidence), the case did not turn on the credibility of any witnesses.[46] The case turned on what (if any) inferences could legitimately be drawn from the evidence. In that respect, the appellate Court is just as well placed as the jury at first instance.

3.4 In terms of what the evidence needed to prove to the requisite standard, in summary (and expressed simply), the elements for manslaughter in this case were:

(a) Under s 66(1) Crimes Act 1961:

(i) Either Falala or Viliami fired a shotgun at a person at 73 Calthorp Close (not in issue in light of their verdicts);

(ii) Manu helped that person by words or conduct;

(iii) Manu intended to help that person fire a shotgun at a person at 73 Calthorp Close;[47]

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[46] Other than in respect of the reliability of Havea's opinion about the gun in the Tiktok video – see n 36 above.

[47] Mere presence is insufficient proof of intention: *R v Schriek* [1997] 2 NZLR 139, (1996) 14 CRNZ 449, 3 HRNZ 583 (CA); *Charnley v R* [2013] NZCA 226, (2013) 26 CRNZ 264 at [45]. In *R v Newton* [2024] NZHC 1411 Mander J recently and aptly held that inaction by a gang member present in a room where his nephew was being assaulted could not be found by a jury to amount to encouragement – "Mr Newton's intention at the time is required to be proved beyond reasonable doubt but the evidence only invites speculation. "

(iv) Manu did not know that person meant to cause death or meant to cause injury reckless as to death (that would be murder) but knew firing a shotgun at a person at 73 Calthorp Close would cause more than trivial physical harm.

AND/OR

(b) Under s 66(2) Crimes Act 1961:

(i) Manu joined a plan to fire a shotgun at a person at 73 Calthorp Close;

(ii) Manu did not foresee a killing (that would be murder) but foresaw a shooting (i.e. an assault of type that actually occurred);

(iii) Manu foresaw infliction of more than trivial physical harm (likely to be established if (ii) proven);

(iv) Manu knew of the shotgun (likely to be established if (ii) proven).

3.5 The evidence could not prove the elements in issue and so Manu's case should not have proceeded to the jury. Manu advanced a s 147 CPA application at the end of the Crown case on 24 and 28 November 2023. Fulsome submissions were made:

(a) that the elements were not capable of proof on the evidence (and relatedly, about what constitutes an assisting act as opposed to merely being present);

(b) that it was a logical fallacy for the jury to be able to find Manu guilty of manslaughter on the Crown's case (that Manu knew of/foresaw the firing of a shotgun at a person, but did not know of/foresee a killing.)

3.6 The application was unsuccessful. His Honour did not deal with the issue set out at 3.5(b) above. The crux of his Honour's decision is set out at [15]-[16]:[48]

> [15] In particular…if the jury accepted Havea Iongi's evidence that Manu Iongi was in Falala Iongi's car immediately after the killing of Mrs Fisi'ihoi, a range of inferences could be drawn from the other circumstantial evidence available. That evidence included:

[48] [**Casebook 2:857-858**].

(a) Manu Iongi's familial and gang connections with both Falala and Viliami Iongi;

(b) the evidence that Manu Iongi had access to weapons and/or ammunition both prior to and after the killing of Mrs Fisi'ihoi;

(c) the time at which the black BMW began its drive from the vicinity of the homes of Falala and Viliami Iongi and Manu Iongi from Flat Bush to 73 Calthorp Close (around 02:08); and

(d) the evidence of the neighbours in Calthorp Close that suggested that two people exited the shooter's vehicle while the engine was still running, consistent with a third occupant remaining present in the car.

[16] While this evidence was clearly insufficient to enable a conclusion to be drawn that Manu Iongi himself shot Mrs Fisi'ihoi, I concluded it was for the jury to determine whether the evidence was sufficient to draw an inference that Manu Iongi was more than a passive observer and whether he had the necessary intention to enable him to be found guilty of either murder or manslaughter as a party pursuant to s 66(1) or (2) of the Crimes Act 1961.

3.7 If his Honour accepted that the evidence at [15](a)-(d) could not have founded an inference that Manu was the shooter, his Honour should also have accepted that the evidence could not have founded an inference that he played any other role. The [15](a)-(d) evidence does not logically allow the jury to infer that Manu got out of the car, or that he was the getaway driver. That evidence also allowed the jury to reasonably infer that Manu remained in the car in the passenger seat, and was merely a passive bystander.

3.8 The Court of Appeal's decision contains a similar lacuna:[49]

[86] [Havea Iongi's evidence] was sufficient to enable the jury to infer that Manu Iongi was one of the men who went to Calthorp Place approximately 10 minutes before he was seen in a car at Havea Iongi's place.

[87] If Manu Iongi remained in the car, with the engine running, the jury could reasonably have inferred that he intentionally assisted the killing of Mrs Fisi'ihoi by enabling the shooter and the other member of the group to make a swift getaway.

[88] If, however, as Powell J concluded, Manu Iongi was one of the two who got out of the vehicle, the jury could reasonably have inferred that he intentionally assisted the shooter by his presence, or by allowing the principal to proceed more effectively with his criminal plan.

3.9 The Court of Appeal similarly did not deal with the issue set out at 3.5(b) above.

[49] [**Casebook 1:37**].

4 The verdict was unreasonable – submissions

Insufficient evidence

4.1 Counsel's primary submission is that the inferences the Crown contended could be drawn regarding Manu's actus reus and mens rea were simply not available on the evidence. The Crown invited the jury to impermissibly speculate. To reach a manslaughter verdict, the jury must have done just that.

4.2 Even if this Court considers the inferences the Crown contended for *were* available on the evidence, the jury was also required to discount other reasonably possible inferences. To reach a manslaughter verdict, the jury must not have done that.

4.3 To build on the submissions at 2.13 and 2.14 above, on the evidence in this case the jury could *not* exclude the reasonable possibility that Manu was merely a passive bystander to the shooting of Mrs Fisi'ihoi. For example, the jury could *not* exclude any of the following reasonable possibilities:

(a) Manu did not know of/foresee any actions by Falala/Viliami at 73 Calthorp Close.

(b) Manu only knew, or foresaw that Falala and Viliami Iongi would go to 73 Calthorp Close to:

(i) inflict property damage; or

(ii) intimidate Mr Fisi'hoi; or

(iii) use violence less than a shooting; or

(iv) use violence less than a shooting 'at a person'; or

(v) only carry out a shooting in self-defence, either 'at a person' or elsewhere (i.e. a warning shot).[50]

4.4 None of these possibilities would attract liability for manslaughter. None of these possibilities could be discounted by the jury.

4.5 In *Kuru* this Court described the high risk of unfair prejudice caused by inviting impermissible reasoning, *to wit* failing to acknowledge the possibility of differing factual scenarios or that "at times, events happen spontaneously" or "it is … a matter of common sense that there would be …

[50] See closing address on behalf of Manu Iongi, pages 11-13 [**Casebook 2:773-775**].

variation".[51] The Crown case here caused the same high risk.

4.6 The Crown theory was far from the only logical and reasonable explanation, and the jury could not find it proved beyond reasonable doubt. The jury's verdict was therefore unreasonable.

Manslaughter unavailable on Crown case

4.7 Additionally, it was a logical fallacy for the jury to acquit Manu of murder but find him guilty of manslaughter on the Crown's case (that Manu knew of/foresaw the firing of a shotgun at a person but did not know of/foresee a killing.)

4.8 This Court has previously commented, in the context of s 66(2), that the higher the criminality of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that defendants formed the intention to prosecute the common purpose, but the easier it will be to infer that such defendants knew that the ultimate offence was a probable consequence of its implementation.[52]

4.9 In this case, the Crown formulated the mens rea for the assisting act (s 66(1)) and the common purpose (s 66(2)) at a very high level of criminality – 'firing a shotgun at a person'. This is much higher than the formulation nominated by this Court in *Burke* of a serious hiding while carrying weapons.[53]

4.10 Here, the assisting act and common purpose were pitched so highly that once the jury found actus reus by Manu, it should have found he knew the shooter had murderous intent or he had foresight of death. Given the nature of a shotgun, and the singular nature of the intention/plan, it is a logical fallacy that Manu could not have known the shooter had murderous intent or foreseen death.

4.11 Of course, a manslaughter verdict *may* have been available on an alternative formulation of the mens rea (such as that nominated in *Burke*). The Crown case here suffered from the opposite problem to that in *Burke*: in *Burke*, the Crown case had not been pitched "high" enough; here, it was pitched so high that it effectively precluded any verdict other than murder.

4.12 To be clear, this is not a submission that Manu should have been found guilty of murder. This argument stands alone from and does not bear upon the primary argument regarding there being insufficient evidence to sustain

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[51] *Kuru v R* [2024] NZSC 184 at [56].
[52] *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [49].
[53] *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1, (2024) 31 CRNZ 293 at [50].

any verdict.

4.13 Rather, by acquitting Manu of murder the jury must have found that he *did not* knowingly assist or plan "to fire a shotgun at a person". The jury effectively answered two questions of the question trail (16 and 17) inconsistently. As a result of faulty reasoning, or confused/compromised findings, the manslaughter verdict is unsafe.

Ground 2: miscarriage of justice

5 Deficiencies in summing up and directions – background

5.1 A miscarriage of justice occurred via a combination of errors or irregularities in the trial judge's summing up and directions. The errors or irregularities created a real risk the outcome of the trial was affected – indeed they may have led to the unreasonable verdict discussed above.

5.2 The purpose of a summing up in a criminal trial is to provide the jury with the assistance it needs to perform its task. It must be both comprehensive and comprehensible.[54] This is a context-dependent exercise.[55]

5.3 In this case, the jury had a particularly difficult task, and required more assistance than the trial judge in fact provided:

(a) The jury required a greater factual summary of the defence cases – particularly Manu's case (**Deficiency A**).

(b) The jury required specific directions as to how the standard of proof should be applied when deliberating on the questions in the question trail wholly dependent upon circumstantial evidence and inferential reasoning (**Deficiency B**).

5.4 The trial judge gave the standard directions about the burden and standard of proof early in the summing up.[56] They included a direction that if the jury considered a defendant's case to be reasonably possible, it will not be able to be satisfied beyond reasonable doubt.[57]

5.5 Later, the Judge gave the standard directions about inferences and circumstantial evidence. His Honour stated that inferences are not guesses.[58] His Honour further stated (emphasis added):[59]

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54 *R v Rodgerson* [2015] 2 S.C.R. 760 at [50].
55 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [167].
56 At [23] onwards [**Casebook 2:796-797**].
57 At [29] and [30] [**Casebook 2:797**].
58 At [68] [**Casebook 2:804**].
59 [**Casebook 2:804-805**].

[69] Counsel in this context use the phrase circumstantial evidence. That is because inferences are usually drawn from circumstantial evidence. **The Crown therefore asks you to have regard to all of the evidence that you regard as reliably established in deciding whether you are satisfied beyond a reasonable doubt that the Crown has established that each of the defendants had the necessary involvement, knowledge and/or intention at different times.** To do this requires and relies on reasoning by inference, and, as counsel discussed with you, it derives its force from the presence of a number of strands of evidence. **I say again that inferences are not speculation; they are drawn from that facts that you find to be reliably established as opposed to speculating on matters that may be possible but are not based on any facts before you**.

[70] The standard illustration of this concept is that, like a rope, any one strand may not support a particular weight, but the combined strands may be sufficient to do so. It is for you to decide whether that is the case here in connection with each of the three charges that you are determining. Ultimately you need to be persuaded beyond a reasonable doubt that they do if you are to convict all or any of the defendants of all or any of the charges that they face.

5.6 His Honour went on to describe the evidence and the parties' cases as follows (emphasis added):[60]

The Charges and the Question Trail

[97] ... I will turn now to discuss the elements of the charges against the defendants. In doing so I will touch briefly on the case for both the Crown and the defendants. I am conscious that the closing addresses of counsel will be fresh in your minds, **and I do not intend to revisit their submissions or the evidence in any detail, other than in very broad terms,** as is necessary to enable you to start your deliberations. I recognise that you have heard detailed submissions on the evidence from both Crown and defence counsel and do not want to be seen as putting any particular gloss on those arguments as that is very much a matter for you.

...

[133] As Falala Iongi has denied being involved it is for you to determine whether the necessary inference can be inferred about his involvement from facts that you accept to have been reliably established. **The Crown says you can infer intention from a wide range of factors including the time of night the BMW left Flat Bush, the route taken, the short stop on the way, and the accounts of what occurred from the neighbours at Calthorp Close, from which the Crown contends can be inferred that all three defendants were involved - being the driver and two who got out of the car** – so as to meet the requirements of Question 11(b) or (c), noting that Falala Iongi was driving the BMW at the time it arrived at Havea Iongi's home and there is no suggestion that anyone else drove his BMW that night.

[134] **In contrast the defence position is the inferences that are available all fell well short of meeting any of the tests set out in Question 11, pointing in particular to the lack of detail and/or the**

[60] [**Casebook 2:811-821**].

inconsistencies in the evidence provided by the neighbours.

[135] After completing your analysis, if all 12 of you have answered yes to the Question 11 question that corresponded to the Question 10 question that you answered yes to, then you can find Falala Iongi guilty of murder.

...

[138] **When you have completed your analysis of Falala Iongi, you must then move on and work through the same questions** with regard to charge 3 for Viliami Iongi commencing at Question 13, and **then Manu Iongi from Question 16.**

[139] **While the application of the tests to both Viliami Iongi and then Manu Iongi are the same, obviously the evidence of involvement and the inferences that can be drawn in relation to Viliami Iongi and Manu Iongi may differ from those available in respect of Falala Iongi.** For example, as I have already noted, there is no suggestion that anyone other than Falala Iongi was the driver of his BMW, while only Viliami Iongi's cell phone polled in the vicinity of Calthorp Close at around the time Mrs Fisi'ihoi was killed.

[140] While the Crown contends that similar inferences can be drawn from the evidence of the movements of the car and the evidence of the neighbours at Calthorp Close in respect of both Viliami Iongi and Manu Iongi's intentions, **with regard to Manu Iongi's intention Ms Hogan's submission was that there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the alternatives in Question 11 [sic]. The differences in the evidence applicable to the different defendants both highlights and reinforces my earlier comments that it is absolutely necessary for you to work through each of the questions with regard to each of the defendants before you can reach a verdict against a particular defendant on a particular charge**.

5.7 After the jury had retired to deliberate, both counsel for the Crown and Manu raised the issue of insufficiency of the trial judge's summary of Manu's case.[61] A lengthy legal discussion ensued, in which the trial judge firmly expressed his reluctance to traverse any of the parties' cases in detail. Ultimately the Judge was persuaded to make one further comment about Manu's case, namely that if the jury accepted Havea's evidence that Manu was in the car, Manu's case is that he was no more than a passive bystander.[62]

5.8 The trial judge recalled the jury and stated (emphasis added):[63]

> [4] ... **With reference to the position of both Viliami Iongi and Manu Iongi, and out of an abundance of caution so as to avoid any misapprehension about the arguments advanced in relation to those defendants, I make the following additional comments with regard to the question trail as it applies to both Viliami Iongi and Manu Iongi:**

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61 [**Casebook 9:150-154; 9:155-160**].

62 [**Casebook 9:159**].

63 [**Casebook 2:826-827**].

> (a) ....
>
> (b) Secondly, and likewise, those summaries that I gave you also apply in the same way to Manu Iongi but **in the event that you reject Havea Iongi's evidence that Manu Iongi was in the BMW there is no other evidence of involvement. Alternatively, even if Havea Iongi 's evidence was accepted and Manu Iongi was found to be in the car, I remind you of Ms Hogan's submissions that there is otherwise no evidence by which Manu Iongi could be inferred as being anything other than a "passive bystander", and that in any event, there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the alternatives in Question 11 [sic].** What I am doing is just setting out, again, in a slightly more detailed way the summary of Manu Iongi's position on that issue and as I said throughout my summing up, I was not intending to go through in detail the detailed submissions that all counsel made about all of the issues.

5.9 His Honour's very short summary of Manu's case can be contrasted with the number of contentions and the detail in counsel's closing address.[64]

6 Deficiencies in summing up and directions – submissions

Deficiency A - insufficient summary of Manu Iongi case

6.1 The trial judge should have better summarised Manu's case. Doing so may have cured Deficiency B – relating to the directions on circumstantial evidence and inferences (and relatedly the onus and standard of proof), discussed next.

6.2 The obligation to explain a party's case to the jury is fundamental. Failure to do so will result in a miscarriage of justice. In *R v Shipton*, the Court of Appeal stated:[65]

> [33] The underlying principle is that it is the absolute duty of a trial judge to identify and adequately remind the jury of the defence case in relation to each defendant. It follows that a failure to refer in the summing up to a central line of defence that has been placed before the jury will generally result in the conviction being set aside, and a new trial ordered.
>
> [34] These obligations on a trial judge are not contingent, in any case. They are a fundamental obligation on the Court in relation to a fair trial. ...
>
> [35] There never has been, and is not now, any dispute as to the character of this fundamental requirement of a summing up. The difficulty in the vast majority of cases which advance on appeal under this head has lain rather in what is required in the fact-dependent circumstances of each case.

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64 Closing address for Manu Iongi, page 11-13 [**Casebook 2:773-775**].

65 *R v Shipton* [2007] 2 NZLR 218 (CA).

6.3 In *Cullen v R* similar inferences issues arose.[66] The summary of the defence in *Cullen* case was greater than in this case.[67] Nonetheless, the Court of Appeal held (emphasis added):

> [19] There was no specific summary of each of the Crown and defence closings in the summing up. The question is whether, in the context of the particular decisions the jury was required to make on the 17 counts that remained for their determination when they retired to consider their verdicts, the Judge's summary was adequate; particularly when, as the Judge acknowledged**, the issues turned on available inferences, as distinct from speculation or guesswork**.
>
> [20] In our view, the summing up did not comply with the obligations clearly stated in *Shipton*. Notwithstanding the relatively short length of the trial, it was necessary for the Judge to identify and adequately remind the jury of the Crown and defence cases. **Where the defence case is that inferences on which the Crown relied to prove its case were unavailable, it was incumbent on the trial judge to draw the jury's attention, in relation to particular charges where differing approaches may be taken, to those inferences that each party contended could be properly drawn**. ….

6.4 The trial judge's summary of Manu's case (outside the topic of reliability of Havea's evidence) comprised:

(a) A three-line comment in the context of Falala's part of the question trail referencing the "lack of detail and/or the inconsistencies in the evidence provided by the neighbours" (at [134]).

(b) A cursory reference to counsel's submission that there was insufficient evidence that Manu had the requisite mens rea (at [140]).

(c) A comment in the context of Falala's part of the question trail relating to the December 2019 shooting that "as Ms Hogan pointed out to you being a mere passive bystander is insufficient" (at [110]).[68] This was not repeated in the context of the 15 January 2020 shooting or Manu's case (before counsel sought further directions).

6.5 The further directions did not rectify these failures.

6.6 His Honour should have referenced Manu's arguments that there was no evidence from which to infer (let alone *infer beyond reasonable doubt)* that Manu committed a culpable act or had a culpable state of mind and that there were numerous other inferences reasonably available that could not be discounted, including that Manu was merely a passive bystander to the

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66 *Cullen v R* [2012] NZCA 413.

67 Above, at [25] – refer paragraph [20] of the recited summing up.

68 [**Casebook 2:814**].

shooting of Mrs Fisi'ihoi.

6.7 The jury needed this information from the trial judge in order to carry out its deliberations properly. In the context of a six-week multi-defendant murder trial, where the Crown case against Manu relied exclusively on inferences, and where the defence case was a detailed exposition of why those inferences were unavailable, the trial judge's high-level summary without reference to evidential arguments was plainly inadequate.

Deficiency B – insufficient directions about circumstantial evidence and inferences (and relatedly the burden and standard of proof)

6.8 When directing the jury on circumstantial evidence and inferences a trial judge must ensure the jury appreciates that even if it decides the inferences the Crown contends for can be drawn, it cannot convict unless it also discounts as a reasonable possibility the inferences the defence contends for. A timely reminder/emphasis on the burden and standard of proof was wholly lacking in this case.

6.9 Accepted principles in New Zealand about inferences and circumstantial evidence directions are:

(a) If a case rests on circumstantial evidence from which a jury could draw equally available inferences, to decide between them would require impermissible speculation.[69]

(b) The possibility of drawing two different inferences from competing facts does not preclude a jury from drawing any inference at all. However, the jury must not speculate or guess.[70]

(c) Jurors should not be directed to accept or reject inferences where there is no logical basis for either step.[71]

(d) "Judge[s] should give the jury practical and fair assistance as to how particular parts of the evidence may help or tell against or even positively exclude the proof of a case beyond reasonable doubt…"[72]

6.10 Also, in certain cases, the trial judge may need to provide more detailed directions as to circumstantial evidence and inferences. In *R v Maxwell*, proof of the only issue in dispute (whether the defendant was in lawful custody when he tried to escape) depended wholly on circumstantial

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69 *Sullivan v R* [2010] NZSC 151, *Cullen v R* [2012] NZCA 413 at [19]-[20], *Kuru* above n 51 per Glazebrook J at [284].

70 *Hutchins v R* [2016] NZCA 173 (leave to appeal declined: *Hutchins v R* [2016] NZSC 117).

71 *R v Puttick* (1985) 1 CRNZ 644 at 647.

72 *R v Hart* [1986] 2 NZLR 408 at 413.

evidence.[73] The Court of Appeal held (emphasis added):[74]

> Although it was necessary in this case for the Judge to have referred to the "strands in the rope" analogy … at least he should have told the jury that the Crown's case was that the only inference open in the circumstances was one which allowed no reasonable doubt and that it was not sufficient that the evidence should merely show a strong probability of guilt.
>
> **The Judge should have mentioned to the jury the possibility of other inferences being available as raised in cross-examination of counsel (principally that the applicant may have been granted bail), and also to any inference which may have been available from failure of Crown to produce evidence of what happened in the courtroom**. The jury could easily have rejected these inferences as bare possibilities and still have found that the only reasonable inference in the circumstances was one pointing to the lawfulness of the custody.
>
> However, in the absence of any evidence from the Crown as to what actually happened to Maxwell in the courtroom, **we do not think the Judge should have omitted canvassing these other possible inferences with the jury**. **His direction on inferences was inadequate for a case where proof of the only issue in dispute depended wholly on circumstantial evidence**. In these circumstances, we think it inappropriate to invoke the proviso.

Development of principles

6.11 *R v Hodge* is the origin of modern directions about circumstantial evidence in criminal cases.[75] *Hodge* was a murder case where identification of the defendant relied solely on circumstantial evidence. The report of the case records that Alderson B told the jury:[76]

> before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."
>
> He then pointed out to them the proneness of the human mind to look for – and often slightly to distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.

6.12 That approach to reasoning by inference from circumstantial evidence is well-embedded. For example, *Teper v R* is a Privy Council decision still cited

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73 *R v Maxwell* (1983) 3 CRNZ 644 (CA) at 647.

74 At 647.

75 *R v Hodge* (1838) 2 Lewin 227, 168 ER 1136.

76 At 228/1137.

by modern United Kingdom courts for the proposition that:[77]

> It is … necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

6.13 This is related to the burden and standard of proof – if the facts allow for a rational inference consistent with innocence, then the Crown has not proven its case to the standard of beyond reasonable doubt.[78]

6.14 In *Hart v R*, the Court of Appeal recognised that a *Hodge* direction may be desirable in some instances:[79]

> Since at least *R v Hedge* [1956] NZLR 511 … it has been established in New Zealand that an express Hodge direction**,** although perfectly proper — and conceivably even desirable — in certain circumstances, is not required as a matter of law.

6.15 That is also reflected in the most modern New Zealand discussion of *Hodge* directions – *Cameron v R*. There, the Court of Appeal found there was no error in a summing up that failed to avert specifically to the point from *Hodge* because, on those facts:[80]

> it is plain that the sorts of concerns underlying the direction were met in this case by the combination of the orthodox direction on circumstantial evidence and the Judge's firm directions as to the need for proof beyond reasonable doubt.

6.16 In *R v Manu'ula* the Court of Appeal cited the case of *Ramage*[81] as follows:[82]

> The Crown case against the accused was circumstantial. In such a case the jury may infer guilt where that is the only rational conclusion on the facts proved: see the direction in *R v Hodge* (1838) 2 Lew CC227.

6.17 However, the current specimen directions on inferences[83] and circumstantial evidence[84] in the New Zealand Criminal Jury Trials Benchbook do not refer to circumstances where a *Hodge* direction may be appropriate.

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77 *Teper v R* [1952] AC 480 (PC) at 489.
78 *R v Villaroman* 2016 SCC 213, [2016] 1 SCR 1000 quoted below at [6.27].
79 *R v Hart* above n 72 at 413.
80 *Cameron v R* [2010] NZCA 411 at [85].
81 *R v Ramage* [1985] 1 NZLR 392 (CA) at 393.
82 *R v Manu'ula* [2007] NZCA 82 at [8].
83 Criminal Jury Trial Bench Book at [7.26] (available from https://www.courtsofnz.govt.nz/assets/benchbooks/cjtbb_public/#/home/16408/10/11).
84 At [7.3].

United Kingdom

6.18 A flexible approach has been adopted in the United Kingdom. In *McGreevy v Director of Public Prosecutions* the House of Lords did not consider a *Hodge* direction was required as a matter of law.[85] Rather:[86]

> I think that this is consistent with the view that Hodge's case (supra) was reported not because it laid down a new rule of law, but because it was thought to furnish a helpful example of one way in which a jury could be directed in a case where the evidence was circumstantial.
> …
>
> I consider that the form in which this general requirement is emphasised to a jury is best left to the discretion of a judge without his being tied down by some new rule which would be likely to have the effect that a stereotyped form of words would be deemed necessary. In a case in which inferences may have to be drawn by a jury from such facts are found by them a judge will wish to give the jury guidance as to their approach and in giving that guidance he will certainly be assisted by having in mind what was said by Alderson B [in *Hodge* and in] *Teper v The Queen*.

6.19 The English Court of Appeal has explained why specific help on circumstantial evidence is often needed (emphasis added):[87]

> [39] The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (see *R v Teper* [1952] AC 480). However, as the House of Lords explained in *McGreevy*, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. **The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty?** It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence.

6.20 The England and Wales Crown Court Compendium (the equivalent of a benchbook) states:[88]

> 10. In a case in which the **only** evidence is circumstantial, the jury should be directed as follows:
>
> (1) In some cases there is direct evidence that a defendant is guilty, for example evidence from an eyewitness who saw the defendant committing the crime, or a confession from the defendant that they committed it.

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85 *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276 (HL NI).

86 At 283-284.

87 *Kelly v R* [2015] EWCA Crim 817 at [39].

88 Crown Court Compendium Part 1 July 2024, April 2025 update at Part 10-1 Circumstantial Evidence at [10]-[11].

(2) In other cases however, including this one, there is no direct evidence and the prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that D is guilty but which do, say the prosecution, leave no doubt that D is guilty when they are drawn together.

(3) Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it.

(4) See also paragraph 11 below.

11. In any case involving some circumstantial evidence, the jury should **also** be directed as follows:

(1) Briefly summarise any evidence and/or arguments relied on the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it.

(2) The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which, if any, they accept and which, if any, they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.

(3) However, the jury must not speculate or guess or make theories about matters which in their views are not proved by any evidence.

(4) It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty.

Australia

6.21 The Australian position is somewhat firmer than that in New Zealand and the United Kingdom. In *Shepherd v R*, the High Court of Australia stated (emphasis added):[89]

> In many, if not most, cases involving substantial circumstantial evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in those terms may be confusing rather than helpful. **Sometimes such a direction may be necessary to enable the jury to go about their task properly.** But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given.

6.22 In *R v Kotzman*, the Victoria Court of Appeal considered such a direction to be required because:[90]

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89 *Shepherd v R* (1990) 170 CLR 573 (HCA), per Dawson J at 578, with whom a majority of the Court agreed.

90 *R v Kotzmann* [1999] VSCA 27, [1999] 2 VR 123 at 138 per Callaway JA with whom Phillips CJ concurred. Note, this case was mostly about the standard of proof required for facts from which inferences were to be drawn.

> The jury must, of course, be instructed that the guilt of the accused has to be established to that standard [beyond reasonable doubt] and in most circumstantial cases they should be given a strong direction to that effect. For the human mind is apt to jump to conclusions, attaching too much weight to a fact that is really only a strand in a cable or being too quickly convinced by an accumulation of detail that is in truth explicable as coincidence or in some other way consistent with innocence. That has long been known to the law and is now being confirmed by studies in cognitive psychology.

6.23 The Judicial College of Victoria has provided significant guidance on this in the Criminal Jury Trial Benchbook at [3.6].[91]

> 8. Where the prosecution case depends upon circumstantial evidence, it is usually necessary to give the following two directions:
>
> (i) To find the accused guilty, his or her guilt must not only be a reasonable inference, it must be the only reasonable inference which can be drawn from the circumstances established by the evidence; and
>
> (ii) If the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty (*R v Hodge* (1838) 2 Lewin 227; *Mannella v R* [2010] VSCA 357; *Knight v R* (1992) 175 CLR 495; *Shepherd v The Queen* (1990) 170 CLR 573; *Chamberlain v R (No 2)* (1984) 153 CLR 521; *Barca v R* (1975) 133 CLR 82; *Plomp v R* (1963) 110 CLR 234; *Thomas v R* (1960) 102 CLR 584).
>
> …
>
> 30. The need for expanded directions on the process of drawing inferences arises because the human mind is apt to jump to conclusions, attaching too much weight to a fact that is really only one part of the case, or being too quickly convinced by an accumulation of detail that is in truth explicable as coincidence or in some other way consistent with innocence (*R v Kotzmann* [1999] 2 VR 123).

6.24 In terms of when to give such a direction:

(a) The Judge must consider the need for such a direction whenever circumstantial evidence is relied upon by the prosecution,[92] though it does not need to be given in every case where the prosecution relies on circumstantial evidence. The trial judge's decision should be based on the circumstances of the case, and the nature of the summing up.[93]

(b) In many, "if not most", cases involving "substantial circumstantial

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[91] Judicial College of Victoria Criminal Charge Book [3.6] "Circumstantial Evidence and Inferences" (available at https://resources.judicialcollege.vic.edu.au/article/1053858).

[92] At [33] (citations omitted).

[93] At [34] (citations omitted).

evidence", this direction would be helpful,[94] though it should not be given if unnecessary, or likely to confuse the jury rather than assist them, [95] or in cases that do not depend upon circumstantial evidence or where the amount of such evidence is slight.[96] Nor should such a direction be given where the only substantial inference which needs to be drawn is about the accused's state of mind.[97]

6.25 In *R v Perera* a *Hodge* direction should have been given but was not.[98] The Crown alleged the defendant supplied drugs (by placing them in a gutter). Both parties contended different inferences could be drawn from the same set of facts. The jury were asked to infer guilt based on the timing of contacts between the appellant and a third party, and the fact that the appellant possessed currency ten days later. The defence case offered innocent explanations for the appellant's movements, and the possession of money in question. The Queensland Court of Criminal Appeal held, given the heavy reliance upon circumstantial evidence by the Crown, and the nature of the defence case (also relying upon inferential reasoning), a *Hodge* direction was of "critical importance."[99]

Canada

6.26 The Supreme Court of Canada in *R v Griffin* stated (emphasis added):[100]

> We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification … . **The essential component of an instruction on circumstantial evidence is to instil in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty**. Imparting the necessary message to the jury may be achieved in different ways.

6.27 In *R v Villaroman* the Supreme Court of Canada drew a distinction between the functions of the directions as to the standard of proof, and the directions as to circumstantial evidence and inferential reasoning.[101]

> [28] The reasonable doubt instruction describes a state of mind — the degree of persuasion that entitles and requires a juror to find an accused guilty …. Reasonable doubt is not an inference or a finding of fact that

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94 At [36] (citations omitted).
95 At [37] (citations omitted).
96 At [38] (citations omitted).
97 At [39] (citations omitted).
98 *R v Perera* [1986] 1 Qd R 211.
99 At 213-214.
100 *R v Griffin* 2009 SCC 28, [2009] 2 SCR 42 at [33].
101 *R v Villaroman* 2016 SCC 213, [2016] 1 SCR 1000 at [28]-[31].

> needs support in the evidence presented at trial… A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence"… **The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict**.
>
> [29] **An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence** … **This is the danger to which Baron Alderson directed his comments**. And the danger he identified so long ago — the risk that the jury will "fill in the blanks" or "jump to conclusions" — has more recently been confirmed by social science research … This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction …
>
> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. **Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences**. …
>
> [31] I emphasize, however, that assistance to the jury about the risk of jumping to conclusions may be given in different ways and, as noted in *Fleet*, trial judges will provide this assistance in the manner they consider most appropriate in the circumstances …

6.28 As a result, Canada's National Judicial Institute provides the following specimen jury direction in respect of circumstantial evidence (noting that any specimen direction must be tailored to the circumstances of the case):[102]

> *Where the evidence for the prosecution is entirely or substantially circumstantial, it is necessary to give a further instruction:*
>
> However, you cannot reach a verdict of guilty based on circumstantial evidence unless you are satisfied beyond a reasonable doubt that (NOA)'s guilt is the only reasonable conclusion to be drawn from the whole of the evidence.

In this case

6.29 All three overseas jurisdictions focus on the context of the case and the substance of the summing up. While there may be differing degrees of firmness between the three jurisdictions as to whether and when a *Hodge* direction is required, all three jurisdictions require a jury to have been

[102] National Judicial Institute, Model Jury Instructions www.nji-inm.ca/index.cfm/publications/model-jury-instructions/final-instructions/types-of-evidence/direct-and-circumstantial-evidence/

sufficiently instructed so as to avoid the risks that Alderson B identified in *Hodge*. The comments by the Court of Appeal in *Cameron*, *Hart* and *Maxwell* indicate the same fundamental approach in New Zealand.

6.30 In this case the jury was not sufficiently instructed.

6.31 The jury needed more assistance than it received. It needed the trial judge to remind it of/emphasise the balance and standard of proof in the context of inferences, because:

(a) The Crown case as to Manu's involvement and state of mind was minimal in the extreme and entirely circumstantial.

(b) Manu's defence was that innocent inferences reasonably arose from the same underlying facts.

(c) The summing up erroneously presented the Crown vs defence inferences as a binary proposition. It gave the impression that the jury was required to choose between the Crown inferences (and convict) or the defence inferences (and acquit). This is demonstrated in the extract of his summing up at [133] and [134], included at 5.6 above. It is also implicit in the addendum, where the Judge omitted to refer to the standard and burden of proof in conjunction with Manu's submissions that there was no evidence to infer he was anything other than a passive bystander and there was no evidence to infer he had a necessary intention.[103]

(d) This risk was not mitigated by the Judge's much earlier direction as to the standard of proof. That direction was at the outset of his summing up and presented in the abstract.

(e) The risk was exacerbated because the Court did not remind the jury of Manu's case as to what inferences could (and could not be) drawn.

(f) As detailed earlier, the jury had a very complex and difficult deliberation.

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[103] A further compounding factor was the Crown's express appeal to implausibility or improbability reasoning (see paragraphs [46.1] and [46.3] of Crown closing [**Casebook 2:738**]. The Court of Appeal in *R v S*(CA373/2020) [2022] NZCA 52, (2022) 30 CRNZ 825 at [165]-[167] pointed out the dangers of reasoning that because something is improbable, one can safely deduce guilt. Glazebrook J "Miscarriage by Expert" (2018) 49 VUWLR, http://www.nzlii.org/nz/journals/VUWLawRw/2018/10.pdf noted: "[T]here is a real danger that the Jury committed a statistical error known as the "prosecutor's fallacy". This fallacy consists of first showing that the "innocent" explanation for certain facts is highly improbable and then deducing guilt from that. That is the wrong approach. …"

6.32 To avoid the risk of insufficient instruction arising in the future, this Court may wish to hold that in similar cases a *Hodge*-type direction is more than desirable. In this regard, counsel endorses the Supreme Court of Canada's comments about the differing functions of directions as to the burden and standard of proof and directions as to circumstantial evidence and inferential reasoning. In some cases – such as this – the former directions do not mitigate deficiencies in the latter.

7 Conclusion

7.1 Manu Iongi should not have been convicted of manslaughter. The jury's verdict was unreasonable, primarily because the jury could not legitimately discount as a reasonable possibility that Manu Iongi was a mere bystander to Mrs Fisi'ihoi's murder. A combination of deficiencies in the trial judge's summing up and directions likely contributed to that outcome.

7.2 The appeal should be allowed under both s 233(2)(a) and s 232(2)(c) of the CPA. Manu Iongi's conviction should be set aside and the Court should order that a judgment of acquittal be entered.

Date: 9 September 2025

Signature: .....
K E Hogan / T Hu
Counsel for the appellant

Pursuant to the Supreme Court Submissions Practice Note 2023 counsel certify that, to the best of their knowledge, this submission is suitable for publication (that is, it does not contain any suppressed information).