
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC109/2025

BETWEEN

SCOTT WATSON

Appellant

AND

THE KING

Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

25 September 2026



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INTRODUCTION

1. The Crown presented a large and powerful volume of independently existing forms of evidence at Mr Watson's trial to establish beyond reasonable doubt it was him – *and not any other person in the vicinity of Furneaux Lodge, or anyone who slipped in and out on a ketch* – who murdered Olivia Hope (17 years old) and Ben Smart (21 years old).¹
2. The Crown case was based on an elimination strategy in the context of significant volumes of probative evidence, some individually very compelling. Chief among them are two hairs which each "very strongly" match Olivia's DNA profile and point compellingly to the young friends having been on the appellant's sloop, *Blade*. There is no risk this case was dependent or turned on an unreliable identification.
3. The evidence against Mr Watson has been extensively examined, including by non-adversarial Inquiry bodies.² The IPCA investigation examined Police and other witnesses, accessed 25,000 documents, and made factual findings on numerous issues the appellant continues to raise.³
4. Kristy McDonald KC investigated the first Royal Prerogative of Mercy (**RPOM**) application.⁴ It centered on allegedly new evidence of two witnesses, Guy Wallace (**GW**) and Rozlyn McNeilly, bearing on their visual identification evidence. Ms McDonald heard oral evidence, including from the two senior trial counsel for Mr Watson, as to their assessment of GW's

¹ Mr Watson was convicted on two counts of murder and sentenced to life imprisonment in 1999. He was ordered to serve a minimum of 17 years' imprisonment and has remained in prison since. The last completed hearing of the Parole Board into readiness for release reflects concern at the appellant's reluctance over years to engage with treatment for psychopathy, entitlement, and other drivers of risk, not denial per se: Decision of the Parole Board re. Scott Watson, dated 30 November 2021 <[Scott WATSON 30/11/2021 - New Zealand Parole Board](#)>

² The case has been the subject of two appeals to the Court of Appeal (both dismissed), one application for special leave to appeal to the Privy Council (declined), an IPCA investigation, and two applications to the Governor-General for the royal prerogative of mercy (**RPOM**). The appellant was able to put his case, unhampered by contradictors. The Crown had no input into either RPOM process.

³ The 2010 findings of the Independent Police Conduct Authority (**IPCA**) in respect of a complaint made by Keith Hunter are set out in IPCA letter to Keith Hunter, 17 May 2010 (**IPCA letter**) [**SC COA Vol 2 at 1408**].

⁴ Kristy McDonald KC, 'Advice to the Ministry of Justice concerning application by Scott Watson for the Exercise of the Royal Prerogative of Mercy' (March 2011) (**Kristy McDonald report**) <[Individual applications for the royal prerogative of mercy | New Zealand Ministry of Justice](#)>. The Crown refers to this March 2011 report not for substantive findings but solely to show that there was some considered strategy by trial counsel about how to approach visual identification, as the Court of Appeal itself suggested might be the case: CA judgment at [762]. [**SC COA Vol 1 at 218**]

evidence and tactical choices made on instructions. She did not find the evidence fresh or sufficiently persuasive to raise a reasonable doubt. The second application, investigated by Sir Graham Panckhurst, covered numerous issues of concern to the appellant. It saw his convictions referred back to the Court of Appeal on the narrow basis that new expert opinion evidence “may raise doubts about the reliability of an important aspect of the prosecution case”, being evidence about the recovery and forensic examination of two hairs found on Mr Watson’s boat, *Blade*. Following the referral, the Court of Appeal allowed Mr Watson to extend his grounds of appeal to include that a miscarriage of justice occurred as a result of the admission of the identification of Mr Watson by GW from Montage B.⁵

5. Most recently, following a five-day hearing with extensive cross-examination of expert witnesses, the Court of Appeal concluded no miscarriage arose from either the forensic evidence led at trial about the hairs located on *Blade*, or the identification of Mr Watson by witness GW from Montage B.
6. Despite finding there was no miscarriage of justice in relation to either ground of appeal, the Court undertook a comprehensive review of the strength of the overall case against Mr Watson.⁶ The Court’s conclusion at the end of its 291-page judgment confirmed the safety of the convictions:⁷

Ultimately, the Crown presented a compelling circumstantial case to show that only Mr Watson could have been the lone man. The evidence was carefully presented, challenged, and subjected to submission and analysis. It was a fair trial.

7. In a focussed leave decision this Court granted leave to appeal on one ground: the visual identification evidence of GW. The approved question is whether the Court of Appeal was correct to conclude no miscarriage of justice arose from the decision of the trial Judge to admit the visual

⁵ *Watson v R* [2022] NZCA 204, [2022] 3 NZLR 1 (per Kós P) [SC COA Vol 1 at 305].

⁶ *Watson v R* [2025] NZCA 455 (CA judgment) at [935]-[1080] [SC COA Vol 1 at 267].

⁷ CA judgment at [1080] [SC COA Vol 1 at 298].

identification evidence of GW. The Court declined the appellant leave to appeal on the other proposed grounds.⁸

8. While the current appeal centres on one aspect of the identity evidence – GW’s selection of Mr Watson from Montage B – it must be remembered that:

8.1 All of the evidence making up the Crown case was *identification evidence*. This is because the only truly disputed element in the Crown case was *the identity of the “lone man”/murderer*.⁹

8.2 GW was a critical witness for the Crown and for the defence on the question of the identification of the “lone man”, or a ketch.

8.3 GWs total body of identification evidence about the lone man was extensive and, by volume and relevance, went well beyond Montage B. Mostly it was narrative of events and descriptions of the man at the Lodge earlier in the night. It covered his opportunities to interact with and see this man *prior* to going down to the wharf. Another bulk of evidence concerned the trip in the Naiad (water taxi) – who was on it; where exactly they went; what was said; the description of the area and rafted boats in the bay where the man, Olivia and Ben disembarked; what the vessel looked like. The defence case emphasised GW’s certainty it was “the same man”.

8.4 The Crown does not need evidence to establish a “direct” association, let alone a final eyewitness link, between Ben and Olivia and Mr Watson’s boat. Also, the potency of GW’s Montage B identification is vastly overstated. Even if put aside, the totality of the rest of the evidence – some parts of which are very “direct”

⁸ *Watson v R* [2026] NZSC 15 (**SC leave judgment**) at [18] [**SC COA Vol 1 at 12**]. Mr Watson’s challenge to GW’s identification evidence was framed this way in the Court of Appeal, see CA judgment at [485]: “A miscarriage of justice ensued because the jury heard that Mr Wallace identified Mr Watson using a montage. It was inadmissible because the procedure adopted to obtain the evidence did not produce a reliable identification by Mr Wallace.” [**SC COA Vol 1 at 140**].

⁹ Except for limited evidence to establish murder, rather than accident or disappearance. See the Crown’s closing address (**Crown closing**) at 3 [**CA COA at 171**] and 7-8 [**CA COA at 175**] and CA judgment at [939] [**SC COA Vol 1 at 268**].

– is more than enough to establish beyond reasonable doubt that the man at the Lodge prior to the Naiad trip is the same man who killed Ben and Olivia: Mr Watson.

9. This is a second appeal. The appellant must establish that the Court of Appeal materially erred in its approach. It is not enough that this Court might weigh some matters of evidence differently. He must show material matters were overlooked, or that the Court’s assessments were simply unavailable.¹⁰ The Crown says the Court below was correct to find GW’s identification from Montage B was sufficiently reliable in all the circumstances. That is not to say there were not vulnerabilities with it. The Court was also right in its conclusion that inclusion of that evidence in the trial could not have made a difference to the outcome.
10. Finally, the appellant cannot ask this Court to conclude that a different approach should or would necessarily have been taken by the defence at trial without providing a proper evidential foundation to assess the actions and decisions of trial counsel. That current counsel might, with the benefit of hindsight, take different decisions is not a miscarriage. The appellant has never at any stage advanced a ground of appeal relating to trial counsel error and the appellant did not file an affidavit suggesting that; no affidavit has been filed by senior counsel. As such, implicit criticisms of, or even just contemporary departures from, decisions or acts or omissions of trial counsel need to be treated with great caution.¹¹ The point is well expressed by the Court of Appeal of England and Wales in *R v Foy*.¹²

One core principle relating to the good administration of justice is the need for finality in litigation. It is ordinarily the obligation of a party to advance his whole case at trial: and an appeal cannot simply be treated as a means of having a second go. There may be some

¹⁰ *Baughman v Queen* [2005] 5 WLUK 740, Privy Council at [33]. Assessing the strength of the prosecution case and the applicability of the proviso is not an issue for the apex appeal court “[that] exercise of judgment was the function of the Court of Appeal. An appellant on an appeal to this Board needs, in the absence of some new evidence or argument not considered below, to show some error of law or of principle by the Court of Appeal. That has not been shown here.”

¹¹ See [84] of these submissions. Also *Loffley v R* [2013] NZCA 579 at [59]: “An appellant is normally bound by decisions reasonably made by counsel, or by the appellant on counsel’s reasonable advice, although such decisions might have affected the result”.

¹² *R v Foy* [2020] EWCA Crim 270 at [50]. The Court of Appeal of Northern Ireland described this as a “well-known and uncontroversial principle” in *R v Smith* [2023] NICA 86 at [16].

exceptions to this general approach: but that remains the general approach. Were it otherwise, the whole trial process would stand to be subverted.

Summary of the parties' positions on the approved question

11. The Crown understands Mr Watson's challenge to be as follows. GW's identification from Montage B was unreliable and therefore inadmissible because it was contaminated by him having been shown a single photograph, possibly an earlier montage (Montage A, which the Crown disputes he was shown), interrogative pressure from Police during an interview on 11 January 1998, and "media saturation". He says Montage B was unfair and predisposed GW (and others) to select his photograph, and the unfair prejudice outweighed the probative value of this evidence.
12. Mr Watson argues a miscarriage of justice occurred because the jury did not have a complete picture of the contaminating events and had no help to assess the relevance of contamination, and the Judge's directions did not sufficiently warn them about the dangers of misidentification. He says the admission of GW's identification from Montage B was a fundamental error: crucial evidence "capable of proving the Crown case on its own" and was intractably linked with other Crown evidence. This rendered the trial unfair.
13. The Crown's response to the appeal ground is that the appellant exaggerates the significance and role in the trial of this piece of evidence. It was admissible and no more than reasonable weight was put on it at trial. In all the circumstances, the selection of Mr Watson from the Montage had sufficient hallmarks of reliability for that evidence to go to the jury, and the essential nature of weaknesses bearing on reliability were before the jury. The proposition the jury "could" have convicted solely on GW's Montage B identification is perverse: that would not have been right in law, and the Crown never suggested this was an available route. Both the Crown's and Judge's approach clearly went against that. The Crown's submissions explain that, however this appeal is examined, the *whole* case remains relevant: whether for demonstrating why in the context of all the evidence no miscarriage of justice could have arisen from admission of GW's

identification from Montage B; or why an error in admitting the particular evidence does not render the trial unfair; or why this Court can nonetheless be sure beyond reasonable doubt of Mr Watson's guilt.

14. GW's Montage B evidence does not carry the influence on the case the appellant says it does, and its admissibility could not affect the outcome: Mr Watson's convictions are safe because there was such a compelling, weighty, multi-faceted case against him. As the Court of Appeal observed, he was the only person who could have been the lone man.

The context for the identification

15. The New Years' festivities at which Olivia and Ben were last seen took place at Furneaux Lodge (a popular holiday destination on the shore of Endeavour Inlet, Marlborough Sounds). Approximately 1500 people were in attendance, and the murderer had to be one of them. Due to its isolated location, the majority of partygoers arrived by boat. Some 105 boats were moored off the immediate vicinity of Furneaux Lodge that night. It was not in question that the "man" came to Furneaux and left on a yacht.
16. In the early hours of New Year's Day, after spending the night partying at the Lodge, Olivia and Ben returned to *Tamarack*, the yacht on which they intended to stay. Finding it full, they boarded a Naiad water taxi piloted by GW (a barman who also drove water taxis when required). Amelia Hope and a male friend, who happened to have been on GW's Naiad until this point, got off at *Tamarack*. Olivia and Ben got on. The lone man patted the seat next to him and said, "better sit over here". The man "sort of raised his eyebrows as if mmm, very nice young lady". Olivia asked GW if there was any accommodation at the Lodge. This prompted the man to say, "I have accommodation aboard my boat, you can come" (gesturing to Olivia) "but he can't" (gesturing to Ben). After brief hesitation, the offer was accepted. GW drove the Naiad a short distance through the moored fleet of boats and dropped the pair off with the lone man on his boat. He then delivered the remaining couple on the Naiad, Hayden Morreseay and Sarah Dyer, to the Pines (accommodation near Furneaux Lodge).

17. Olivia and Ben were never seen again. Extensive dive searches of the mooring area, and a much wider search within the Sounds, revealed no sign of the missing pair, or any of their belongings.¹³ They had no reason to disappear. The jury had to rule out accidental death, and did. That the lone man murdered them and disposed of their bodies was the only rational conclusion.
18. In this scenario, there was a geographically and numerically limited group of people who could have been responsible for Olivia and Ben’s deaths. Witness testimony established the murderer had to be a man who had a yacht at Furneaux Lodge on 31 December 1997 (which Olivia and Ben boarded) which was moored in that location, and in all likelihood was the yacht’s sole occupant. This narrowed the pool of known potential suspects on that particular criteria to two lone sailors, **or** an unknown man on a “mystery ketch”. This was an important part of the identity considerations.
19. The Crown said the identification of all yachts in the bay at Furneaux over the New Year period was an “elimination strategy” and a “core circumstantial plank of the Crown case”. And, to be relevant, the yacht had to be in the same spot in the bay, or close, to where GW said he dropped the lone man.¹⁴
20. Police obtained a witness statement from a person/s on every identified boat and the Crown called 188 of these witnesses to account for the more than 100 other boats moored in the vicinity of Furneaux Lodge that night.¹⁵ Each witness gave evidence about the location of their boat, who was aboard, and who was on shore in the early morning. This reduced the pool of potential suspects. And, by the time of the critical Naiad trip in the early hours, the numbers on shore were thin.

¹³ For a summary of search evidence, see Crown closing at 7-8 [CA COA at 175].

¹⁴ Crown closing at 87 [CA COA at 255] and 90 [CA COA at 258]. The key “propositions” of the elimination strategy are set out, with evidential references, at [5.1.9] of the ‘Crown Compendium of Evidential References’ (**Compendium**) filed in Appendix 2 of the Crown’s Court of Appeal submissions (**Crown CA subs**) [SC COA Vol 2 at 1818].

¹⁵ CA judgment at [869] [SC COA Vol 1 at 251].

21. There were only two boats moored at Furneaux Lodge that night with a single male occupant: *Blade*, a sloop occupied by Mr Watson; and a 40-foot ketch called *Waves*, occupied by a 46-year old man. The man on *Waves* was ruled out easily: his yacht was moored a good distance to the right of the jetty and close to the shoreline. He gave evidence he rowed his dinghy ashore and spent time at the Lodge before rowing back to his boat at 12.30am. He was not cross-examined by the defence.
22. The possibility of the “mystery ketch” arose from GW’s evidence. On 3 January 1998, GW described the boat which Olivia and Ben boarded with the lone man as a “timber ketch with round port holes... moored just starboard of the jetty”.¹⁶ He sketched a boat with two masts, with the descriptor “*ketch?*” next to it. The other couple on the *Naiad* with the lone man contributed relatively little evidence, save that the male, Hayden Morressey, in his fourth statement said there was a ketch.¹⁷
23. The “mystery ketch” was a highly unlikely answer.¹⁸ As the prosecutor told the jury, the ketch would have to have been in the location where GW dropped Olivia, Ben and the lone man off to be of any relevance at all.¹⁹ The ketch GW described was large, between 38-40 feet. GW agreed it was so “dominant” it stood out. The drop-off location being to the left of the jetty,²⁰ and GW’s evidence that the yacht they boarded was rafted to between three and five other vessels, including yachts,²¹ essentially ruled out the existence of a ketch of that size in that spot, either rafted or coming in and leaving.²² The ketch would have had to be rafted in that close area

¹⁶ CA judgment at [513] [SC COA Vol 1 at 151]. And see at [860] GW’s sketch of the ketch [SC COA Vol 1 at 248].

¹⁷ Crown closing at 35 [CA COA at 203].

¹⁸ CA judgment at [866]-[877] [SC COA Vol 1 at 250].

¹⁹ Crown closing at 88 [CA COA at 256]. It did not matter that there might have been ketches out off the Taranaki Coast or down on the Queen Charlotte Sound.

²⁰ CA judgment at [498] [SC COA Vol 1 at 147]. GW said, from the position standing on the end of the jetty looking out to sea, the drop-off destination for the lone man’s boat was to the left.

²¹ CA judgment at [499] [SC COA Vol 1 at 147] and [848]-[856] [SC COA Vol 1 at 246]. GW recalled a boat like a Markline that was tied up behind a ketch, and the lone man saying his boat was moored next to it. There were anywhere from three to five boats, including the lone man’s one.

²² CA judgment at [868] [SC COA Vol 1 at 251]. See also Crown closing at 37-38 which noted *Blade* was in the only raft with yachts in that quadrant [CA COA at 205]. Note, there were only two rafts of yachts in the bay: see Compendium at [5.3.1] [SC COA Vol 2 at 1824].

for some time for the mystery man to go ashore, spend some time at the bar, wait for the Naiad, and then depart the inlet largely unnoticed. To get in there in the first place, it would have had to weave through many other vessels. It is highly improbable a ketch of that description could have come in and left unnoticed – not one of the four dedicated Naiad drivers who were on the water that night saw it.²³

24. If the jury accepted that all other men on identified yachts at Furneaux had been eliminated, the options were reduced to either Mr Watson or an unknown man on a mystery ketch. The rest of the evidence at trial²⁴ was called to prove beyond reasonable doubt that Mr Watson was the murderer – one and the same with the lone man. Each strand of circumstantial evidence which pointed to Mr Watson further reduced the likelihood that the murderer was a man on a mystery ketch. The circumstantial evidence included: Mr Watson’s overt sexual behaviour towards women throughout the night, his departure from the Inlet at daybreak, his odd conduct near Marine Head at 9am in the presence of the Edwards family, prior expressions of desire to take the life of a woman, lies in the account he provided to the police,²⁵ the discovery on *Blade* of hairs which strongly match Olivia’s DNA profile, steps taken to repaint and sanitise his boat in early January, and incriminating statements made to fellow prisoners. Together, the cumulative effect of all the evidence showed guilt beyond reasonable doubt.

A strong circumstantial case: many strands stronger than direct evidence

25. Heron J rightly said to the jury that if it finds a group or series of facts, “undesigned, unexpected coincidences” that compel one conclusion then that may be “a very much safer conclusion...than if one witness...says ‘I saw

²³ Crown closing at 91 [CA COA at 259].

²⁴ Comprehensively summarised at Appendix 2: Crown Case, filed in the Court of Appeal [SC COA Vol 2 at 1707].

²⁵ The law at the time of Mr Watson’s trial was that a proven lie by the defendant was relevant in most cases to credibility and could be used by the jury to justify discounting some or all of the defendant’s account: *R v Toia* [1982] 1 NZLR 555 (CA) at 559. In some cases, lies were also capable of adding to the Crown case where they evidenced consciousness of guilt: see *R v Dehar* [1969] NZLR 763 (CA) at 765; *R v Collings* [1976] 2 NZLR 104 (CA) at 116-117; *R v Bills* [1981] 1 NZLR 760 (CA) at 767.

this crime committed.”²⁶ And, as the Court of Appeal said, there is nothing unusual about the fact the case against Mr Watson was largely circumstantial.²⁷ Most criminal cases are.²⁸ They are not inherently weak or second class;²⁹ they can be equally as probative as cases founded on direct evidence,³⁰ and will often be stronger because of the multiplicity of independently existing evidential strands which point to a particular factual conclusion.³¹

26. Circumstantial evidence allows a fact-finder to infer a fact, or make a factual assessment about a state of affairs, for which there is no direct evidence.³² A single piece of evidence will generally allow for more than one interpretation but separate pieces when considered together may compel the drawing of a particular inference.³³
27. An individual strand of circumstantial evidence need not be especially probative of what is sought to be proven; some strands on their own may

²⁶ Summing up [CA COA at 270]. The directions and comments on coincidence and circumstantial reasoning through the judgment cannot be impeached.

²⁷ CA judgment at [937] [SC COA Vol 1 at 267].

²⁸ Most *forms* of evidence are circumstantial, including forensic evidence like DNA or fingerprints, motive, propensity, identification, opportunity, many statements etc. Circumstantial reasoning applies legitimately to *all* forms of evidence. The distinction with “direct” evidence - what people saw, what the defendant said, or statements in documents – is not particularly valid. It is the quality and relevance of the evidence that matters. The most common category of direct evidence criminal cases are sexual ones – notoriously not stronger for relying largely on the complainant’s direct account.

²⁹ See for example *R v Hillier* [2007] HCA 13, (2007) 228 CLR 618; *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276 (HL) (“no distrust of circumstantial evidence has been shown by English Law”, quoting *Kenny’s Outlines of Criminal Law*); and I H Dennis *The Law of Evidence* (8th ed, Sweet & Maxwell, London, 2024) at [1-0008]: “There is no distinction in principle between direct and circumstantial evidence as a means of proof of facts in issue. Neither form of evidence is considered superior to the other although it is recognised that circumstantial evidence may present more difficulties of evaluation”.

³⁰ *Nieuwenhuijsen v R* [2013] NZCA 207 at [21]. See also *Pue v R* [2014] NZCA 273 at [27]; and *Webb v R* [2013] NZCA 666 at [22].

³¹ *Commissioner of Police v de Wys* [2016] NZCA 634 at [9], citing *R v Guo* [2009] NZCA 612 at [49]-[52]; *R v Hoto* (1991) 8 CRNZ 17 (HC) at 21. See *Cross on Evidence* (online ed, LexisNexis Australia) at [1110]: “...circumstantial evidence derives its main force from the fact that it usually consists of a number of items pointing to the same conclusion...”. See also *Fukofuka v R* [2026] NZCA 112 at [41] (***Fukofuka (2026 CA) [Respondent’s Bundle of Authorities (RBOA) at 73]*** where this Court rejected a submission that a single piece of evidence (propensity) would “act to shore up an otherwise weak Crown case”, observing that: “[i]n our view, that submission minimizes the collective force of all the other circumstantial evidence”. The jury can use circumstantial evidence to infer facts, and also the presence of one or more elements of the offence: Mathew Downs (ed) *Adams on Criminal Law: Evidence – Archived Evidence Commentary pre Evidence Act 2006* (looseleaf ed, Thomson Reuters) at [EC2.06].

³² Circumstantial evidence is evidence from which the prosecution asks the jury to infer the presence of one or more elements of the offence: Mathew Downs (ed) *Adams on Criminal Law: Evidence – Archived Evidence Commentary pre Evidence Act 2006* (looseleaf ed, Thomson Reuters) at [EC2.06].

³³ *Commissioner of Police v de Wys*, above n 31, at [9]; *R v Hoto* (1991) 8 CRNZ 17 (HC) at 21.

count for very little.³⁴ So long as each piece of evidence is sufficiently reliable to put before the jury, it is the jury's function to consider what fair and reasonable conclusions to draw from the admissible evidence.³⁵ Where a question in a trial is the likely *accuracy* or *sufficient reliability* of a single piece of evidence, other evidence in the case (for and against) may be highly pertinent to answering that question.

28. The mutually interrogative and reinforcing nature of circumstantial evidence is legitimate and logical. It is not an improper “bolstering” or shoring-up (unless the questioned evidence is itself fundamentally deficient in probative value and therefore inadmissible).³⁶ The correct approach to evaluating strands of evidence was addressed in *Harika v R*.³⁷

The process of evaluating circumstantial evidence is not a linear process but a dynamic, interactive one. That is, one does not start with one piece of evidence and assign it weight, move to the next and do the same until all pieces are separately weighed, and then give the whole of them some score. Rather, each piece of evidence is used to interrogate others, and is interrogated by others, each piece growing or shrinking in weight in that process, until a conclusion is reached about the cogency of the whole as a unit. In that way, the strength of some items of evidence may help resolve doubts about others.

³⁴ See *Thomas v R* [1972] NZLR 34 (CA) at 38 [**RBOA at 283**], citing the Supreme Court of Canada in *Cote v R* [1942] 1 DLR 336: “It may be, and such is very often the case, that the facts proved by the Crown, examined separately have not a very strong probative value, but all the facts in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for a conviction”. See also the discussion at 38 that, as in the ‘strands of the rope’ analogy, “there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than mere suspicion; but the whole, taken together, may create a strong conclusion of guilt”. Note, the valid analogy is a rope, not links in a chain.

³⁵ *R v Smith* [2023] NICA 31 at [69]-[70]: “The seminal decision of *McGreevy v DPP* [1973] 1 All ER 503 although of some vintage remains good law and serves as a reminder that 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? In answering this question, the jury is required to examine each strand of the circumstantial evidence relied upon by the prosecution, decide which they accept and which they do not, and decide what fair and reasonable conclusions they can draw from the evidence they accept. They must not speculate. It is for the jury to weigh up the evidence and decide whether they are sure of the defendant’s guilt” [**RBOA at 172**].

³⁶ See *R v Turnbull* [1977] QB 244, [1976] 3 All ER 549 at [229]-230 [**Appellant’s Bundle of Authorities (ABOA) at 256**].

³⁷ *Harika v R* [2023] VSCA 317 at [64]. See also *Shepherd v R* [1990] HCA 56, (1990) 170 CLR 573 at 579-580: “Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately”.

29. This Court recently comprehensively reiterated well-settled principles in Glazebrook J's judgment in *Hoggart & Wilson v R*.³⁸ Circumstantial cases ask the jury to draw inferences from "particular strands of evidence and from the evidence as a whole".³⁹ Her Honour confirmed that, other than in exceptional circumstances, the Crown is not required to prove *individual facts* beyond reasonable doubt.⁴⁰
30. As to the effect of circumstantial evidence in proving a criminal *charge* it is "the combined weight of the evidence", "how well those strands cohere", "their cumulative tendency", which is determinative.⁴¹ The underpinning logic is that the defendant is "either guilty or is the victim of an implausible and unlikely series of coincidences".⁴² Each strand of evidence must therefore be assessed "not just on its own, but also in the context of the case as a whole (including the circumstances relied on by the defence)".⁴³ The High Court of Australia has consistently observed the fundamental principle that circumstantial cases must not be considered "piecemeal",⁴⁴ saying in the recent case of *Lang v R*.⁴⁵

³⁸ *Wilson v R* [2026] NZSC 88 at [134]-[139] per Glazebrook J [RBOA at 334]. The Crown does not understand the majority judgment to take any issue with this legal analysis.

³⁹ At [136], citing *Longi v R* [2025] NZSC 191, [2025] 1 NZLR 900 at [7], n 6 per Winkelmann CJ, Williams and Kós JJ citing *Thomas v R*, above n 38, and *R v Gee* [2001] 3 NZLR 729 (CA) at [27] [RBOA at 335].

⁴⁰ At [135]. Her Honour specified, citing *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412 at [8] and *Thomas v R*, above n 38, that, unless a disputed circumstance is an element of the offence, "there must be some "exceptional reason particular to the case" justifying the giving of a direction that proof beyond reasonable doubt of a disputed circumstance is required" [RBOA at 334].

⁴¹ *Webb v R*, above n 30, at [22]; *Dunn v R* [2025] NZCA 216 at [72]; *Nieuwenhuijsen v R*, above n 30, at [21].

⁴² *Benbow v R* [2023] NZCA 344, (2023) 31 CRNZ 12 at [45].

⁴³ *Watt v R* [2014] NZCA 459 at [13], citing *R v Guo*, above n 31, at [50] and *Thomas v R*, above n 34. See also *R v Hillier*, above n 29, at [48]. This accords with the approach taken by Glazebrook J in the minority judgment in *Wilson v R*, above n 38 at [136] and [137] [RBOA at 335].

⁴⁴ *R v Hillier*, above n 29, at [48], quoting *Chamberlain [No 2] v R* (1984) 153 CLR 521 (HCA) at 535. The High Court of Australia observed that, in circumstantial cases, there will often be evidence which, if looked at "in isolation from the other evidence" would yield an inference compatible with innocence. However, "neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal". In *Chamberlain*, the High Court had held at 535: "...in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together'".

⁴⁵ *Lang v R* [2023] HCA 29, (2023) 278 CLR 323 at [251]. As for Canada, the Court of Appeal of Ontario summarised the relevant Supreme Court principles for circumstantial cases in *R v Gibson* 2021 ONCA 530, (2021) 157 OR (3d) 597. See, in particular, at [79]: "...where proof of an essential element or the offence charged depends wholly or substantially on circumstantial evidence, it is the cumulative effect of all the evidence, taken together, each item in relation to another and the whole, that must be considered in determining whether the standard of proof has been met".

If, on the whole of the evidence, “the prosecution has failed to exclude an inference consistent with innocence that was reasonably open”, then the jury is not able to draw that ultimate inference [that guilt has been proved to the criminal standard]. Accordingly, in a circumstantial case, it is impermissible to consider any piece of evidence in isolation from the whole.

31. Ultimately, the question in a circumstantial case is the same as in any other: whether guilt has been proved beyond reasonable doubt “is answered by reference to the evidence as a whole”.⁴⁶

NO MISCARRIAGE AROSE FROM GW’S IDENTIFICATION FROM MONTAGE B

32. It is important not to fall into the trap - avoided by the Court of Appeal - of thinking GW’s primary evidence and importance to the case was centred on his identification from Montage B.⁴⁷ It was not. GW was an important witness for *both* Crown and defence.⁴⁸ His narrative evidence and numerous descriptions gave a detailed account of much of the night⁴⁹ and was probative of many individual issues at trial.
33. The evidence of GW’s identification of Mr Watson from Montage B was admissible: the Court of Appeal was correct to conclude the evidential

⁴⁶ *Tamihere v R* [2024] NZCA 300 at [58] (**Tamihere (2024 CA)**), citing *Guo v R* [2009] NZCA 612 at [50] [**RBOA at 212**]. See also *R v Hillier*, above n 29, at [46], citing *Shepherd v R*, above n 37 at 579; and *R v Gibson*, above n 45, at [78]. *Wilson*, above n 38 at [134] per Glazebrook J, citing *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 at [27] per Winkelmann CJ, Ellen France and Williams JJ, [312] per Glazebrook J and [314] per Kós J [**RBOA at 334**].

⁴⁷ CA judgment at [1067] [**SC COA Vol 1 at 295**]. The first Court of Appeal’s judgment, *R v Watson* CA384/99, 8 May 2000 (**First CA judgment (2000)**) [**CA COA at 315**] recognises the plural identification evidence of GW and set out at [26] that it was beyond question that the case against the applicant “depended substantially on the correctness” of Mr Wallace’s identifications on the Naiad and earlier at the Lodge, “because if they were incorrect the Crown case was seriously undermined”. The Court went on to say: “In making that observation it must also be noted that these visual identifications were but part of the overall evidence relied upon by the Crown as establishing to the required standard of proof that the appellant was the offender. As so often happens, visual identification may be supported (or in some cases weakened) by other evidence” (at [26]) [**CA COA at 328**]. The first CA judgment (2000) had earlier set out at [1]: “Counsel for the applicant responsibly accepted that it was open to the jury to conclude on the evidence that the appellant’s guilt had been established beyond reasonable doubt. Apart from a claim of fresh evidence, the challenge to conviction is based on trial errors which it was submitted, particularly when taken cumulatively, led to a miscarriage of justice.”

⁴⁸ The defence at trial, for the first Court of Appeal, and for the Privy Council strongly asserted GW’s descriptions, compusketch, and possible identification was *exculpatory* of the accused; key favourable evidence for the defence. It was said that GW had in fact never made a positive identification of the applicant, and that “the man” GW described did not look at all like the applicant. Therefore, it was argued, giving an “identification” direction was prejudicial to the defence. It was essential to the defence at trial that the evidence of GW on this topic was part of the case. What is made of the identification now by new counsel is ironic against this original approach as the Court of Appeal noted (CA judgment at [933] [**SC COA Vol 1 at 266**]).

⁴⁹ The lone man at the bar; who was on the boat; timings; where the yacht was anchored; what it was rafted to, etc.

value of the evidence was not outweighed by unfairness in admitting it.⁵⁰ On balance the evidence had *sufficient* hallmarks of reliability that its probative value (i.e. likely accuracy) was greater than its prejudicial or risk value. This is the threshold question.⁵¹ Care at trial was still required as a matter of weight and as to the judicial direction. That occurred.

34. If properly admitted, the reliability of this part of GW's evidence – that is, whether it could reliably be used to suggest the lone man on the boat was in fact Mr Watson - was ultimately a question for the jury. In law, prior to the Evidence Act 2006, the question of reliability (both the threshold and the jury question) was to be approached by considering both the nature and circumstances of the original sighting of the man *and* of the later formal identification, *and* also any admissible evidence independently corroborative (or not) of GW's identification statements relating to the man, *and* other relevant circumstantial evidence of identity.
35. In this case the visual identification evidence includes descriptions by many other people at the Lodge that night of the man which are independently supportive of GW's descriptions (see **[Addendum 1]** to these submissions). Such similarity tends to suggest that GWs memory, in the weeks immediately after New Year, of what the man looked like was broadly accurate. That in turn bears on the likely accuracy with which he identified photograph 3 in Montage B some three months later. There is nothing evidentially improper or unfairly "bolstering" about that.

Applicable Law

Which law applies to this appeal?

36. The statute is clear. When enacting the Evidence Act 2006, Parliament expressly provided in s 206⁵² that the Act's provisions do not apply *to an identification* made before its commencement.⁵³ As this Court confirmed

⁵⁰ CA judgment at [934] **[SC COA Vol 1 at 267]** and [928] **[SC COA Vol 1 at 265]**.

⁵¹ *R v Gwaze* [2010] 3 NZLR 734, [2010] NZSC 52 at [50].

⁵² Evidence Act 2006, s 206 **[ABOA at 13]**.

⁵³ The appellant argues in his submissions at [187] that *Taylor v R* [2018] NZCA 498, [2019] 2 NZLR 38 provides a pathway by which this Court could follow the approach in *R v Fell* [2001] EWCA Crim 696 at [85]. This would be directly contrary to the clear Parliamentary intent expressed in s 206.

in *Ellis v R*, s 5(3)⁵⁴ of the Act has the effect that issues of admissibility are to be determined under the law of evidence that applied at the time of Mr Watson’s trial.⁵⁵ The Court of Appeal in *Peato v R* explained the policy reason for this:⁵⁶

The reason s 45 does not apply to precommencement identifications is that the requirements of s 45 differ from identification procedures under the New Zealand Police Manual of Best Practice (1997), which governed how formal identifications were carried out prior to the commencement of the Evidence Act. Obviously Parliament did not want to rule evidence from such identification procedures to be inadmissible, provided the procedures had been undertaken in accordance with best practice at the time.

37. This Court recognised in *Ellis* that, when reviewing the safety of a conviction, it is “impossible to conduct that review other than through present day eyes”.⁵⁷ As such, the Court must have regard to developments in understanding about eyewitness identifications since Mr Watson’s trial when considering the reliability of the evidence in question. The Court of Appeal responded to the appellant’s submission deftly and accurately when it said: “[i]f we consider the admission of the identification unsafe in light of modern eyewitness science, it is no answer that the identification would have passed muster when measured against eyewitness science in 1999”,⁵⁸ but “whether contemporary requirements of a “formal procedure” under the Evidence Act were complied with is of no direct relevance to the admissibility inquiry”.⁵⁹ The effect of s 45⁶⁰ is to strongly incentivise Police from 2007 to comply with formal procedures in order to see visual identification evidence admitted.

Law on admissibility at the time of Mr Watson’s trial

38. Prior to the Evidence Act there were no bespoke legal rules governing the admissibility of any particular sort of identification evidence.⁶¹ Rather, the

⁵⁴ Evidence Act 2006, s 5(3) [ABOA at 10].

⁵⁵ *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 (*Ellis SC substantive judgment*) at [86] [ABOA at 338].

⁵⁶ *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [19], cited in *R v Check* [2009] NZCA 548 at [67].

⁵⁷ *Ellis SC substantive judgment*, above n 55, at [90] [ABOA at 92]. CA judgment at [735] [SC COA Vol 1 at 206].

⁵⁸ CA judgment at [735] [SC COA Vol 1 at 206].

⁵⁹ CA judgment at [737] [SC COA Vol 1 at 207].

⁶⁰ Evidence Act s 2006, s 45 [ABOA at 5].

⁶¹ Adams on Criminal Law EC7 archived commentary at [EC7.01(2)]. See also *R v Harris* (1991) 7 CRNZ 611

admissibility of identifications was a matter of judicial evaluation based on general principles of the law of evidence.⁶² This was articulated as follows by Richmond P in *R v Russell*:⁶³

...evidence of identification by photograph is legally admissible and relevant. The real question in all cases is whether or not the trial judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on the grounds that its prejudicial effect is out of all proportion to its true evidential value, or on general grounds of “unfairness”. All the decided cases are, we think, no more than illustrations of this principle.

39. In *R v Turnbull*,⁶⁴ the leading common law case on identification evidence (and from which the direction in s 344D⁶⁵ of the Crimes Act was derived),⁶⁶ the Court of Appeal of England and Wales set out a list of factors which go to the quality of identification evidence: “the *Turnbull* factors.” They include: how long the witness had the accused under observation, at what distance and in what light; whether the observation was impeded in any way; whether the witness had seen the accused before, how often, and, if occasionally, whether the witness had any special reason for remembering the accused; and whether there was any material discrepancy between the description given to the police and the accused’s actual appearance. This Court has confirmed these factors are equally relevant for a jury’s and a judge’s consideration when determining the quality of identifying evidence.⁶⁷
40. *R v Turnbull* set out the position at common law that, where identification evidence is of good quality, the jury can be safely left to assess the value of

(CA) at 613.

⁶² *R v Russell* [1977] 2 NZLR 20 (CA) at 27 [ABOA at 274]. See also *R v Ormsby* [1985] 1 NZLR 311 (CA) at 312-313 [ABOA, Tab 18, at X]; *R v Tamihere* [1991] 1 NZLR 195 (CA) (*Tamihere (1991 CA)*) at 198 [ABOA at 344].

⁶³ *R v Russell*, above n 62, at 27 [ABOA at 274].

⁶⁴ *R v Turnbull*, above n 36, at 228-229: “All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger” [ABOA at 255].

⁶⁵ Crimes Act 1961, s 344D [ABOA at 8].

⁶⁶ *R v Waipouri* [1993] 2 NZLR 410 (CA) at 413 [RBOA at 181].; *Fukofuka v R* [2013] NZSC 77, 1 NZLR 1 (*Fukofuka (2013 SC)*) at [28] [ABOA at 247]; *Tamihere v R* [2026] NZSC 22 (*Tamihere (SC)*) at [118] [ABOA at 212].

⁶⁷ See *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [30] where this Court confirmed the remarks in *R v Turnbull*, above n 36, although discussing directions to a jury, are apposite to a consideration by a judge under s 45 of the Evidence Act [ABOA at 699].

the identifying evidence even where there is no other evidence to support it (provided that an adequate warning had been given about the need for special caution).⁶⁸ Where the quality of identifying evidence is poor, however, the case should be withdrawn from the jury “unless there is other evidence which goes to support the correctness of the identification”. The examples given of what might constitute a poor quality identification are cases where the identification depends “solely on a fleeting glance or on a longer observation made in difficult conditions”. The Court confirmed the other evidence which supports the correctness of the identification need not be corroboration in the sense that lawyers use that word, if its effect was to make the jury sure there had been no mistaken identification.⁶⁹

41. As the Court of Appeal explained in *R v Waipouri* in 1993, these common law principles had been frequently applied in New Zealand, “most prominently”, up to that point, in *R v Tamihere*.⁷⁰ Thus, prior to the Evidence Act, the settled approach at common law (in both England and New Zealand) was:⁷¹

41.1 First, to consider the circumstances of the purported identification which bear on the quality of the evidence; and

⁶⁸ *R v Turnbull*, above n 36, at 229 [ABOA at 256].

⁶⁹ *R v Turnbull*, above n 36, at 229-230 [ABOA at 256]. The Court provided examples of such supporting evidence at 230: “for example, X sees the accused snatch a woman’s handbag; he gets only a fleeting glance of the thief’s face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father’s. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *Reg. v. Long* (1973) 57 Cr.App.R. 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment odd coincidences can, if unexplained, be supporting evidence.”

⁷⁰ *R v Waipouri*, above n 66, at 413 [RBOA at 181], citing *R v Tamihere* (1991 CA), above n 62. See also *Tamihere* (1991 CA) at 203: “In cases in this field the strength of any supporting evidence is commonly and in our opinion rightly treated as relevant to whether it is safe to admit the questioned identification evidence” [ABOA at 349]. See also *Fukofuka* (2013 SC), above n 66, at [25]: “For at least 60 years, New Zealand judges have been required to exercise considerable caution in relation to identification evidence. The current legislative scheme, however, has its origins in the judgment of the English Court of Appeal in *R v Turnbull*.” [ABOA at 245].

⁷¹ *R v Turnbull*, above n 36 [ABOA at 251], *R v Waipouri*, above n 66 [RBOA at 178], and Hodge M Malek *Phipson on Evidence* (21st ed, Sweet & Maxwell, London, 2025) at [15-24] [RBOA at 502].

- 41.2 If the identification is deemed to not be of good quality, to consider the other evidence which goes to support the correctness of the identification.
42. The need to maintain effective control over police procedure generally was also a material consideration when considering whether exclusion of evidence is necessary.⁷² Under present-day law, this concern is substantively addressed by s 45 of the Evidence Act.⁷³ It does not have retrospective effect. As the Court of Appeal here observed,⁷⁴ whether exclusion is necessary to maintain effective control over Police procedure must logically be assessed in light of police procedures in place at the time of the identification in question: in this case, the 1997 New Zealand Police Manual of Best Practice (**Police Manual**).⁷⁵

Standards, science and expert evidence about visual identifications

43. By the time of this trial, psychological evidence about the risks associated with eyewitness identification were well known.⁷⁶ They were invariably and for good reason dealt with in trials in common law jurisdictions by way of judicial directions, statutory requirements for warnings, rules about Police processes, and not by the calling of psychologists. Relevant matters bearing on identification in this case are not outside the experience and understanding of the jury (the reliability of a witness's memory also being ordinarily treated as coming within the knowledge of the fact finder⁷⁷).

⁷² *Tamihere* (1991 CA), above n 62 at 203, citing *R v Ormsby*, above n 62, at 313 [**ABOA at 349**].

⁷³ Evidence Act 2006, s 45 [**ABOA at 5**].

⁷⁴ CA judgment at [737] [**SC COA Vol 1 at 207**].

⁷⁵ [**SC COA Vol 3 at 2396**].

⁷⁶ See Lord Devlin's 1976 "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases", for example at [4.12], p 71 (under the heading "Modern Research"): "Psychological studies of the process of memory and recall underline the need to approach evidence of eye-witness identification with great caution." In relation to the "displacement effect" also see: *R v Ruscoe* (1997) 14 CRNZ 669 (CA) at 675; and *R v Dixon* CA77/97, 25 June 1997.

⁷⁷ See *M (CA68/2015) v R* [2017] NZCA 333 at [27]: "The ordinary rule is that courts treat memory as a jury matter because it is deemed to lie within jurors' experience and understanding. The experience and understanding of jurors extends generally to the processes of acquisition, retention and recall, and they can evaluate for themselves the possibility of contamination. That being so, expert evidence about memory is ordinarily not substantially helpful and so is not admissible."

44. The first part of the joint report of Drs Wells and Quigley-McBride (**the Drs**) was rightly admitted in the Court of Appeal.⁷⁸ It provides an overview of well-established general observations and principles related to eyewitness identification, based on modern scientific evidence, which are helpful to the evaluation of the procedures used in this case and the admissibility of identifications from Montage B.⁷⁹ The Crown endorsed the admission of that part of the report in the Court of Appeal.
45. The Crown does not dispute that the nine recommendations for a “pristine” identification procedure, set out in the 2020 scientific review paper the Drs’ refer to, can help to prevent mistaken eyewitness identifications.⁸⁰ The Drs identified five particular matters in their report which were said to be particularly relevant for the purposes of Mr Watson’s case, and the Crown agrees these are of significance in relation to the reliability of identification evidence.⁸¹
46. The paper’s own terminology is “recommendations”,⁸² as accepted by Dr Wells in the Court of Appeal,⁸³ and many of the recommendations are not reflected in New Zealand’s contemporary statutory thresholds, let alone required at the time of trial.⁸⁴ As such, non-compliance with the “recommendations” is not itself capable of founding a claim of unfair, unreliable or inadmissible evidence. A fact and circumstance specific inquiry is required.

⁷⁸ Affidavit of Dr Gary Wells (**Drs’ report**). [SC COA Vol 1 at 385]

⁷⁹ CA judgment at [612] [SC COA Vol 1 at 175] and [716] [SC COA Vol 1 at 201]. This was accepted by the Crown.

⁸⁰ Dr Wells and others “Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence” (2020) 44 Law & HumBehav 3. [SC COA Vol 3 at 2008]

⁸¹ Set out in CA judgment at [615]: avoiding “show-ups”, using a double-blind procedure, warning the witness that the offender may not be in the line up at all and not telling them someone in the lineup has been arrested, taking a clear verbatim record, and not repeating an identification procedure with the same witness and suspect. [SC COA Vol 1 at 176]

⁸² Conducting lineups using a double-blind safeguard is only required by law in a “majority of states” (see Drs’ Report at 6) [SC COA Vol 1 at 393] and securing a verbatim eyewitness statement of the identification procedure by way of video recording is “strongly advocated (see Drs’ Report at 7). As Drs Wells and Quigley-McBride set out in their report, only “the majority of U.S. states require eyewitness identification procedures that follow the basic principles that Wells laid out in 1998” (Drs’ Report at 1) [SC COA Vol 1 at 388].

⁸³ Notes of Evidence from the Court of Appeal hearing (CA NOE) at 11 [SC COA Vol 3 at 2136].

⁸⁴ CA judgment at [714] [SC COA Vol 1 at 200].

47. For clarity, there is no argument from the Crown that misidentifications are of real concern in criminal justice processes, and that the expanded procedures in s 45 of the Evidence Act 2006 were introduced because of the increasing body of evidence showing that inaccurate identification evidence has been responsible for a number of miscarriages of justice.⁸⁵ Section 45 is, in substance, a risk management tool. Adherence to its standards will mean that any given visual identification offered in court will come with certain assurances on aspects of reliability.⁸⁶
48. However, even the expanded procedures in s 45 today do not require a double-blind procedure, immediate confidence statement, video recording the procedure, or avoiding repeated identifications. And, non-adherence to these standards says nothing about whether any given identification is in fact reliable.
49. The Court of Appeal declined to admit the latter half of the Drs' report due to "considerable reservations about the second part of the Report where the experts descend into what can fairly be described as advocacy".⁸⁷ This Court declined leave to revisit the Court of Appeal's admissibility ruling on that part of the report.⁸⁸ The important point the Crown takes from the Drs' report is that GW's identification may have been further contaminated by being shown a single photograph and by other memory contaminating

⁸⁵ *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [33] [**ABOA at 35**].

⁸⁶ The recent release of the Criminal Cases Review Commission's (CCRC) Report into Eyewitness Identification Evidence in Aotearoa reflects these such concerns. Te Kāhui Tātari Ture Criminal Cases Review Commission, 'Eyewitness Identification Evidence in Aotearoa | New Zealand' (Systemic Issues Report, June 2026). Notably, as the CCRC itself notes at [3.2], the 2020 report of Dr Wells' which on which their recommendations were based was before the Court of Appeal in this very proceeding. The Crown accepted the nine recommendations in Dr Wells' report and the principles underpinning them, and the Court of Appeal gave thorough consideration to his report. In that sense, there is nothing "new" in the concerns raised by the CCRC since the Court of Appeal considered Drs' Wells and Quigley-McBride's evidence on this topic. The CCRC report does not take these issues any further.

⁸⁷ CA judgment at [717] [**SC COA Vol 1 at 201**]. The Court's concerns fell into five categories: incomplete material; misrepresenting the evidence (for example in relation to Mr Morressey); ignoring other relevant evidence; drawing conclusions which were inappropriate for them to draw; and giving evidence which was inconsistent with their position in other forums or papers they cite.

The Appellant's submissions at [57] appear to raise an issue with the jury not being told that Hayden Morressey had been shown Montage B and not identified Mr Watson. It is understandable that counsel did not cross-examine Mr Morressey about being shown Montage B and not identifying Mr Watson. As he said in examination in chief, he had "only seen the back of him" and had not seen the front of his face. In cross-examination he confirmed that all he could safely say about the description of the man was his hair. This was consistent with what he said in his statement and depositions.

⁸⁸ SC leave judgment at [14]. [**SC COA Vol 1 at 12**]

events. To what degree is impossible to say. The science is not in dispute that contamination may have had some impact on GW's memory of the man.

GW's identification from Montage B sufficiently reliable to go before the jury

50. An important distinction must be understood at the outset. The defence challenged the admissibility of Montage B pre-trial. Heron J ruled the Montage (and all witnesses' identifications from it) admissible in a reasoned judgment dated 13 May 1999.⁸⁹ The admissibility of GW's identification from Montage B was not challenged pre-trial, but was intensely challenged before the jury. That being the case, some of the challenges in this appeal relate to matters which were raised in the pre-trial hearing with respect to Montage B itself (for example, whether the particular photograph used of the appellant or the choice of the distractors predisposed witnesses to select photograph number 3 (Mr Watson) over others in the Montage). Other challenges, however, invite a post-trial assessment of the use of the Montage and the circumstances of the identification.

The pre-trial challenge to Montage B

51. The pre-trial application regarding the admissibility of Montage B was argued during a hearing on 5 and 6 May 1999.⁹⁰ Montage B was challenged on the basis the photograph used was unlawfully obtained or, alternatively, that it was unfair. The argument for unfairness was based on various concerns including the photograph used, the choice of distractors, and the media coverage of Mr Watson before 31 March 1998.⁹¹
52. Detective Senior Sergeant Edward Rae explained the purpose of Montage B and the choice of photograph used.⁹² Police decided to create a head-and-shoulders montage as the earlier montage (Montage A) comprised

⁸⁹ *R v Watson* HC Wellington T2693/98, 13 May 1999 (**Pre-trial decision of Heron J**) [**Add Mats Vol 1 at 500 and 506-507**].

⁹⁰ See Notes of Evidence on s.344A application before Hon Justice R A Heron [**Add Mats 1 at 462**].

⁹¹ Memorandum on behalf of respondent (accused) setting out basis of evidential admissibility challenges, dated 4 May 1999 [**Add Mats Vol 2 at 7**].

⁹² A briefing note on 3 April 1998, quoted in CA judgment at [602] also explains the intended use of Montage B [**SC COA Vol 1 at 173**].

full-length photographs and some witnesses described seeing the lone man close up. Police wanted to show features generally described by those witnesses so it would accurately reflect what the male looked like on the night. The photograph ultimately chosen for Montage B was one of two possibilities taken by Detective Fitzgerald on 12 January 1998, the second of which shows Mr Watson looking to the side and with raised eyebrows.⁹³ The photograph used “described more accurately what was described by witnesses in the bar”.⁹⁴

53. The defence called evidence from Peter Durrant: a photographic analyst, who gave evidence about the photograph of Mr Watson which was used in Montage B.⁹⁵ Mr Durrant’s overall opinion was that the photograph was not a good photographic image and was not a good likeness of Mr Watson. This included because the photograph showed his eyes partly closed; it used a wide-angle lens which slightly distorted his appearance, especially his nose; it was fuzzy; and it accentuated darker parts of his features, showing a “5 o’clock shadow” on his upper lip and other blemishes on his face.⁹⁶
54. When ruling Montage B admissible on the materials and submissions before him,⁹⁷ Heron J concluded the use of the photograph was “legitimate” and carried no “inherent unfairness”: “[a]s a montage it seems to me that it was as good a range in the circumstances and I reject the criticism of it”.⁹⁸ His Honour considered “[t]here can be no doubt that the montage was carefully prepared so far as the distractors were concerned”

⁹³ The photograph chosen for Montage B and the alternative photograph can be seen in CA judgment at [487] **[SC COA Vol 1 at 143]**. See also **[Add Mats Vol 1 at 512]** (bottom left).

⁹⁴ **[Add Mats Vol 1 at 485-486]**.

⁹⁵ His statement appears to have been admitted by consent. After the evidence for the Crown concluded, a brief was admitted by consent prior to Mr Watson being sworn **[Add Mats Vol 1 at 488]**.

⁹⁶ Peter Durrant’s statement, dated 30 April 1999 **[Add Mats Vol 2 at 5]**. The statement includes: the photograph of Mr Watson used in Montage B shows his full face and his eyes are partly closed; the camera used had a wide-angle lens which gives a slightly distorted appearance, especially of his nose; movement has occurred which caused the image to appear fuzzy; the image is not “becoming” because he is the only one with his eyes partly closed and the image accentuates darker parts of his features (e.g. the “5’oclock shadow” on his upper lip and other blemishes on his face); and the quality of the images on Montage B overall are poor.

⁹⁷ Rulings & Interim Rulings (No. 1) of Heron J dated 13 May 1999 **[Add Mats Vol 1 at 499]**.

⁹⁸ **[Add Mats Vol 1 at 507]**.

and observed that a number of people did not identify Mr Watson but identified others in the Montage.⁹⁹

55. The Judge acknowledged that the photograph used was thought to depict the accused “as he was late in the evening with the slightly hooded eyes” but observed that, given Mr Watson was photographed in the afternoon, “it is obvious the accused does from time to time maintain that appearance”.¹⁰⁰ In relation to the “risk of inter witnesses discussion, electronic media and the like”, Heron J ruled that specific photographic identifications by witnesses should not at that point be outweighed by general objections in relation to the “risk of inter witness discussion, electronic media and the like”: these were “all matters for the jury to take into account if the evidence is put before them, as to the witnesses overall reliability”.¹⁰¹

Montage B did not predispose

56. The Court of Appeal’s careful review¹⁰² of the creation and use of Montage B confirms Heron J’s pre-trial conclusion it was admissible. It did not predispose witnesses to select Mr Watson rather than one of the other photographs.¹⁰³
57. In terms of the choice of photograph, the Court of Appeal concurred with Heron J’s conclusion photograph 3 was legitimate. Of the two possible photographs that could be used in Montage B, the one chosen depicted Mr Watson in a way that matched his “hypothesised appearance on New Year’s Eve, as informed by the description of witnesses”.¹⁰⁴ As the Court observed, the alternative available photograph had its own problems: it showed Mr Watson looking sideways and also appeared to show him with

⁹⁹ [Add Mats Vol 1 at 506].

¹⁰⁰ [Add Mats Vol 1 at 507].

¹⁰¹ [Add Mats Vol 1 at 507]. The Judge also noted, with respect to inter-witness discussion, electronic media and the like, that: “The jury can look at that in specific terms if it is put to the witness, or in general as to the likely accuracy of identification...”

¹⁰² CA judgment at [748]-[753] [SC COA Vol 1 at 212].

¹⁰³ CA judgment at [930] [SC COA Vol 1 at 265].

¹⁰⁴ CA judgment at [751] [SC COA Vol 1 at 213] (see Appellant’s submissions at [160]).

unnaturally raised eyebrows.¹⁰⁵ Images in the first montage (Montage A) are plainly not suitable for this key witness exercise.

58. In relation to the criticism that the photograph showed Mr Watson with half-closed eyes or mid-blink, the Court of Appeal aptly noted “Mr Watson’s eyes have such an appearance in other photographs on the police file, including the single photograph”.¹⁰⁶ Notably, at the trial, GW also said that he thought that number 2 also had half-closed eyes.¹⁰⁷ The Court of Appeal considered that in addition to photograph 2, photograph 6 could also be said to show a person with hooded eyes.¹⁰⁸ Mr Watson submits that photograph 5 also has eyes that matched GW’s description.¹⁰⁹ Contrary to Mr Watson’s submission,¹¹⁰ there were viable “similar” alternatives against which GW’s selection was tested.
59. As to whether Montage B predisposed witnesses to select Mr Watson rather than one of the distractors, the Court of Appeal rightly concluded the Montage satisfied the requirement from the Police Manual that it include “at least eight photographs” showing people “of similar appearance”.¹¹¹ This confirmed Heron J’s conclusion that the Montage was carefully prepared so far as the distractors were concerned.¹¹² As the Court of Appeal explained in *Ah Soon v R*:¹¹³

Whether the photographs show men of similar appearance to the appellant is a fact-dependent evaluative exercise. Whether the others shown in the montage are similar in appearance to the suspect is a question of degree. Similar does not mean identical. The police are not required to go to extraordinary or impractical lengths to ensure that those shown are similar in appearance. However,

¹⁰⁵ CA judgment at [751] [SC COA Vol 1 at 213].

¹⁰⁶ CA judgment at [750] [SC COA Vol 1 at 213].

¹⁰⁷ [NOE at 2217]. When Rozlyn McNeilly was asked in cross-examination if there was anyone else in Montage B with what she would describe as “slanted or half closed eyes”, she replied “[m]aybe 2 would be slightly slanted” [NOE at 1515].

¹⁰⁸ CA judgment at [753] [SC COA Vol 1 at 214].

¹⁰⁹ Appellant’s submissions at [166] “... It is respectfully submitted that the reason why Mr Wallace was drawn to both photographs three and five is self-evident. They were the only men shown with eyes that matched Mr Wallace’s description...”

¹¹⁰ Appellant’s submissions at [174].

¹¹¹ CA judgment at [752] [SC COA Vol 1 at 214].

¹¹² Pre-trial decision of Heron J [Add Mats Vol 1 at 500 and 506-507].

¹¹³ *Ah Soon v R* [2012] NZCA 48 at [23] [ABOA at 645] (quoted in the CA judgment at [752] [SC COA Vol 1 at 214]). See also *Fukofuka v R* [2012] NZCA 510 (*Fukofuka (2012 CA)*) at [25] [RBOA at 43]. Also see fn 227 of the Crown’s submissions for the CA for additional authorities. [SC COA Vol 2 at 1644]

there may be cases where an accused person has particular identifying features which, unless the others shown in the montage have similar features, may lead to a witness unfairly picking out the accused. The guiding principle must be whether the photo montage or other formal procedure is such as to avoid any material risk of predisposing the witness to identify the accused.

60. The creation and use of Montage B otherwise substantially complied with the requirements at the time under the Police Manual.¹¹⁴ While critical of the construction and use of the montages, the IPCA concluded Police records did not reveal any deliberate intention or conscious plan on the part of Police to influence witnesses inappropriately, nor provide tangible evidence of serious misconduct.¹¹⁵ Exclusion is not necessary in order to maintain effective control over police procedure generally.¹¹⁶ As the Court of Appeal noted, part of the basis for the IPCA's criticism appears to be concerns about Montage A, in which Mr Watson was the only man with visible tattoos.¹¹⁷
61. Questions of similarity are largely subjective. Looking at Montage B overall, the photographs are sufficiently "similar" in appearance that there was no material risk of predisposing witnesses to identify Mr Watson's photograph.
62. The Court of Appeal was correct to note "it is important to avoid overstating the importance of a single characteristic and consider the similarity of the photographs in Montage B overall."¹¹⁸ A number of witnesses shown Montage B made no reference to the eyes when

¹¹⁴ CA judgment at [927] [SC COA Vol 1 at 265]. *Adams on Criminal Law – Evidence* (online ed, Thomson Reuters) at [EC7] at EC7.07: The relevant portion of the 1997 New Zealand Police Manual of Best Practice sets out in relation to montages, that photographs can be used for the purpose of establishing identity. If the identity of the suspect is known, photographic identification should be used only if the suspect is unavailable for a formal or informal identification parade. The witness must be shown at least eight photographs, and the witness should not be helped or consulted. The people in the photograph must be of similar appearance. A witness who has viewed photographs is not prevented from identifying a suspect at a formal or informal parade. After showing photographs to a witness, a written report should be made containing the time, date and place of viewing; the name and address of the witness; the identities of the people in the photograph; and the details of the photograph from which the witness made a positive identification. See also CA judgment at [737] for the Court of Appeal's analysis that it is the Police Manual against which Police conduct at the time of Mr Watson's trial must be assessed [SC COA Vol 1 at 207].

¹¹⁵ IPCA letter, above n 3, at [27] [SC COA Vol 2 at 1415].

¹¹⁶ *Tamihere* (1991 CA), above n 62, at 203 [ABOA at 349].

¹¹⁷ CA judgment at [930] [SC COA Vol 1 at 265].

¹¹⁸ CA judgment at [753] [SC COA Vol 1 at 214].

describing their identification decision.¹¹⁹ As the Court of Appeal also noted, the contention that Montage B predisposed witnesses to select the photograph of Mr Watson over other photographs is untenable when it is considered that, of 53 witnesses shown Montage B, only 27 (half) positively identified Mr Watson, and some identified others relying on a variety of facial features.¹²⁰ The fact that only 8 of the 43 witnesses shown Montage A identified Mr Watson can be readily explained by the photograph being a full length image of Mr Watson.

63. *R v Luce* is relied on to argue that Montage B was akin to a single photograph¹²¹ but the facts are self-evidently distinguishable. In *Luce* the Court of Appeal concluded a montage was unfair because the photograph of the appellant was the only one in the montage that matched the description a key witness had provided to Police.¹²² In that case, the child witness described the offender as having grey hair and wearing a yellow top. The photograph used in the montage was the only one showing a man with grey hair wearing a yellow t-shirt. The Court concluded this was “akin to a situation where a single photograph of an accused is made available to a complainant for identification purposes”.¹²³ That is not the situation with Montage B.
64. The appellant uses a technical question of Mr Watson’s status – on the fluid spectrum of witness, to a probable suspect, to *the* suspect – to assert Detective Fitzgerald deliberately misled Heron J at the pre-trial hearing when cross-examined about having taken photographs of Mr Watson on 12 January 1998 (one of which became the photograph used in Montage B). There is nothing in this point. Detective Fitzgerald was cross-examined

¹¹⁹ See CA judgment at fn 218 [SC COA Vol 1 at 214] (Thomas Forbes [NOE at 1572] and Cara Brosnahan [NOE at 1785]).

¹²⁰ See Ryan Shaughnessy who thought numbers 5 and 6 were closest to the man he collided with, and when asked what was it about those photographs that bore a resemblance to the man, he replied, “the ushiveness and the facial hair and also the shape of the face and the wiry sort of look as well dark hair, unkempt dark hair” [NOE at 1590]; and who was interested in photographs numbers 1 and 5, and when asked what features were similar to the man, she said in relation to number 1, “it was prob the style of haircut”, and in relation to number 5, “the eyes” [NOE at 1657].

¹²¹ Appellant’s submissions at [152]-[156].

¹²² Appellant’s submissions at [152]-[155], citing *R v Luce* (CA 434/05, 7 March 2006).

¹²³ *R v Luce*, above n 122 [ABOA at 631].

as to why he had not cautioned Mr Watson when interviewing him on 12 January. The Detective explained that counsel and he (for Police) are likely using the terminology of “suspect” differently.¹²⁴ Notably, under the Judge’s Rules, the police were required to caution a witness when they had sufficient evidence to charge, or when they sought to question a person in custody. Mr Watson was in neither of those categories in January. He was undoubtedly in the frame as a suspect – a person of considerable interest who could not be excluded – at this early stage of the investigation, but he was not a suspect in the way counsel was apparently using that term for the purposes of due process rights. For a detailed account of the timeline concerning the number of suspects and “suspect profiles” created; the point at which Police narrowed on Mr Watson as the only relevant suspect; and still later when they had sufficient evidence to charge, see the IPCA letter.¹²⁵

Circumstances of GW’s identification do not render it inadmissible

65. The circumstances of GW’s identification of Mr Watson from Montage B are as follows. GW’s identification took approximately a minute and a half. He was “immediately drawn” to photographs number 3 and 5, and settled on photograph 3. He explained it “wasn’t hard” to discount photograph 5 as “his face was fuller and he doesn’t fit my recollection”.¹²⁶ The statement he made when viewing Montage B is set out in full in the Court of Appeal’s judgment.¹²⁷ His statement included that:

I believe photograph number 3 is the person who was in the bar and on the boat with me. At that time however he had good growth on his chin and face. He had a more unkempt look. His hair had more

¹²⁴ [Add Mats Vol 1 at 469].

¹²⁵ IPCA letter, above n 3, at [49]-[58] [SC COA Vol 2 at 1419]. During the course of the investigation more than 100 suspects were identified and eliminated. In late January 1998, some 46 suspects still remained. By 11 February 1998 that number had been reduced to 29. Of the more than 100 suspects initially considered, some were eliminated quickly, while others required considerable follow up. Despite growing evidence pointing to Mr Watson, the Police remained open minded to all possibilities. On 23 January 1998, Mr Watson was referred to as being the strongest of 46 suspects, “without excluding the possibility of other offenders”. It was not until mid-March 1998 that Detective Inspector Pope referred internally to having a prime suspect, and not until late 1998 that he sought legal advice as to whether there was sufficient evidential basis for Mr Watson to be charged. Only in May 1998 was he prepared to confirm publicly that Operation Tam had been elevated from a missing persons inquiry to a homicide investigation. Mr Watson was not arrested and charged until 15 June 1998.

¹²⁶ CA judgment at [673] [SC COA Vol 1 at 190].

¹²⁷ CA judgment at [548] [SC COA Vol 1 at 158].

length to it and was more bushy and wavy. This meant that his fringe was lower down his forehead towards his eyebrows. It's the eyes of the person in photograph number 3 that stand out for me more than anything. The photograph portrays the person more as I remember him, that is his eyes do not have an open trusting look.

66. The statements of GW and the officer conducting the procedure, Detective Sergeant Hamilton,¹²⁸ show that GW was specifically told to take his time,¹²⁹ that he was not rushed, and they explain the decisions he made and why. At trial, GW explained his confidence in his identification of photograph number 3 as being the male in the Naiad, saying “I am pretty definite” (in examination-in-chief),¹³⁰ and “very sure” (in re-examination).¹³¹ Also, the final evidence GW gave at trial, in response to a question from Heron J, shows that his confidence was still balanced with some “caution”.¹³² As the Court of Appeal concluded, “[t]his is not a case where misplaced reliance on *an overconfident eyewitness* appears to be the fulcrum on which the jury’s verdict turned” (emphasis added).¹³³ Further, there is nothing in the record to suggest this is a case where “confidence inflation” occurred at trial, indeed, the opposite.
67. As the Court of Appeal observed, the time taken for the identification was readily explicable in the circumstances given Dr Wells’ evidence in the Court of Appeal confirmed that a “quick” decision time for a simultaneous lineup (like Montage B) is approximately 30 seconds, and GW was told not to rush.¹³⁴

¹²⁸ A note of a Police briefing on 14 April 1998 says: “Because of the extended session that some of the staff have had with WALLACE, an independent member of the Police will carry out the photographic identification with him to preclude any suggestion of bias or impropriety” (see CA judgment at [603] [SC COA Vol 1 at 173]).

¹²⁹ GW said in his statement he took his time because Detective Sergeant Hamilton had said, “it was an important matter and I should take my time” [SC COA Vol 2 at 1480]. Detective Sergeant Hamilton said in his statement, “I told him it was an important matter and that he should take his time” [SC COA Vol 2 1482].

¹³⁰ [NOE at 2203]. When asked about the montage he had been shown in April, GW explained that he recognised number 3. In comparison with the male on the night, the person in the photograph had shorter hair and did not have quite so much stubble on his face. The eyes seemed similar. When asked how sure he was that number 3 was the person on the Naiad, GW said, “I am pretty definite”. He was then asked how the likeness in photograph 3 compared with the person he served in the bar, and he said, “yes the same person”.

¹³¹ [NOE at 2224]. In relation to how sure or positive he was in the way he expressed his recognition of number 3, he said, “well very sure like the eyes, had a very mistrusting look.”

¹³² [NOE at 2227].

¹³³ CA judgment at [932] [SC COA Vol 1 at 266].

¹³⁴ CA judgment at [670] [SC COA Vol 1 at 190] and [774] [SC COA Vol 1 at 221]. Mr Watson’s quote in the

68. In terms of contemporary standards, there is no record of Detective Constable Hamilton informing GW that the suspect may or may not have been among the persons in Montage B, (now required under s 45(3)(d) of the Evidence Act and regarded as best practice today). However, this was not a requirement under the Police Manual. The record of the procedure shows a carefully managed process, properly documented.
69. Mr Watson says it does not matter that the Montage did not predispose every witness to whom it was shown to select his photograph: what matters is that it predisposed GW. He argues it is a known fact that the way Mr Watson's eyes were depicted in the photograph used in Montage B "had a dispositive influencing effect on Mr Wallace's selection of [his] picture".¹³⁵ Two points are made in response.
70. To the extent that Mr Watson alleges intentional choice of a photograph which would predispose GW to select him based on the eyes, it is important to recognise that Montage B was not created for GW. The 3 April 1998 briefing note, mentioned prior,¹³⁶ explains it was being used with witnesses who identified a person of similar description to Mr Watson but who was not on the wharf between the times of 4.00 and 5.00 am, and those who were on the Naiad (including GW) were being saved for identification parades. Detective Fitzgerald explained at the pre-trial admissibility hearing why he took the photographs on 12 January.¹³⁷
71. Secondly, while GW said it was "the eyes of the person in photograph number 3" that stood out to him when viewing Montage B,¹³⁸ the evidence does not show GW was overly focussed on the man's eyes in the descriptions he gave prior to viewing Montage B. In fact, GW's first

Appellant's submissions at [100] from the report of Drs' Wells and Quigley-McBride: "By quickly we mean a matter of mere seconds in time versus something that takes 30 seconds or a minute or more", ignores the observations of the Court of Appeal in CA judgment at [672] **[SC COA Vol 1 at 190]** that the Drs' evidence "was at best somewhat misleading in this regard". The Appellant's submissions at [170] implies that accurate identifications in simultaneous lineups can only be made within 30 seconds but this is not correct.

¹³⁵ Appellant's submissions at [162]-[163].

¹³⁶ See briefing note dated 3 April 1998, as quoted in CA judgment at [602] **[SC COA Vol 1 at 173]**.

¹³⁷ **[Add Mats Vol 1 at 467]**.

¹³⁸ See CA judgment at [548] for GW's statement upon viewing Montage B **[SC COA Vol 1 at 158]**.

description of the lone man on 3 January 1998 made no mention of the eyes at all. Rather, GW focussed on the man's head and facial hair, describing him as "unshaven but didn't have a moustache", and that he had "short dark wavy hair and smelled like a bottle of Bourbon".¹³⁹ GW briefly mentioned the man's eyes in his second statement on 5 January after describing the man as Caucasian, about 32 years old, about 5/8" tall, wiry build, may have had tattoos on his arms, brownie colour hair, wavy and medium length, about two days' growth on his face. The only reference to eyes was that the man was "bourboned up, like his eyes weren't focussing."¹⁴⁰ In his interview on 11 January 1998, when comparing his compusketch and the compusketch created with the assistance of Roz McNeilly and Chey Phipps, GW said "[r]ight around the eyes, slanted a lot".¹⁴¹ GW's other statements focussed more on the actions and movements of the lone man.¹⁴²

72. The evidential record simply does not support the appellant's contention that Montage B had a "dispositive influencing effect on Mr Wallace's selection of the appellant's picture."¹⁴³ It is equally logical that GW recognised Mr Watson's eyes because he was the lone man.
73. This was not a case of a fleeting glance by GW.¹⁴⁴ GW's evidence at trial included that he paid particular attention to the man in the bar,¹⁴⁵ the man introduced himself by name and said he was from Picton.¹⁴⁶ He was drinking beer and spirits, which he thought was bourbon (but could not be 100 per cent sure). He paid in cash with bank notes that were crunched up.¹⁴⁷ He did not appear to be with anyone else. GW also saw him in the garden bar. Before midnight, GW had to intervene to settle down the

¹³⁹ CA judgment at [514] [SC COA Vol 1 at 151].

¹⁴⁰ CA judgment at [519] [SC COA Vol 1 at 151].

¹⁴¹ 11 January 1998 Interview at 129 [SC COA Vol 2 at 1288].

¹⁴² For example, what the man was drinking, that he paid in cash, and where he was in the bar. See the summary of GW's statements prior to his viewing of montage B as set out in CA judgment at [513]-[547] [SC COA Vol 1 at 151].

¹⁴³ Appellant's submissions at [163].

¹⁴⁴ CA judgment at [770] [SC COA Vol 1 at 220].

¹⁴⁵ CA judgment at [490] [SC COA Vol 1 at 145].

¹⁴⁶ CA judgment at [492] [SC COA Vol 1 at 146].

¹⁴⁷ CA judgment at [493] [SC COA Vol 1 at 146].

beginnings of a fight in the main bar, and the man was in the vicinity.¹⁴⁸ GW called last drinks at 2.25am but his boss overruled him.¹⁴⁹ Later, GW came across a young couple looking for a water taxi to the Solitude jetty and he said he would take them to the nearby Doctors jetty. As they were walking to the jetty, he came across the man from the bar. When they reached the jetty, there were several other people waiting for a ride, including a young female and young male who wanted to go to Tamarack.¹⁵⁰

74. GW's first description of the person on the Naiad was recorded on 3 January 1998 (when GW's memory would have been best, "before there could be any suggestion of taint or corruption of his memory").¹⁵¹ As the Court of Appeal noted, based on the expert evidence of Drs Wells and Quigley-McBride: "the most reliable identification evidence is generally that given closest in time to the relevant event". GW said the male was about 32 and 5'9" tall. The male was wiry build, unshaven (but did not have a moustache), and had short dark wavy hair.¹⁵²
75. The Court of Appeal recognised that GW's descriptions of the lone man varied over time.¹⁵³ However, the Court also noted that his later descriptions were consistent with descriptions given by others who we know were describing Mr Watson, and there are "strong links tying the various descriptions of a lone man together and to Mr Watson, suggesting all those witnesses (including Mr Wallace) were talking about the same man, and that man was Mr Watson".¹⁵⁴ What is also known from the first RPOM is that trial counsel made a considered choice to limit their cross-examination of GW in order to limit the potential for the Crown to re-examine GW on his identification evidence.¹⁵⁵

¹⁴⁸ CA judgment at [494] [SC COA Vol 1 at 146].

¹⁴⁹ CA judgment at [495] [SC COA Vol 1 at 146].

¹⁵⁰ CA judgment at [496] [SC COA Vol 1 at 146].

¹⁵¹ CA judgment at [771] [SC COA Vol 1 at 220].

¹⁵² CA judgment at [805] [SC COA Vol 1 at 229].

¹⁵³ CA judgment at [771] [SC COA Vol 1 at 220].

¹⁵⁴ CA judgment at [924] [SC COA Vol 1 at 264].

¹⁵⁵ Kristy McDonald report, above n 4, at [4.63].

76. The appellant departs from the science in putting too much weight on the compusketch produced with GW's input on 9 January 1998. The image in the compusketch does not suggest GW's identification from Montage B is unreliable. The purpose of facial composites is to serve as an investigative lead, not as a tool for evidential identification. The defence case is that the compusketch does not look at all like Mr Watson, and the Court of Appeal considered the compusketch does not bear a "close resemblance" to Mr Watson,¹⁵⁶ but two points require emphasis. First, the evidence of the Drs' does not support Mr Watson's point. The 2020 review paper of which Dr Wells was one of the authors, makes the point that composites have little value as an identification tool "because composites do not reliably represent a recognizable representation of the culprit..."¹⁵⁷ Dr Quigley gave evidence to the same effect.¹⁵⁸ Second, GW himself indicated the technical process of producing an accurate sketch was difficult. He gave evidence about the process which involved relaying descriptions to a police officer and selecting facial features from pre-set templates.¹⁵⁹
77. It is also noted the appellant appears to rely on "new" evidence for the first time in this Court in the form of scientific articles relating to this topic (composites)¹⁶⁰ and others (eyewitness identification evidence),¹⁶¹ and academic writing on the topic of the media surrounding Mr Watson's trial.¹⁶² These documents were not before the Court of Appeal and have

¹⁵⁶ CA judgment at [922] [SC COA Vol 1 at 264].

¹⁵⁷ CA judgment at [685] [SC COA Vol 1 at 193].

¹⁵⁸ See evidence of Dr Quigley-McBride in the Court of Appeal: CA NOE at 76 [SC COA Vol 3 at 2201]: "They're information for investigations. They serve sort of a different purpose than just looking at identification accuracy. They're an investigatory lead." And at 77: "composites are quite hard to create because they require you to be able to describe someone really well". And at 78: they are not reliable 'evidence' for identification purposes.

¹⁵⁹ See GW's evidence at depositions [Add Mats Vol 1 at 181]. At trial, he explained in relation to the process, "well they have only got a certain amount of style of each set of eyes, nose, mouth, chin, forehead, hair and they don't apply to everybody". GW agreed that the original had some pencil on it as well as over the hair, and in relation to why that was done, he said, "[because] from what I was trying to get on sketch I didn't feel the artist could act get the proper style that I wanted". In relation to dots or marks to indicate the location of some growth around the whisker area, and how well in terms of coverage and density he thought it had been captured, GW said, "well not too bad but it was like the face was more pale so the stubble would stand out more and also with the neck, it made the stubble stand out more but he couldn't seem to get it right" [NOE at 2202]. He also gave evidence about this in cross-examination [NOE at 2213].

¹⁶⁰ Appellant's submissions at fns 21/260.

¹⁶¹ Appellant's submissions at fn 244.

¹⁶² Appellant's submissions at fn 120.

not been tested. Any reliance on them for points of evidence in this proceeding should be cautiously considered.

Three-and-a-half month delay

78. The Court of Appeal correctly recognised that delay is a factor on the unreliability side of the evaluative equation.¹⁶³ The three-and-a-half month period between New Years' Eve and 20 April 1998 when GW was shown Montage B was understandably a feature at trial for the defence, and it was a factor explicitly singled out for jury consideration by the Judge in summing up.¹⁶⁴ However, in the circumstances the delay was not unreasonable or inherently problematic. Initially, a decision was made not to show GW a montage as he was being reserved for an identification parade along with the other witnesses on the Naiad.¹⁶⁵ This accords with the requirements of the Police Manual at the time.¹⁶⁶ The issue of whether Mr Watson was indeed refusing to attend an identification parade was not resolved until 15 April 1998.¹⁶⁷ Moreover, a period of three and a half months does not mean that there cannot be a reliable identification.¹⁶⁸
79. Mr Watson submits that the Court of Appeal's judgment does not directly engage with the time period of three and a half months, and that this was

¹⁶³ CA judgment at [920]-[922] [SC COA Vol 1 at 264].

¹⁶⁴ Summing up at 16 [CA COA at 276]. See also at 10 [CA COA at 270] (as to time to an identification), at 27 [CA COA at 287] (as to frailties of human recollection) and at 40 [CA COA at 300] (as to 15 weeks until this ID).

¹⁶⁵ See briefing note from 3 April 1998, quoted in CA judgment at [602] [SC COA Vol 1 at 173].

¹⁶⁶ As the Court of Appeal noted in CA judgment at [740]: "The 1997 Manual also provided that, if possible, suspects should be identified using an identification parade rather than photographic identification". [SC COA Vol 1 at 208]

¹⁶⁷ On 24 February 1998, Detective Senior Sergeant Rae wrote to Mr Davidson requesting Mr Watson attend an identification parade. On 27 February 1998, Mr Davidson set out that any such identification parade would be unfair and pointless. There was further correspondence, and on 10 April 1998, Detective Senior Sergeant Rae again asked if Mr Watson was refusing to attend an identification parade and said that in the absence of a definite statement before 15 April 1998, it would be taken as a refusal by Mr Watson to attend an identification parade. No reply was received by 15 April 1998, and GW viewed Montage B on 20 April 1998.

¹⁶⁸ See *Downes v R* [2018] NZCA 98 (it took slightly over five months from the date the offence was reported until the first positive identification and a further month until the final positive identification was obtained. However, the Court of Appeal was satisfied that formal procedure was undertaken as soon as practicable (at [13]); and *Brady v R* [2023] NZCA 236 (the judge had found that "whether the delay of 5 months impacted on the reliability of the evidence was in the circumstances properly a matter for the jury to determine" (at [17])). The Court of Appeal observed that it "needs to be borne in mind that save for the situation when visual identification evidence is patently unreliable such that it should not be heard at trial, the mere fact that this type of evidence can inherently risk being inaccurate due to the fallibility of human memory is not in itself a reason to exclude the evidence." The appropriate weight to be put on Mr Menon's evidence, having regard to its credibility and reliability was a matter for the jury (at [34]).

a “critical oversight” by the Court.¹⁶⁹ This is plainly incorrect. The Court referred to the three-and-a-half month delay in multiple parts of its judgment¹⁷⁰ including noting that the “identification occurred more than three months after Mr Wallace saw the lone man” when acknowledging that there are factors suggesting Mr Wallace’s identification of Mr Watson, when considered without reference to other supporting evidence, was not a reliable identification.¹⁷¹ It is hard to see what more the Court of Appeal should have done with this factor.

Single photograph

80. The issue of a single photograph was part of the IPCA’s post-trial inquiry, but did not feature in the trial. The Crown accepted in the Court of Appeal that, on 9 January 1998, GW was likely shown a single photograph of Mr Watson. The Court of Appeal analysed this feature in detail. A single photograph of Mr Watson had been shown by the Police to a number of witnesses in the early days of the investigation to confirm or eliminate Mr Watson,¹⁷² and three had identified Mr Watson.¹⁷³ The photograph used is a black and white photograph of Mr Watson dated 19 January 1990 (taken 8 years before).¹⁷⁴ It was apparently shown to GW by an unknown officer in the corridor between rooms, and the actual circumstances of it being shown, the conditions, precisely how long it was viewed are not known.¹⁷⁵ But as the Court of Appeal recognised, multiple factors tell

¹⁶⁹ Appellant’s submissions at [167]. At [11], Mr Watson submits “Entirely absent from the Court’s evaluation of the circumstances that bore on the reliability of Mr Wallace’s identification of the three-and-a-half month delay....”

¹⁷⁰ See CA judgment at [645] **[SC COA Vol 1 at 184]** where it referred to the report of the Drs discussing that the identification was “over three and a half months since” New Year’s Eve; at [761] **[SC COA Vol 1 at 218]** where it noted the defence challenges at trial included the “three-and-a-half-month delay”; and at [841] **[SC COA Vol 1 at 244]** where it accepted in relation to the identifications from Montage B that they do not necessarily meet today’s requirements for a “formal procedure” under s 45 of the Evidence Act because identifications were delayed given that Montage B was only created in March 1998.

¹⁷¹ CA judgment at [921]-[922] **[SC COA Vol 1 at 264]**.

¹⁷² Document 30222 – 7 January 1998 job sheet of R Rackliff includes, “TO DO Show photo of yacht and WATSON to WALLACE to confirm or eliminate from enquiry” (referred to in IPCA letter, above n 3, at [30] **[SC COA Vol 2 at 1416]**).

¹⁷³ Timothy Everest on 8 January 1998; Oliver Perkins on 8 January 1998; and Teresa Geddes 11 January 1998 (see Rolton memorandum at 2). **[SC COA Vol 1 at 2]**

¹⁷⁴ Rolton memorandum at 2 **[SC COA Vol 2 at 1392]**.

¹⁷⁵ CA judgment at [759] **[SC COA Vol 1 at 217]**. GW explained his response to the single photograph in various ways. In his 11 January 1998 Police interview he said the single photograph “didn’t look like him at all... not like the guy [in] the sketch”. In an exchange with Detective Sergeant Moore on 27 April 1998, he said, “[t]hey just asked if I knew this guy and I said I didn’t”. And in a 2001 statement to Detective

against the showing of the single photograph being sufficiently serious to require exclusion of GW's subsequent identification from Montage B: in particular that the photograph of Mr Watson was 8 years old and depicted a much younger Mr Watson, and that the evidence does not suggest GW was exposed to anything more than a "fleeting" glance at the photograph.¹⁷⁶

81. Heron J was not aware of the photograph event when he ruled Montage B admissible. Nor was this event before the jury. *Records show without doubt* that the police records relating to the single photograph were disclosed to the defence,¹⁷⁷ and the defence also had a transcribed interview with GW by Carl Berryman (a former senior Detective working as an investigator and hired by Mr Watson) in which GW referred to being shown a single photograph.¹⁷⁸ For reasons only trial counsel could explain, they did not use this information at the pre-trial hearing on 5 and 6 May 1999 or at trial.¹⁷⁹ Only senior trial counsel responsible for the visual identification aspect of the case can explain these matters, and he has not been asked to do so. Beyond that, it is speculation. It is inconceivable that counsel did not read or engage with their own investigator's interview of a key witness, or with Detective Fitzgerald's 11 January interview.
82. What *is* known from their direct evidence in the first RPOM process is that the two lead defence counsel made highly deliberate and strategic decisions about their approach to GW's evidence in the 11-week trial. We know they were experienced, well resourced, and had disclosure. The evidence shows they were aware of the strategy choices presented by GW's various identifications and descriptions, and steered a path through them. They advanced a strong challenge to the reliability of GW's Montage

Superintendent Millar he said, "I was unable to say if it was [the person in the photograph] or not".

¹⁷⁶ CA judgment at [760] [SC COA Vol 1 at 217].

¹⁷⁷ See Appendix 1 to the Crown's Court of Appeal submissions [SC COA Vol 2 at 1704].

¹⁷⁸ CA judgment at [576] [SC COA Vol 1 at 166].

¹⁷⁹ Mr Antunovic's cross-examination at the November 1998 depositions hearing [Add Mats Vol 1 at 158] included reference to an interview on 26 February 1998 with Carl Berryman, a private investigator hired for Mr Watson. During this interview, GW told Mr Berryman he had been shown the single photograph and "a line up in a manilla folder". However, Mr Antunovic did not refer to the single photograph or "line up in a manilla folder" during the depositions hearing and did not raise it at the pre-trial admissibility hearing on 5 and 6 May 1999 or at the trial.

B evidence.¹⁸⁰ It is also known on the basis of the record that, by the time of the pre-trial hearing, the defence had already secured a concession from GW in the depositions hearing that positively ruled out Mr Watson as being the lone man on the basis of the *Mina Cornelia* photograph and the video GW was shown by the media on 3 February 1998 – both of which became key parts of their challenge to the identification evidence at trial¹⁸¹

83. Notably, while Heron J was unaware of the showing of the single photograph, His Honour *did* consider contamination arising from the “risk of inter witnesses discussion, electronic media and the like”. His Honour concluded that specific witnesses’ identifications should not at that point be outweighed by general objections of that kind, but that these were matters for the jury to take into account as to the witnesses’ overall reliability or the likely accuracy of identification if evidence is put before them.¹⁸² The single photograph would likely have fallen into the same category. Trial counsel were alive to the science of contaminated eye-witness memory, and cross-examined relevant witnesses on that.¹⁸³ The Court of Appeal was correct to consider the single photograph would not have altered Heron J’s pre-trial ruling on the admissibility of Montage B.¹⁸⁴
84. Mr Watson submits that the Court of Appeal wrongly “rejected” the evidence of Nicolette Levy KC that trial counsel were not “aware” that GW had been shown a single photograph.¹⁸⁵ Unfortunately, this submission materially misrepresents the way the factual issue was put in the Court below, which was that *the single photograph event was not disclosed* to the defence. That is the point Ms Levy attempted, via hearsay and without regard to the full record of correspondence, to make in her affidavit¹⁸⁶ (in

¹⁸⁰ Kristy McDonald report, above n 4, at [4.63].

¹⁸¹ CA judgment at [559]-[561] **[SC COA Vol 1 at 161]**.

¹⁸² **[Add Mats Vol 1 at 500 and 506-507]**.

¹⁸³ See footnote 190.

¹⁸⁴ CA judgment at [760] **[SC COA Vol 1 at 217]**. The Court of Appeal correctly found the “circumstances were significantly less serious and contaminating than those in *Tamihere*, where this Court ruled the evidence admissible”, having set out the facts of *Tamihere* (1991 CA) at [757]. The Court of Appeal in *Tamihere* (1991 CA) was correct to take into account other reliable evidence in support of the trampers’ identifications and to rule the identifications admissible.

¹⁸⁵ Appellant’s submissions at [202].

¹⁸⁶ See Affidavit of Nicolette Levy at [23]-[26] **[SC COA Vol 2 at 1155]**.

response, see Appendix 1 to the Crown’s submissions in the Court of Appeal).¹⁸⁷ The Court was correct to conclude “Ms Levy’s affidavit carries little weight”.¹⁸⁸ The substance was incorrect, it was hearsay, and the right deponent was competent, compellable and local. The appellant is not permitted to assert in these circumstances what relevant trial counsel “knew” without providing a proper evidential foundation for the claim.¹⁸⁹

85. What is known from the record is that trial counsel – who elsewhere deliberately used media exposure to test witnesses’ memories¹⁹⁰ – chose not to cross-examine GW about possible contamination of his memory as a result of having been shown a video of Mr Watson by Julie Roberts, a member of the media, on 3 February 1998. In the absence of an affidavit from trial counsel the Court does not have evidence on the strategy for the media issue, and specific others. However, the Court of Appeal’s conclusion is notable:¹⁹¹

As to whether Mr Wallace’s evidence was not challenged before the jury to the extent it might have been (for example, by suggesting the media coverage of Mr Watson contaminated Mr Wallace’s memory rather than merely representing a probative no-identification of Mr Watson), that appears to reflect a deliberate defence strategy to avoid undermining Mr Wallace’s credibility in the eyes of the jury. It must be borne in mind that, given his description of the lone man’s boat as a ketch completely dissimilar to *Blade*, his 9 January 1998 compusketch and his ruling out of Mr Watson as being the lone man based on the *Mina Cornelia* photograph, Mr Wallace was in fact an important and potentially helpful witness for the defence. At the 2000 appeal, counsel for Mr Watson contended that Mr Wallace’s evidence did not amount to an identification of Mr Watson and was in fact exculpatory of Mr Watson.

¹⁸⁷ See Appendix 1 to the Crown’s Court of Appeal submissions at [1]-[3] [SC COA Vol 2 at 1704].

¹⁸⁸ CA judgment at [581] [SC COA Vol 1 at 167].

¹⁸⁹ Appellant’s submissions at [202(c)]. For a strong statement of appeal counsel’s duties see Mark Lucraft *Archbold: Criminal Pleading Evidence and Practice* (Sweet & Maxwell, London, 2026) at [7-168] [RBOA at 504] and *R v Singh (Kunwar)* [2017] EWCA Crim 466, [2018] 1 WLR 1425 [RBOA at 145]. These principles align with the approach in New Zealand’s Court of Appeal (Criminal) Rules 2001, rr 12A and 12B. Where the question is what trial counsel “knew” and why they did not act in a particular way, an account of that should be provided before the Court is asked to speculate.

¹⁹⁰ By way of example, see cross-examination of Kevin McLaughlin [NOE at 1018-1019], Phillippa Holstein [NOE at 1549-1550], Simon Bell [NOE at 1566], and Donald Anderson [NOE at 1947].

¹⁹¹ CA judgment at [762] [SC COA Vol 1 at 218]. See also Kristy McDonald’s report, above n 4, at [4.63], in particular in relation to decisions by trial counsel to deliberately limit their cross-examination of GW in order to limit the potential for the Crown to re-examine GW on his identification evidence.

86. Most importantly, and regardless of the reason why this information was not before the jury, its absence cannot have caused a miscarriage of justice in the circumstances of this case. Importantly, memory is contaminated and overlaid by all sort of events and experiences, each impacting in nuanced ways. And the fact of contamination does not, of itself, make a later identification from a photograph montage unreliable (even in cases subject to the Evidence Act). Rather, the fact of a distinct contaminating event is one of numerous factors relevant to a Judge’s decision as to reliability.¹⁹² In every case, the nature and extent of contamination must be weighed.¹⁹³ Science and the Drs in this case could not speak to the “size” of impact this photo would have had on this witness’s memory, or differentiate it from other contaminating events.¹⁹⁴ The Court’s assessment was open to it.
87. The Court of Appeal did not err in its view that even if the evidence of the single photograph had been before the jury, “it was unlikely to have had material impact over and above the other material before the jury in any event”. The Crown accepts that the showing of a single photograph would have added to the risk of influencing GW’s memory; but to what degree is unknown and speculative. The circumstances as recorded, however, do not themselves suggest it would have materially affected GW’s later formal identification process. As the Court observed, the jury were alive to the key factors tending to suggest GW’s identification of Mr Watson from Montage B could not be relied upon, namely that GW had ruled out Mr Watson based on the *Mina Cornelia* photograph, media exposure, the compusketch and the three-and-a-half month delay before Mr Watson was shown Montage B.¹⁹⁵

¹⁹² CA judgment at [758] [SC COA Vol 1 at 216], citing *Boote v R* [2013] NZCA 122 [RBOA at 3] and *Fukofuka v R* [2019] NZCA 290 (*Fukofuka (2019 CA)*) [RBOA at 51]. In *Boote*, the complainants had been told the name of their alleged attacker and sought out photographs of him on facebook prior to viewing a montage. In *Fukofuka*, unbeknown to the Police, one of the complainants had been referred to a YouTube clip featuring the appellant prior to identifying him in a photograph montage. Also see *Gibbins v R* [2015] NZCA 462 at [13] and [14] (see fn 255 of Crown’s CA submissions) [SC COA Vol 2 at 1649].

¹⁹³ *Fukofuka (2019 CA)*, above n 192, at [25] [RBOA at 56].

¹⁹⁴ Cross-examination of Dr Quigley-McBride: CA NOE at 91, line 25-26 [SC COA Vol 3 at 2216].

¹⁹⁵ CA judgment at [761] [SC COA Vol 1 at 218].

88. The Court was correct to consider that the displacement effect of GW being shown the single photograph was, in the circumstances, not sufficiently serious to require exclusion of GW's identification from Montage B, or "would or should" have altered Heron J's ruling on the admissibility of Montage B generally.¹⁹⁶ Although the IPCA said that showing a single photograph to a witness was "highly undesirable",¹⁹⁷ the IPCA found that its "exhaustive" investigation, with oral evidence and access to 25,000 documents "does not reveal evidence of any deliberate intention or conscious plan on the part of the Police to influence witnesses inappropriately, nor provide tangible evidence of serious misconduct."¹⁹⁸
89. *R v Lewis*¹⁹⁹ and *R v Ormsby*,²⁰⁰ on which the appellant relies,²⁰¹ do not take the issues any further.²⁰² Nor does *R v McIntosh*²⁰³ assist on these facts: in that case, Tipping J noted he would not take into account other direct and circumstantial evidence to let in identifications where the first identification had been obtained as a result of unfair Police procedure,²⁰⁴ and the jury would not be able to properly assess possible contamination of a subsequent dock identification (itself highly problematic) which may have been tainted by the first inadmissible identification. The facts are not comparable to this case. The circumstantial evidence in the present case is used to assess a mixed factual/legal question of *sufficient reliability for admission*, not to overcome a plainly inadmissible identification.
90. Mr Watson repeatedly submits a "witnesses non-identification of a suspect is important *exculpatory* evidence", relying on the report of Drs Wells and

¹⁹⁶ CA judgment at [760] [SC COA Vol 1 at 217].

¹⁹⁷ IPCA letter, above n 3, at [12.2] and [33] [SC COA Vol 2 at 1410].

¹⁹⁸ IPCA letter, above n 3, at [27] and [33] [SC COA Vol 2 at 1415].

¹⁹⁹ *R v Lewis* HC Auckland T59/97, 11 June 1997, Fisher J [ABOA at 367].

²⁰⁰ *R v Ormsby* [1985] 1 NZLR 311 (CA) [ABOA at 351].

²⁰¹ Appellant's submissions at [113]-[114].

²⁰² *R v Lewis* is a High Court authority which did not involve a single photograph. The passage relied on by the appellant is Fisher J's summary of principles drawn from earlier decisions. The Court of Appeal was correct to distinguish *R v Ormsby*, "given there was no evidence pointing to the defendant's guilt other than the identification in that case" (CA judgment at fn 231 [SC COA Vol 1 at 217]).

²⁰³ *R v McIntosh* HC Invercargill T 8/90, 22 August 1990 [ABOA at 390], cited in Appellant's submissions at [115]-[116].

²⁰⁴ The Police had deliberately held Mr McIntosh in custody on a minor unrelated charge so that the witness could see him alone in the dock: see *R v McIntosh*, above n 203 at 9 [ABOA at 398].

Quigley-McBride,²⁰⁵ and specifically suggests the showing of the single photograph was exculpatory.²⁰⁶ As the Court of Appeal found, the Drs' report did not qualify their comments on non-identifications in lineups being exculpatory evidence with reference to a recent study (Dr Quigley-McBride was one on the six authors) which indicates their view is not shared by a surveyed majority of experts.²⁰⁷ The proposition, which the appellant repeats throughout his submissions, is not, as expressed, a scientifically reliable one.

91. The fact that some witnesses – who it was not disputed had observed or interacted with Mr Watson – had not identified Mr Watson when shown a montage, correctly led the Court of Appeal to reject the Drs' opinion offered on the appeal that a non-identification is *necessarily* strong exculpatory evidence in this case.²⁰⁸ The use of the term “exculpatory” is imprecise and unhelpful in the context of legal concepts of evidence and proof.²⁰⁹ Logically though it is accepted that, depending on the facts, other witnesses' non-identifications or contrary descriptions may be relevant countervailing factors to an assertion of reliability, just as corroborating circumstantial evidence may be relevant. Both propositions follow from the logic of *Turnbull*.

11 January 1998 interview

92. On 11 January 1998, GW was interviewed (video recorded) by Detective Tom Fitzgerald.²¹⁰ During the course of the interview, GW was tested and challenged at length in relation to his account that the boat he had seen was a ketch. The yacht, he said, was large, about 38-40 ft.²¹¹ He agreed that

²⁰⁵ Appellant's submissions at [16]. See also [93], [123], [201], [202(d)].

²⁰⁶ Appellant's submissions at [123].

²⁰⁷ CA judgment at [675] [SC COA Vol 1 at 191].

²⁰⁸ CA judgment at [836] [SC COA Vol 1 at 243].

²⁰⁹ Non-identification by some witnesses plainly do not show “innocence”. Presumably what is meant is that they may provide a basis to challenge or undermine the identifications of other witnesses, if made in comparable circumstances.

²¹⁰ See 11 January 1998 interview transcript [SC COA Vol 2 at 1160]. In Appellant's submissions at fn 115, Mr Watson says this Court can take judicial notice of the officer's propensity for misleading suspects. It is unnecessary to look at previous cases involving an officer. What is relevant is what is on the record in this case.

²¹¹ 11 January 1998 interview transcript at 20 [SC COA Vol 2 at 1179].

it was dominant and said, “it stands out”.²¹² GW was also pressed on his description of the male and any prior knowledge of the male. GW was informed during the interview that other people had said the man (who was attempting to pick up women) was a local male called Scott Watson.²¹³

93. Mr Watson submits that GW’s identification is inadmissible because of the improper pressure placed on GW during this interview,²¹⁴ and that this was a “critical gap” in the Court of Appeal’s analysis. The interview requires reading. The Court of Appeal carefully analysed this “long” interview,²¹⁵ and observed that, following an extended exchange as to whether the ketch existed, Detective Fitzgerald was “clearly impatient” with GW, and that he suggested GW had been telling lies.²¹⁶ The analysis included that GW referred to having been shown a photograph,²¹⁷ and that Detective Fitzgerald had told GW other people had described the man trying to pick up women as “a local guy called Scott Watson”.²¹⁸ Further, that the description of the man that the other barmen had seen was “[s]cruffy, unkempt hair” and “[w]avy, unshaven, tradesman like”, and GW had said “[y]eah my statement”, when asked if it rang a bell.²¹⁹
94. As the Court of Appeal said, when making the final assessment as to whether GW’s identification from Montage B was admissible:²²⁰

At the time of the identification, he was well aware that Mr Watson was the police’s prime suspect and no doubt that it would be of assistance to the police if he identified Mr Watson.

95. There is no gap in the Court of Appeal’s analysis. The Court was correct to find that GW did not “mould his account to match the Crown case”, despite

²¹² 11 January 1998 interview transcript at 41 [SC COA Vol 2 at 1200].

²¹³ 11 January 1998 interview transcript at 165 [SC COA Vol 2 at 1324]. GW also said he had heard his name over at the Blenheim CIB press up and said “the Watson name rings a bell, the Scott doesn’t”.

²¹⁴ Appellant’s submissions at [20] and [129].

²¹⁵ CA judgment at [528]-[537] [SC COA Vol 1 at 153].

²¹⁶ CA judgment at [530] [SC COA Vol 1 at 153].

²¹⁷ CA judgment at [531] and [533] [SC COA Vol 1 at 154].

²¹⁸ CA judgment at [535] [SC COA Vol 1 at 155].

²¹⁹ CA judgment at [536] [SC COA Vol 1 at 155].

²²⁰ CA judgment at [923] [SC COA Vol 1 at 264]. Appellant’s submissions at [20] refer to the “improper pressure placed on Mr Wallace in the January police interview was a factor entirely absent from the Court’s list of evaluative factors favouring exclusion” citing the CA judgment at [923].

the fact he was clearly aware from the interview that the Police took issue with his description of the boat being a ketch.²²¹

96. Mr Watson asserts that the jury were deprived of this information that “substantially added to the defence case that Mr Wallace’s identification was the contrived product of moral pressure” as there were “self-evident risks” associated with introducing the interview (which refers to Mr Watson).²²² This point can be taken no further without evidence from trial counsel as to their strategy, but it is clear that, given the importance of GW as a witness, trial counsel were very strategic in their approach to his evidence.²²³ In the end, the weight to put on Detective Fitzgerald’s approach and statements to GW was something the Court of Appeal needed to assess. It was open to the Court in making its own assessment to put some weight on the fact GW did not change his position on anything.
97. Finally, Mr Watson asserts that Detective Fitzgerald’s comment that “all the other barmen” had identified Mr Watson as the “sleazy man” raises two possibilities. Firstly, that Detective Fitzgerald misled GW in the 11 January interview about the state of the Police’s case, or secondly that other witnesses referred to had also been shown the single photograph.²²⁴ This is not consistent with what was said in the interview.

Video shown by media on 3 February 1998 and media coverage

98. It has never been disputed that there was significant media attention on this case. Counsel were clearly aware of this.²²⁵ The Court of Appeal correctly noted “[t]here were extensive references to the media coverage at the trial”.²²⁶ The prosecutor said the disappearance of Olivia and Ben

²²¹ CA judgment at [926] [SC COA Vol 1 at 265]. See Appellant’s submissions at [173].

²²² Appellant’s submissions at [206].

²²³ Kristy McDonald report, above n 4, at [4.63].

²²⁴ Appellant’s submissions at [129].

²²⁵ The thesis included in Mr Watson’s authorities, Cate Brett *Control of the Crime Story: Free Speech vs Fair Trial* (University of Canterbury, Christchurch, 2001) includes at page 42 a comment from senior trial counsel, Bruce Davidson, about the defence strategy surrounding media attention on Mr Watson during the pre-trial period. This records that Mr Davidson opposed a police suppression order when Mr Watson was arrested on a charge of theft of a dinghy “so that if and when he (Watson) was ever arrested on the homicide charges (and) identification became an issue, it might be able to be suggested to witnesses that they were only identifying a suspect who had already been given prominence in newspapers and on television”.

²²⁶ CA judgment at [566] [SC COA Vol 1 at 164].

had attracted “perhaps unprecedented media interest and attention”²²⁷ and the trial Judge directed on it.²²⁸

99. Mr Watson makes a generalised submission that the media’s focus on him as the suspect “compounded the taint already embedded in the identification processes adopted in relation to Mr Wallace”²²⁹ but cannot specify how this actually impacted GW’s identification.²³⁰ The only identified evidence of media “taint” of GW’s identification specifically is that a television item on One Network News on 3 February 1998 depicted GW being shown a video, apparently of Mr Watson. GW gave evidence about this at trial (he could not tell from the quality of the video), and it was fully explored before the jury. A bare assertion that GW’s evidence was otherwise “tainted” by “media saturation” is unsupported by the evidence and there was no error in the Court of Appeal’s analysis on this topic.
100. It is also noted that Mr Watson now relies upon a discussion paper produced by a student as part of a Master of Arts thesis in relation to his submission that “[t]here was a media frenzy surrounding the disappearance of Ms Hope and Mr Smart and the subsequent trial of Mr Watson.”²³¹ Mr Watson submits that the paper should be seen as being “an excellent description of the level of interest.” This appears to be an attempt to go behind the Court of Appeal’s ruling to decline to admit wide-ranging further evidence (filed three months after the hearing) on the topic of media coverage, and this Court’s grant of leave does not extend to the proposed challenge of that decision²³² (as acknowledged by Mr Watson).²³³

²²⁷ CA judgment at [566] [SC COA Vol 1 at 164].

²²⁸ Summing Up of Heron J [CA COA at 298].

²²⁹ Appellant’s submissions at [139].

²³⁰ Appellant’s submissions at [139].

²³¹ Appellant’s submissions at [135] and fn 120: Cate Brett *Control of the Crime Story: Free Speech vs Fair Trial* (University of Canterbury, Christchurch, 2001) [ABOA at 1281].

²³² SC leave judgment at [16] [SC COA Vol 1 at 12].

²³³ Appellant’s submissions at fn 125: “The appellant attempted to produce examples of the media saturation through the affidavit of Mr James [sic] Brown, but that was not received and this Court did not grant leave on the point.”

101. The important point is that the jury were well aware of, and directed on, the media attention and the risks posed to the identifications in this case. It is speculation to take the analysis any further than this.

There is good evidence Mr Watson was never shown Montage A

102. Mr Watson says that whether GW was shown Montage A is “[a] point that remains in contention.”²³⁴ The Crown disputes that GW was shown Montage A, and set that out in Appendix 1 for the Court of Appeal.²³⁵ The matter was not pursued by trial counsel.
103. The Court of Appeal found that, on balance, it is “more likely that the police did not show Mr Wallace Montage A.”²³⁶ The Court was correct to so find, based on all of the evidence. The Court analysed the admissible material in detail,²³⁷ including an investigation by Detective Superintendent Jim Millar in 2001, in which statements were taken from a number of Police officers/employees and also from GW himself (in Australia), in which he said he was not shown Montage A.
104. As the IPCA found in 2010,²³⁸ there is “conflicting evidence” as to whether GW was shown Montage A on 11 January 1998.²³⁹ The IPCA, despite having access to the full Police files and the complaint evidence, could take the question of Montage A no further. However, the IPCA seems to have lacked some material that arguably does take it further, namely the material from Detective Superintendent Millar’s special investigation (carried out entirely

²³⁴ Appellant’s submissions at [143] (see also the Appellant’s CA submissions at [142]).

²³⁵ See Appendix 1 to the Crown’s Court of Appeal submissions [SC COA Vol 2 at 1704].

²³⁶ CA judgment at [608] [SC COA Vol 1 at 174].

²³⁷ CA judgment at [585]–[608] [SC COA Vol 1 at 168].

²³⁸ IPCA letter, above n 3, at [19] [SC COA Vol 2 at 1414]. Such specialist reports are essentially opinion evidence and not normally admissible. But this IPCA letter has from the outset of this appeal been a part of the appellant’s case, and the Crown does not pursue an objection on this ground.

²³⁹ The first version of Montage A, created on 11 January 1998, used a full length photograph of Mr Watson taken on 8 January 1998. As Detective Constable McCornick explained at the hearing on 5 May 1999, she wanted to maintain a uniform background for all the eight people (the photograph of Mr Watson in the first version had a calendar and eye chart in the background), and a second version of Montage A (exhibit 141 at the trial) was created by using a photograph of Mr Watson taken by Detective Fitzgerald on 12 January 1998. The purpose of Montage A was to ascertain who the “sleazy” person at the bar was [Add Mats Vol 1 at 476].

separately for the (then) Deputy Solicitor-General) and held at Crown Law, not on the Police files.²⁴⁰

105. There is no evidence before this Court to warrant revisiting the issue or to justify a contrary conclusion. Regardless, a different conclusion would not have altered the Court of Appeal's analysis:²⁴¹ despite concluding it was more likely he had *not* been shown Montage A, the Court of Appeal nonetheless took into account that GW had possibly been shown it in its analysis.²⁴²

Reliability of GW's identification was squarely before the jury

106. GW's identification from Montage B was undoubtedly important evidence for the Crown and there was considerable focus on its reliability at trial. The jury was acutely aware of numerous issues in relation to reliability. These included media exposure generally and possible contamination of GW's memory from having been shown a video of Mr Watson by the media, the three-month period between New Year's Eve and GW's identification from Montage B, the compusketch, his own recognition of "caution" attaching to his identification,²⁴³ some variance in his descriptions over time, and GW having ruled out Mr Watson from the *Mina Cornelia* photograph. Reliability could not have been more central. The defence challenge addressed each of these matters, including in comprehensive cross-examination of GW by Mr Antunovic. Both parties directly addressed the reliability of GW's identification evidence in their

²⁴⁰ The records of the Millar investigation were in the Crown file. It also appears the IPCA did not have the notes of evidence from the May 1999 admissibility hearing.

²⁴¹ The CA judgment at [587] (and elsewhere) refers to two versions of Montage A as "A1" and "A2". This appears to be relying on the use by the IPCA of "A1" and "A2". The Police had not used "A1" and "A2" to describe the two versions of Montage A (see footnote 239). It is believed the IPCA referred to A1 and A2 because of a document created by Detective Rolton which was divided into two lists: "sheet 1" which was a list of 24 people who were shown Montage A but there was no copy of what they were shown on file, and "sheet 2" which was a list of 19 people who were also shown Montage A but where there was a copy of what they were shown on the file.

²⁴² CA judgment at [607] [SC COA Vol 1 at 174], [763] [SC COA Vol 1 at 219], [923] [SC COA Vol 1 at 264] and [931] [SC COA Vol 1 at 266].

²⁴³ [NOE at 2227].

closing addresses²⁴⁴ and the Judge comprehensively dealt with this topic in summing up.²⁴⁵

107. Importantly, the positions taken by the two parties at trial required the jury to critically consider which parts of GW's evidence it accepted as reliable and which parts it did not: it was accepted by both sides that GW could not be correct about both the man and the boat.²⁴⁶ Any suggestion that the jury may not have sufficiently appreciated or engaged with the issue of the reliability of GW's evidence ignores the realities of the trial and the record.
108. It is also noteworthy that the appellant has taken varying positions at different times regarding the strength of GW's identification evidence from Montage B. At trial, counsel for Mr Watson argued in closing that GW's identification of Mr Watson from Montage B was so "pitifully weak" as to be no identification at all. This position was maintained in Mr Watson's first appeal. As the recent Court of Appeal noted in the decision under appeal, "[i]t is not lost on us that, at the 2000 appeal, it was argued on [Mr Watson's] behalf that the Judge erred in giving an identification warning in respect of Mr Wallace on the basis that, properly viewed, Mr Wallace excluded Mr Watson as the lone man rather than identifying him".²⁴⁷ The same position was pursued in the petition for special leave to appeal the Privy Council. It is somewhat difficult to consider the evidence so prejudicial that it must outweigh any probative value and should never have been before the jury given the terms with which the evidence was described to the jury and the first Court of Appeal.

²⁴⁴ In the defence closing address, trial counsel argued GW's identification was "so pitifully weak that it should be ignored". He emphasised the time lapse, analysed GW's reasons for picking photo 3, pointed to the *Mina Cornelia* photograph and compusketch, and reminded the jury GW had been shown footage of Watson by the media [**Add Mats Vol 1 at 530, 531 and 533**]. In the Crown closing, the prosecutor set out the *Turnbull* factors, noted people are "very capable of getting it wrong" and human memory is susceptible to error, and referred to GW having been shown a video by the media prior to viewing Montage [**CA COA at 180 and 189**].

²⁴⁵ The Judge explained the defence criticised GW's identification as a "poor identification" [**CA COA at 276**], explained why the photograph used in Montage B was out of character, told the jury to have regard to the "integrity of photographs, whether you think they are fair and in accordance with police practice" [**CA COA at 287**], and noted multiple times that it was the jury's role to decide which parts of which witnesses' evidence they accepted [**CA COA at 263, 290 and 298**].

²⁴⁶ See Summing Up [**CA COA at 290**]: "In Wallace's case you have the irony of having, the Crown says, to pick him as a good identifier of people but a poor identifier of boats".

²⁴⁷ CA judgment at [933] [**SC COA Vol 1 at 266**]; First CA judgment (2000) at [23] [**CA COA at 326**].

Summing up adequately conveyed the need for real caution

109. Heron J’s summing up on this topic was exemplary.²⁴⁸ It commenced with the orthodox warning required at the time under s 344D of the Crimes Act 1961 warning of the special need for caution in relation to identification evidence.²⁴⁹ Nowadays, s 126(2)(a) of the Evidence Act requires that the jury be specifically alerted to the possibility of a miscarriage of justice resulting from mistaken identification evidence.²⁵⁰ It was not a requirement at the time of Mr Watson’s trial that the warning spell out the danger of wrongful convictions,²⁵¹ and the Evidence Act 2006 does not apply to this appeal.²⁵² However, Heron J’s summing up explained the need for real caution due to the possibility of a witness making a mistake with identification, and that the same possibility of identification mistake applied to all witnesses.²⁵³
110. The recent Court of Appeal concluded the direction “conveyed the seriousness of the exercise being undertaken by the jury and the need for real caution,... reflected the purpose of the warning that jurors must be made aware of the factors affecting the reliability of eyewitness identification evidence,... addressed the *Turnbull* factors, highlighted the issues raised by trial counsel in respect of identification and overall addressed the matter of identification in a fair and comprehensive way.”²⁵⁴ This confirmed the conclusion of the first Court of Appeal that “[i]t was made clear that the special need for caution was required *before* convicting

²⁴⁸ The IPCA described the direction as “copybook” in its letter, above n 3, at [25] [SC COA Vol 2 at 1415].

²⁴⁹ Summing Up [CA COA at 271]. Crimes Act 1961, s 344D (2)(a)-(c) provides it must include the “reason for the warning”, alert the jury to the possibility that a mistaken witness can be convincing, and where there is more than one identification witness, alert the jury to the possibility that all of them may be mistaken.

²⁵⁰ Evidence Act 2006, s 126(2) provides: “The warning need not be in any particular words but must – (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice...”. [ABOA at 12] See also *Tamihere* (SC), above n 66, at [118] [ABOA at 212]; *Fukofuka* (2013 SC), above n 66, at [28] and [33] [ABOA at 12].

²⁵¹ *R v Mei* [1990] 3 NZLR 16 (CA); *R v O’Carroll* (1992) 8 CRNZ 187 (CA); and *R v Lloyd* CA107/84, 28 February 1985.

²⁵² Evidence Act 2006, s 5(3) [ABOA at 10]; *Ellis* SC substantive judgment, above n 55, at [86] [ABOA at 338].

²⁵³ Summing Up at 11 [CA COA at 271].

²⁵⁴ CA judgment at [919] [SC COA Vol 1 at 263].

in reliance on identification evidence”.²⁵⁵ These conclusions were plainly correct.

111. The appellant’s claim that the prosecutor pre-emptively undermined the Judge’s identification warning²⁵⁶ is not open on the record. The prosecutor’s approach was correct and responsible: the Judge’s caution does not mean the jury should “discount” the witness’ evidence, but it is a “wake up call” to “exercise *special caution* and if having exercised *special caution* you still form the view that the identification is reliable, fair enough, but don’t go there until you’ve exercised this route that involves taking *special caution*.” (emphasis added).²⁵⁷

Reliability is properly supported by independently admissible and probative identification evidence

112. As the Court of Appeal found, a significant body of evidence supports the correctness of GW’s identification of Mr Watson. This goes to the actual legal safety of the evidence. The logic of separate strands of admissible circumstantial evidence and coincidence reasoning apply to visual identification evidence as much as any other. As set out earlier, considering such evidence to the extent it bears on the reliability of identification evidence is the settled approach at common law, long confirmed in *R v Turnbull*. The Court of Appeal was correct in law to take the relevant body of evidence into account in this way. Its approach was logically rigorous.
113. What has never been in issue is the proposition that the “lone man” on the Naiad was the *same* man described by GW and others in the bar and garden bar at the Lodge throughout the night. This was an essential part of both the defence and Crown theories, and GW himself was adamant and unwavering on this point. This means that any evidence from other witnesses that tended to support or undermine GW’s descriptions of the “lone man” (how he looked, what he said, how he acted, what he was

²⁵⁵ First CA judgment (2000) [CA COA at 315].

²⁵⁶ Appellant’s submissions at [75].

²⁵⁷ Crown closing at 24 [CA COA at 192].

wearing, etc) was relevant to assessing the reliability – the likely accuracy – of GW’s memory of the man and his evidence bearing on identity.

114. Mr Watson argues the Court of Appeal conflated the “distinct processes” of determining admissibility and the proviso by “conducting a wide-ranging examination of *all* of the evidence by the Crown.”²⁵⁸ This is simply not correct. The analytical structure of the Court of Appeal’s analysis is explicitly set out at [747].²⁵⁹ In the Crown’s submission, that approach (while conservative, as explained below) cannot be faulted. It was nuanced, stepped and carefully reasoned.
115. From [487]-[745] the Court set out in detail the issues and submissions relating to each of the identification concerns. The Court’s legal analysis follows from [745]. Using the Court’s structure as set out in [747]:
 - 115.1 Topics at [747](a)-(c): pre-disposal; single photograph; circumstances of montage identification. From [748]-[774] the court examined the reliability factors relating to GW’s identification *on its own*. Under *Turnbull*, it is not fundamentally unsafe and therefore inadmissible; more consideration is required. It is in the *Turnbull* category that allows consideration of the circumstantial evidence – for and against – to test reliability.
 - 115.2 (d) other evidence descriptive of the lone man that supported GW’s identification: see [776]-[845]. The Court introduces this by saying: “the other evidence supporting Mr Wallace’s identification of Mr Watson...demonstrates that Mr Wallace’s evidence of what the lone man said to Olivia when on the Naiad was consistent with Mr Watson’s lewd suggestions to women throughout the New Year’s celebrations”: [775]. The probative value and logic of this was explained: [821], [824], [825]. And at [829] the Court observes that the comment the lone man makes on the Naiad (“you can

²⁵⁸ Appellant’s submissions at [190].

²⁵⁹ [SC COA Vol 1 at 210].

come... but he can't") is "an important link" to Mr Watson and his behaviour at Furneaux Lodge.

- 115.3 (e) the evidence suggesting Olivia, Ben and the lone man were dropped not at *Blade* but at a ketch: see [846]-[877]. If that was the case, Mr Watson was not the lone man, and GW's identification must be wrong. This was the critical reliability point for the defence. For the Crown, the exact location of the yacht was key in responding to this factor, as well as the yacht being rafted in that quadrant. At [875], the defence case was that it was the "same man" dropped off, and the location equivocal. At [876], the court found the evidence of the drop-off location responds to the ketch theory, and at [875] that GW's description of the drop-off location appears consistent with the Naiad approaching *Blade*.²⁶⁰
- 115.4 (f) the "two trip theory": see [878]-[912]. The plausibility of a return trip to the Lodge was relevant to the issue of identification: if Mr Watson remained on *Blade*, after being taken there by Mr Anderson (the defence case), he could not have been the man on the Naiad: [880]. Many pieces of corroborative evidence show the appellant was back on shore, around about 3.30am: [903]-[906].
- 115.5 (g) the adequacy of the summing up on the issues relating to identification: see [913]-[919]. This goes to whether the known reliability issues and considerations were sufficiently highlighted to the jury.
- 115.6 (h) admissibility assessment: see [920]-[934]. The Court assessed GW's identification as "moderately probative": [920]-[928], noting as part of that "strong links tying witness descriptions" to the lone man,²⁶¹ and to Mr Watson, suggesting they were all,

²⁶⁰ See also CA judgment at [775] [SC COA Vol 1 at 221]: "Further, the drop-off location was consistent with the area in which *Blade* was moored".

²⁶¹ See also CA judgment at [1069] [SC COA Vol 1 at 296] for a summary of the linkages between the circumstantial identification evidence.

including GW, talking about the same man, Mr Watson: [924]. The Court then assessed unfairness: [929]-[931]. It found the cumulative effect of all the above evidence “strongly supports the admissibility”. GW had to be right *either* about the man *or* the ketch: [932].

116. Having undertaken the stepped process above, the Court concluded the admission of the evidence did not give rise to a miscarriage of justice: [934]. Only then did the Court go on to review the rest of the evidence, in assessing the strength of the case against Mr Watson “overall”.²⁶² This included a wide range of entirely extrinsic matters such as the independent evidence of DNA results, the forensic examination of the boat, and the appellant’s highly suspicious conduct on 1 and 2 January.
117. **[Addendum 1]** to these submissions summarises the linkages between the witnesses’ independent descriptions (i.e. the body of evidence referred to at [747](d)). On the *Turnbull* approach, the rest of the evidence is also legitimately available to test and support the factual accuracy of GW’s identification of Mr Watson as the likely man, and it therefore can support admission of the evidence. The Court here, however, chose to take a more restrained approach. It determined the reliability and admissibility of GW’s identification based solely on the evidence that bore directly on the likely accuracy of GW’s own descriptions, and account of events. On that evidentially conservative basis, the Court found the identification admissible.
118. The rest of the evidence nonetheless remained highly relevant to guilt. For that, the Crown relies on the Court of Appeal’s judgment and this Court may also refer to the **[Crown Compendium of Evidential References]**.²⁶³ To that, only some additional points are made below on specific matters criticised by the appellant.

²⁶² CA judgment at [935]-[1080] **[SC COA Vol 1 at 267]**.

²⁶³ **[SC COA Vol 2 at 1714]**.

119. The appellant is wrong to cite *X v R* as a case which demonstrates that the Court of Appeal’s approach in this case was incorrect.²⁶⁴ That recent case concerned (deliberate) non-disclosure of the critical information known to Police which would have led inevitably to the identification being ruled inadmissible. As a result of the non-disclosure, counsel and the judge were unable to properly assess the reliability of the identification or make submissions on this point. It was the essential reliability evidence withheld from the defence, in a very weak case, supported only by propensity evidence.

The hair evidence is highly compelling

120. The DNA evidence stands alone. It is highly compelling evidence that the victims were on Mr Watson’s boat, *Blade*. Two blonde hairs recovered from *Blade* were a critical part of the case against him. DNA results from forensic examinations in New Zealand, Australia and the United Kingdom supported the position that the hairs were Olivia’s. Contrary to the appellant’s throwaway assertion that there remain significant issues with the hair evidence,²⁶⁵ the Court of Appeal’s conclusions following an extensive and careful review, and covering matters that were not explored in such depth at trial, establishes each individual hair is highly probative evidence against Mr Watson.²⁶⁶ Significantly, 27 years on from the trial, the hair evidence has *greater probative value* now than it did at Mr Watson’s trial: the DNA results are stronger, and the possibility of contamination is even less likely.
121. The present-day position on the hair evidence is as follows.
122. The DNA results were sound,²⁶⁷ and the results from both hairs now provide “strong to very strong support”.
- 122.1 In respect of hair YA69/13: The experts agreed that Ms Vintner’s trial evidence of the likelihood ratio this DNA profile would result

²⁶⁴ Appellant’s submissions at [193].

²⁶⁵ Appellant’s submissions at [225] and [267].

²⁶⁶ CA judgment at [474] [SC COA Vol 1 at 136]. The Court of Appeal heard viva voce evidence from (and cross-examination of) six expert witnesses: Mr Doyle, Mr Gunn and Ms McElhinney gave evidence for the appellant. Professor Holland, Professor Robertson and Ms Vintner gave evidence for the Crown).

²⁶⁷ CA judgment at [290] [SC COA Vol 1 at 88] and [473] [SC COA Vol 1 at 136].

if YA69/13 was from Olivia (compared to any randomly chosen New Zealand caucasian) was “conservative”.²⁶⁸ All of the appeal experts accepted the nuclear DNA²⁶⁹ result provides “very strong support” for the proposition that the hair belonged to Olivia.²⁷⁰

122.2 In respect of hair YA69/12: The trial evidence was that the mitochondrial DNA²⁷¹ match provided “strong support.” That assessment was available and reliable.²⁷² What is more, the Court of Appeal found the larger mtDNA databases available today show the match is even stronger than was understood in 1998. A jury hearing this evidence today would properly be told that the mtDNA results provide “strong to very strong support” that the hair YA69/12 was from Olivia *or one of her maternal relatives*.²⁷³ The evidence on appeal therefore strengthens the Crown evidence at trial.²⁷⁴

123. All of the possibilities for how the hairs got on to the tiger blanket were properly before the jury, and the jury was well-appraised of the risks.²⁷⁵
124. The possibility of laboratory contamination is “extremely unlikely”.²⁷⁶ On the evidence now, the possibility of laboratory contamination is even “less

²⁶⁸ CA judgment at [177] [SC COA Vol 1 at 62], [193] and [194] [SC COA Vol 1 at 66].

²⁶⁹ Nuclear DNA (nDNA) provides a (near) unique profile of the given individual.

²⁷⁰ CA judgment at [212] [SC COA Vol 1 at 70], [288(a)] [SC COA Vol 1 at 87], [175] [SC COA Vol 1 at 62] and [195] [SC COA Vol 1 at 66].

²⁷¹ Mitochondrial DNA is shared between maternal relatives.

²⁷² CA judgment at [288b] [SC COA Vol 1 at 88] and see [278] [SC COA Vol 1 at 85], [246-261] [SC COA Vol 1 at 78] and [274] [SC COA Vol 1 at 84].

²⁷³ CA judgment at [274] [SC COA Vol 1 at 84], see [248] [SC COA Vol 1 at 78], [252] [SC COA Vol 1 at 79] and [253] [SC COA Vol 1 at 79]. Amelia Hope was the only maternal relative who was present at Furneaux Lodge and can be ruled out as the source of the hair on the basis of her hair colour: her red-brown hair was a distinctly different colour to the two blonde hairs. Further, as the Court of Appeal observed, if the hair had originated from Amelia rather than Olivia, this would not have assisted the defence case: see CA judgment at [276]-[277] [SC COA Vol 1 at 84].

²⁷⁴ CA judgment at [274] [SC COA Vol 1 at 84] and [278] [SC COA Vol 1 at 85].

²⁷⁵ CA judgment at [473] [SC COA Vol 1 at 136]. The jury were “well-appraised of the risks” of laboratory contamination (see [426] [SC COA Vol 1 at 122]). The defence comprehensively addressed transference and had the assistance of an expert on this topic (see [318] [SC COA Vol 1 at 97] and [456] [SC COA Vol 1 at 130]), the jury were “not left in any doubt” that the Crown conceded transference was a possibility (see [456] [SC COA Vol 1 at 130]), and the summing up on this topic was correct (see [481] [SC COA Vol 1 at 138]).

²⁷⁶ CA judgment at [403] [SC COA Vol 1 at 116] and [426] [SC COA Vol 1 at 122]. What is now understood from the evidence which was “extensively canvassed” in the Court of Appeal is that the only time laboratory contamination could have occurred was on 7 March (see [426] [SC COA Vol 1 at 122]). The Court of Appeal concluded this was “extremely unlikely.”

likely” than it was at trial; processes used complied with examination guidelines.²⁷⁷

125. The possibility of inadvertent transfer of the hairs from the Hope family home to *Blade* by a police officer is “so speculative as to be random guesswork”.²⁷⁸
126. The possibility of secondary transfer on New Years’ Eve (i.e. that Mr Watson came into contact with two hairs shed naturally by Olivia through the course of the evening and inadvertently carried them to his sleeping berth) remains a theoretical “possibility”. But how likely that is as an explanation for how the hairs came to be on the tiger blanket must be assessed in light of the rest of the evidence.²⁷⁹
127. The fact the two blond hairs were not identified in ESR’s initial look at 400 hairs from *Blade* on 22 January does not support a theory of contamination of samples. The reference hairs from the house had not yet been received by ESR.²⁸⁰ Ms Vintiner was seeking hairs with roots for nDNA testing, and her examination was brief, minimal, not a sift.²⁸¹
128. In short, the hairs have “high probative value”.²⁸² The Judge was correct to say in summing up that, if the hairs on the tiger blanket “did not come about accidentally, then they have strong probative force”.²⁸³ Contamination is “extremely unlikely”, and transference would be an

²⁷⁷ CA judgment at [403(c)] and [403(d)] [SC COA Vol 1 at 116], [405] and [406] [SC COA Vol 1 at 117]. The only time laboratory contamination could have occurred was on 7 March (see [426] [SC COA Vol 1 at 122]). Professor Robertson observed that it is clear from Ms Vintner’s testimony at trial that she was well aware of the need to take necessary precautions to minimize the potential for contamination and, assuming she undertook the procedures she described in detail in her appeal affidavit, “there was negligible opportunity for the hairs to have been left on a work bench and available for potential cross-transfer to other items” (see [404]-[405] [SC COA Vol 1 at 117]). The appellant’s expert, Ms McElhinney, agreed (see [393] [SC COA Vol 1 at 113]).

²⁷⁸ CA judgment at [353] [SC COA Vol 1 at 104]. No person involved in the investigation went to Ms Hope’s house and to the *Blade*.

²⁷⁹ CA judgment at [317] [SC COA Vol 1 at 97] and [481] [SC COA Vol 1 at 138]. Note, Mr Watson told Police he had not seen or encountered Ben and Olivia that night at Furneaux.

²⁸⁰ CA judgment at [356]-[357] [SC COA Vol 1 at 105].

²⁸¹ CA judgment at [410] [SC COA Vol 1 at 118] and [368] [SC COA Vol 1 at 107]. The use of technicians to assist the ESR scientists was made clear at trial (see [418] [SC COA Vol 1 at 120] and [424] [SC COA Vol 1 at 121]).

²⁸² CA judgment at [474] [SC COA Vol 1 at 136].

²⁸³ CA judgment at [462] [SC COA Vol 1 at 133]. And at [481] [SC COA Vol 1 at 138]: all the circumstantial evidence is relevant to the possibility of contamination.

extraordinary coincidence. The obvious explanation is that Olivia’s hairs were on *Blade* because she was on *Blade*.

Other discrete challenges raised by the appellant

Challenges to other evidence

129. Countless issues have already been considered and determined in two previous appeals to the Court of Appeal, an application to the Privy Council, the IPCA and the RPOMs. In the absence of compelling new admissible evidence (of which there is none before this court), it should not lightly revisit conclusions reached by previous courts or inquiries on aspects of the case (especially where they have heard evidence, including from trial counsel), and which have been the subject of rulings or determinations.²⁸⁴
130. In this category are attempts by the appellant to argue there are “significant frailties” and “well-known issues” with the hair evidence,²⁸⁵ or that “issues remain” with the two-trip theory and jailhouse confessions,²⁸⁶ or encouraging the Court to speculate on issues which have been addressed in those earlier processes. The hair evidence was considered in extensive detail by the Court of Appeal in 2024, and this Court declined the appellant leave on that ground. The two-trip theory was determined by the Court of Appeal in Mr Watson’s first appeal in 2000,²⁸⁷ and carefully analysed again by the Court of Appeal in 2024 who concluded there is “nothing in the timing evidence to discount the Crown’s two-trip theory as a reasonable possibility”.²⁸⁸ The prisoner informant evidence was the subject of an IPCA investigation post-trial which investigated allegations of improper Police conduct or pressure on the two witnesses, J and K, and the nature of any incentives they may have received. The IPCA undertook its own inquiries and took evidence on this topic. It found everything relevant had been disclosed, the witnesses were tested by the defence, and there

²⁸⁴ The principle of *stare decisis* is engaged where points of law and the previous court’s approach to those points is argued on appeal for a second time. Finality and the strong imperative for certainty are important: *R v Hayes* [2024] EWCA Crim 304, [2024] 2 C App R 6 at [155] [**RBOA at 143**]. See also *R v Smith* [2023] NICA 86 at [16].

²⁸⁵ Appellant’s submissions at [225] and [267].

²⁸⁶ Appellant’s submissions at [262].

²⁸⁷ First CA judgment (2000) at [41]-[45] [**CA COA at 335**].

²⁸⁸ CA judgment at [911] [**SC COA Vol 1 at 260**].

was no evidence whatsoever of improper incentivisation.²⁸⁹ The appellant did not offer one piece of evidence in the Court of Appeal or here to support the continued allegations about the prisoner informant evidence. This Court should not entertain them.

Challenges to the closing address

131. Mr Watson is critical of the prosecutor for suggesting in closing that the *Mina Cornelia* photograph was not of sufficiently good quality to be much use.²⁹⁰ The evidence on appeal, which the Crown does not dispute, is that it was of good quality. However, the prosecutor's comments about the photograph were plainly submission. The judge's directions clearly directed the jury that it was the sole arbiter of fact. The jury had the photograph and had heard the evidence.
132. James Ruhfus' evidence²⁹¹ that Mr Watson appeared clean shaven when the *Mina Cornelia* photograph was taken (shortly before Mr Watson went ashore for the first time) was not capable of disproving or resolving the body of countervailing and conflicting evidence from witnesses as to how the applicant appeared to them.²⁹² Numerous witnesses who were clearly describing Mr Watson, including Donald Anderson who the Crown and defence agreed at trial had taken the applicant back to *Blade* (the Crown says for the first time), described Mr Watson as not being clean shaven.²⁹³ Mr Ruhfus' evidence could not have led to a different verdict, and it was correctly on that basis ruled inadmissible applying the cogency test. As the Court of Appeal observed, the Judge dealt with the issue in summing up, essentially making the same point as Mr Ruhfus.²⁹⁴ What the *Mina Cornelia*

²⁸⁹ IPCA letter, above n 3, at [12.9] [SC COA Vol 2 at 1411] and [146]-[165] [SC COA Vol 2 at 1434].

²⁹⁰ Crown closing at 23 [CA COA at 191]: "any reliance on photo 32 to rule Mr Watson out would be without any real foundation at all".

²⁹¹ This is not fresh evidence. The photograph was provided to Mr Watson's photographic expert, Mr Durrant, on 13 April 1999 (affidavit of William Harvey – Exhibit D) [SC COA Vol 2 at 1472]. Mr Durrant was provided with the negative on 14 June 1999 (affidavit of William Harvey – Exhibits F, G and H) [SC COA Vol 2 at 1474]. Mr Durrant did not give evidence at the trial (notably, Mr Durrant had provided a written brief of evidence at depositions.). Trial counsel and/or Mr Watson would ordinarily be expected to explain why this was so.

²⁹² CA judgment at [780]-[781] [SC COA Vol 1 at 223].

²⁹³ At [783]-[791] [SC COA Vol 1 at 224].

²⁹⁴ At [781] [SC COA Vol 1 at 223].

photograph actually showed and what it meant was inevitably a matter for the jury.²⁹⁵

133. Mr Watson also says the prosecutor erred in his description in closing of how the compusketch was prepared. There is nothing in this.²⁹⁶

The centrality and importance of Montage B is significantly overstated

134. In this appeal, Mr Watson emphasises the centrality of GW’s identification from Montage B, characterising it as “the most direct evidence of guilt”, “singularly...capable of establishing the Crown case”.²⁹⁷ He claims its purportedly unfair admission rendered his trial unfair because it was “intractably linked” to the other evidence which placed Olivia and Ben on *Blade*.²⁹⁸ The Crown’s fundamental point in response is that the centrality of GW’s identification is significantly overstated: both in terms of the weight which the jury were invited to put on this piece of evidence, and its place in relation to the rest of the evidence against him. **[Addendum 2]** to these submissions, a summary of the Crown closing and structure, may assist. It is the force of all of the evidence that places them with Mr Watson.
135. First, GW’s identification was never cast as holding the weight Mr Watson now claims. It is true that GW was a critical witness for both the Crown and defence. Given his role as the Naiad driver who took Olivia and Ben to the lone man’s boat, and one of the last people to see them alive, this was

²⁹⁵ At [782].

²⁹⁶ The prosecutor told the jury that the witness has to choose from a “template of established hairstyles, face shapes, nose shapes, eye shapes, configurations, etc” and “they are never anything like a photograph” **[CA COA at 188 and 189]**. Mr Watson says the prosecutor was wrong because he claims the compusketch was prepared freehand by the police artist rather than using a computer (Appellant’s submissions at [69]). This claim is incorrect: the compusketch was prepared using a computer, with the assistance of a Police officer, and, at GW’s direction, someone used a pencil to draw on hair and touch up the facial hair (CA judgment at [502]-[503] **[SC COA Vol 1 at 148]**). The Crown clarified the position prior to the Court of Appeal hearing. On 30 May 2023, the Crown had informed Mr Watson’s counsel in response to an information request that it appeared the sketch was prepared freehand by Senior Constable Tibbotts, rather than created using any software (see memorandum of Detective Rolton - Complaint Five, Suspect Photo Identification, dated 15 June 2008 (Rolton memorandum at 17) **[SC COA Vol 2 at 1391]**). However, the compusketch had been created using a computer (this is also confirmed by the way counsel refer to the compusketch during the depositions hearing and at the trial). On 15 March 2024, the Crown provided Mr Watson’s counsel with the computer printout for the creation of the compusketch and two images of Mr Watson. The first image had written below it “finish sketch on compusketch before art work on hair”. The second image was signed by GW and Senior Constable Tibbotts and had the artwork added by hand. This second image was exhibit 154 at the trial.

²⁹⁷ Appellant’s submissions at [221] and [223].

²⁹⁸ Appellant’s submissions at [239] and [265].

somewhat inevitable. But his identification of Mr Watson from Montage B was not *the* central piece of evidence against him. It is certainly not true the prosecutor invited the jury to think it could convict solely on the basis of GW's identification.²⁹⁹ To do so would have been contrary to *Turnbull*. The Crown was overt in its explanation to the jury that it must carefully assess the reliability of GW's evidence (including the contradiction that he couldn't be right about both the man and the boat) and then, per the *Turnbull* approach, look at the rest of the evidence and consider which parts of GW's identification evidence it supports. The most pertinent portion of Mr Davidson KC's closing on this topic is set out below:³⁰⁰

But the Crown doesn't ask you to go that far in this case. The Crown hasn't just hung its case on Mr Wallace's evidence. Why? Well obviously, Mr Wallace on the one hand says the man in the Naiad I'm pretty sure is Mr Watson. But on the other hand it wasn't Mr Watson's boat that I saw the man getting on to, it was something quite different. And so he can't be right on both accounts I suggest to you, can he? There's no suggestion that Wallace, Mr Watson I should say, got on to someone else's boat, clambering over that en route back to his own or something like that. So is Mr Wallace right about saying that this man in the Naiad he thinks was Mr Watson, or is he right about his description of the boat. So what the Crown invites you to do in this case is, one, analyse closely what Mr Wallace has said to you and what Miss Dyer and Mr Morrissey have said. Amelia Hope and Rick Goddard as well although they play a lesser role. And then look at the rest of the case, the rest of the evidence, and see, does any of that other evidence make some aspects of Mr Wallace's evidence more likely, does it support it, what parts of it does it support. So as I say, a starting point is probably an analysis or review of what Mr Wallace has told you. (emphasis added)

136. Ultimately, this Court must assess the structure, strategy, emphasis, and major vs minor planks of the Crown case from the closing address itself.
137. Second, the consistent attempts by counsel for Mr Watson, both at trial and on appeal, to employ the reductive tactic of casting the Crown case as having only three essential planks³⁰¹ overlooks the remaining evidence and, for effect, misconstrues the logic and power of the circumstantial case. The Court of Appeal decision accurately summarises the defence

²⁹⁹ Appellant's submissions at [221].

³⁰⁰ Crown closing at 12-13 [CA COA at 180].

³⁰¹ Two hairs; GW's identification from the montage; and the inmate reports of the appellant's admissions and behaviour.

approach to this [947]. Trial counsel's strategy was to get the jury to focus on the most direct evidence placing Ben and Olivia on the *Blade*, and suggest that if the Crown could not prove those "direct" matters beyond reasonable doubt, there was insufficient other evidence to establish guilt. Plainly that approach to the evidence is not correct.

138. As set out earlier in these submissions, the intrinsic and necessary logic of such cases requires guilt be determined on the totality of the evidence, and each strand of evidence must be considered in light of all the others. The Crown's closing address properly invited the jury to do just that. Mr Davison KC spent considerable time, up front, explaining that the case was dependent on the totality of the evidence, and expressly made the point that circumstantial evidence in many cases will be safer than relying on the accuracy of eye-witness recollection.³⁰²
139. The Court of Appeal's comprehensive analysis shows this was a multi-faceted and extremely strong Crown case.³⁰³ Indeed, trial counsel acknowledged on the first appeal that an argument about the sufficiency of the evidence could not succeed.³⁰⁴ GW's evidence was admissible, if properly handled, but it is the sheer volume and the varying weight of individual strands of evidence, collectively pointing towards the appellant, that make the case for guilt inescapably strong. The force of the DNA evidence combined with the other key planks is more than a small mountain of evidence to prove the case beyond reasonable doubt.
140. Finally, as can be seen from the Court of Appeal's meticulous analysis, there remains a significant body of probative evidence, which of itself provides a strong case for Mr Watson's guilt, and is entirely extrinsic to GW's identification evidence and his descriptions of the lone man. The Crown does not seek to summarise that evidence here: see Part III of the

³⁰² Crown closing at 6 [CA COA at 174]. The Judge made the same point in forceful terms: Summing Up at 10. [CA COA at 270]

³⁰³ CA judgment at [1080] [SC COA Vol 1 at 298].

³⁰⁴ First CA judgment (2000) at [1] [CA COA at 315] and [56] [CA COA at 342]. This was confirmed in the Kristy McDonald report, above n 4, at [3.19], [3.41], [5.8] and [5.10].

Court of Appeal’s judgment. The evidence of GW’s montage selection was not “intractably linked” to all other evidence in the case such that his trial could be rendered unfair as a result of inadmissible evidence having been before the jury.³⁰⁵ The impact of GW’s identification from Montage B, properly understood in the context of the whole trial, does not have the necessary character.³⁰⁶

25 September 2026

M F Laracy | S C Baker | T R Simpson
Counsel for the respondent

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

AND TO: The appellant

³⁰⁵ *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [35].

³⁰⁶ In *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300, the Court referred at [38] to Lord Bingham’s observation in *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 at [28] that there will come a point where a departure from good practice is so gross, so persistent, so prejudicial, or so irremediable, an appellate court will have no choice but to condemn the trial as unfair and quash the conviction as unsafe. See also *Guy v R*, above n 305, at [38]; approving *Wilde v The Queen* [1988] HCA 6, (1988) 164 CLR 365.

ADDENDUM 1: LINKAGES BETWEEN WITNESSES' INDEPENDENT DESCRIPTIONS

1. The large body of evidence from other witnesses who described interactions with the “lone man” or Mr Watson at Furneaux Lodge on New Years’ Eve support the identification of Mr Watson as the “lone man” in the bar, whom both the Crown and defence accepted, on the basis of GW’s evidence, was the “same man” on the Naiad (and thus the murderer).
2. The Court of Appeal’s summary of the consistent themes which emerged from this body of evidence is compelling.¹ The key links which tie the witnesses’ evidence together were described as follows:²
 - 2.1 references to sailing around Tonga;
 - 2.2 asking women if they wanted to go back to his boat or crew for him;
 - 2.3 using the phrase “dog on a chain” (which evidence of an earlier conversation at Momorangi Bay prior to New Years’ Eve established was a distinctive phrase Mr Watson repeatedly used);
 - 2.4 giving his name as Scott but giving different places where he was from;
 - 2.5 being more than simply flirtatious but overtly coarse and offensive to a number of women;
 - 2.6 being aggressive and generally behaving inappropriately;
 - 2.7 consistencies in descriptions of the man’s physique, complexion and clothing (wiry or medium build, olive complexion, a white tee-shirt underneath a blue denim shirt with rolled up sleeves, and jeans;
 - 2.8 tattooed arms and a missing fingertip;

¹ CA judgment at [823](a)-(g) [SC COA Vol 1 at 233]. See also the **Crown Compendium of Evidential References** at [4.2.3] for references to the Notes of Evidence on this topic [SC COA Vol 2 at 1767].

² At [824] [SC COA Vol 1 at 239].

- 2.9 spending a significant amount of time near Reg's corner at the front of the Main Bar;
 - 2.10 rolling his own cigarettes and drinking spirits; and
 - 2.11 telling people he had a ketch.
3. As the Court of Appeal recognised, some of the witnesses' descriptions deviated from the above descriptors but "the minor discrepancies between their descriptions and the links we set out are merely the expected product of the vagaries of memory".³ What is compelling is the consistent descriptions of similar and distinctive conduct which help to establish that Mr Watson was the "lone man" who GW and other witnesses observed in the bar earlier in the night. As the Court of Appeal concluded:⁴
- what we can rely on is the consistency of the witnesses' descriptions of the man's clothing and behaviour, in particular his topics of conversation, as well as general consistency in description of skin tone, the presence of tattoos, rolling his own cigarettes, and the type of liquor he was consuming. The evidence supported a conclusion that the witnesses were discussing their interactions with the same man, Mr Watson. To that extent, even when we set the identifications of Mr Watson from Montages A and B to one side, the evidence against him is not materially weakened.
4. Amelia Hope described the hairline of the lone man on the Naiad as "receding" was particularly relevant given that Mr Watson's hair was receding.⁵
5. This body of evidence also pointed to a particular motive which, as the Crown prosecutor said to the jury, was one important and distinctive identifying feature in this case. The evidence of inappropriate interactions with women at Furneaux Lodge and attempts to secure a woman for the night are numerous. These were set out in some detail in the Court of Appeal's judgment⁶ but examples are set out below:

³ At [825] [SC COA Vol 1 at 240].

⁴ At [842] [SC COA Vol 1 at 244].

⁵ At [684] [SC COA Vol 1 at 193].

⁶ At [823](b) [SC COA Vol 1 at 233].

- 5.1 A man making comments to Anna Kernick, after brushing her breasts, saying: “nice set you have got there love” and then telling her she should “come down onto my boat, I’ll do things to you that you have never imagined or dreamed of”. Witnesses to this interaction described the man largely consistently – wearing a blue denim shirt with dark hair which was described as “wavy, short but like maybe touched his collar”, “sea blown” and “messy”. Anna Kernick and two others identified Mr Watson from Montage B.
- 5.2 Kristal Bailey described a man making a disgusting comment about how she looked and what he thought of her, saying he wouldn’t mind sleeping with her and she should go off with him. She described the man wearing a light blue denim shirt with sleeves rolled up and a white top underneath, dark brown hair with tight curls coming over his ears and halfway down his neck, and identified Watson from Montage B. Two other witnesses gave similar descriptions of him.
- 5.3 Thomas Forbes and Nicholas Sutherland, from the boat *Equaliser*, described a man asking if one of their female friends was for sale. They described him wearing a blue denim shirt and having receding dark hair. Mr Forbes selected Watson from Montage B and Mr Sutherland selected Watson from Montage A.
- 5.4 Mr Watson boarded *Bianco* (which was rafted with *Blade*) in the early hours of New Years’ Day (after returning to *Blade* on Donald Anderson’s Naiad) and told Mr Crawshaw to give his partner to him and that he would “look after her” and “show her a good time”. It was not in dispute that this was Mr Watson.
6. These examples demonstrate the general pattern of interactions witnesses described throughout the night.

ADDENDUM 2: STRUCTURE OF CROWN CLOSING

Where emphasis has been added it is noted.

PP 169-175: Introductory matters, including the strength and logical reasoning process in a large and circumstantial case (173).

175-176: Ruling out accidental disappearance.

176-179: The implications if a case of foul play; murder.

In the abstract, the essential criteria for identification of the murderer:

- Male
- Alone
- Had a yacht
- Unknown to the victims
- Age
- Must have had a reason or motive that triggered the killing of a pair of strangers; sexual motivation, and notes GW's comment "you can come, but he can't"
- The yacht had to have been moored off Furneaux Lodge
- Not moored anywhere but *in the relevant location*: out from the jetty, slightly to the south
- Man had to have been ashore, in order to go back to the yacht
- Would have needed some resources, such as rope/handcuffs
- Needed sufficient time: time and opportunity to be alone with female victim, and opportunity to kill (also tells against the lone yachtsman joining others on a yacht) and time and opportunity to dispose of the bodies, all belongings and all evidence to connect him
- That interval of time needed to alone/unsupervised

Elimination: can discount –

- All men who in the early hours were on boats with others, after returning from Furneaux.

179:

"Now just leaving everything else aside, on the evidence that you've heard, how many people at Furneaux Lodge that night are candidates to fit those criteria. One of those persons had to, I suggest, fill those criteria, because that is the person on the Naiad who has acted in the way to bring about the disappearance of these two young people. So somebody did. Now of all the people there, who is a candidate to satisfy those criteria. This whole case focuses on the identification of the lone yachtsman. Any evidence that tends to strengthen the identification of the accused Mr Watson as the man on the Naiad must, I suggest to you, diminish the alternative proposition that is being put to you that this ketch and its occupant are in some way or other responsible. The more evidence and the more certain you become on that evidence that it is Mr Watson who was on the Naiad, then the less likely it is, isn't it, that he was getting on to a two masted ketch with a blue stripe down the side with portholes with big brass surrounds on them. Because he wouldn't have been getting on to someone else's boat would he. So if you logically become sure that it was him, then doesn't that start to tell you something about how reliable the evidence is that it was possibly a two masted boat." (Emphasis in the original)

Page 180 onward: Comment on Guy Wallace

Crown called great many witnesses, including ones whose evidence conflicts with the Crown case. Prosecutor says it is logical to start with GW because jury can ask “are there any eye witnesses to Ben and Olivia getting on the boat. Yes, Mr Wallace, Miss Dyer and Mr Morrissey.” Crown does not say can convict on GW’s identification alone.

180-181 in full on this point:

“So I suppose a good starting point would be Guy Wallace wouldn't it. You see, let me say at the outset, the Crown has called many witnesses in this case, you don't need me to tell you that, but many witnesses of that number who have given conflicting accounts of the same incidents, conflicting in terms of time, what happened, what they saw, etc. Conflicting accounts of where boats were, what they were doing, what they looked like, which way they were going, etc. So the Crown could have, I suppose, said well we'll just weed out the ones who don't suit our case and we'll leave them out there and if the defence want to call them they will. The Crown has in this case made a conscious decision to call and put before you a number of witnesses in that category, notwithstanding that their evidence may have been in conflict with the Crown case in one way or another. Firstly, it enables you to have, as best we can, the whole picture, and secondly it demonstrates doesn't it what we probably all know very well, it demonstrates it very graphically, that people get it wrong and are very capable of getting it wrong and can be quite sure about being right when they're wrong. And there are a few of those in this case. And so let's start I suggest and you might think when you retire and deliberate, a good starting point might be to look at Guy Wallace. Because just in terms of logic I suppose, ask yourself, are there any eye witnesses to Ben and Olivia getting on to the boat. Yes, Mr Wallace, Miss Dyer and Mr Morrissey. Are we satisfied beyond reasonable doubt that they are identifying a particular person. If we are, end of story. Forget all the rest of it. I'm just talking in terms of logical approach. If you were to say, look, I know or have heard all about this kind of stuff, but I'm satisfied that Mr Wallace was right about that, then that's as far as you would need to go because if he was the man, Mr Watson was the man who was getting on the boat with the couple, I suggest that would be sufficient to establish beyond reasonable doubt that he must have killed them. But the Crown doesn't ask you to go that far in this case. The Crown hasn't just hung its case on Mr Wallace's evidence. Why? Well obviously, Mr Wallace on the one hand says the man in the Naiad I'm pretty sure is Mr Watson. But on the other hand it wasn't Mr Watson's boat that I saw the man getting on to, it was something quite different. And so he can't be right on both accounts I suggest to you, can he? There's no suggestion that Mr Wallace, Mr Watson I should say, got on to someone else's boat, clambering over that en route back to his own or something like that. So is Mr Wallace right about saying that this man in the Naiad he thinks was Mr Watson, or is he right about his description of the boat? Because if he's right about the boat, then it's unlikely to have been Watson, but if he's right about Mr Watson, it's unlikely to be an accurate description of the boat. So what the Crown invites you to do in this case is, one, analyse closely what Mr Wallace has said to you and what Miss Dyer and Mr Morrissey have said. Amelia Hope and Rick Goddard as well although they play a lesser role. And then look at the rest of the case, the rest of the evidence, and see, does any of that other evidence make some aspects of Mr Wallace's evidence more likely, does it support it, what parts of it does it support. So as I say, a starting point is probably an 181 analysis or review of what Mr Wallace has told you. Now again I don't wish to sound to be teaching you commonsense or to be submitting to you matters of commonsense, but there is the sort of perception isn't there that memory's a bit like a videotape, you just ask to remember something and you call it up, that's the way it happens. Well I suggest to you that you know that memory is nothing like that. There are a number of factors that affect memory and people can be right about some things and wrong on others, and they can be in circumstances where they think they've got the whole story and be significantly

wrong. The human memory is susceptible to error, it is susceptible to interpretation. So I suggest you need to just bear in mind a few factors. How good is a person's memory anyway? Not everyone's going to have the same capacity to remember things. How important were the events the person was involved with at the time of their being asked to recall. Was it something which was really important happening to them that might make some impact, or, was it something which was just (insignificant like) the checkout person at the supermarket when they're going to see 150 persons that day. What were the circumstances of the event, one event, one of a number. What was its duration, what was the degree of interaction, what were the lighting conditions, what was the effect of any tiredness on the witness, what was the effect or influence of alcohol, etc, etc. There are a number of other things that affect what people say too, aren't there. Pride, oh I can remember that, I was there, you ask me about it, I'll tell you. I don't want to reveal myself as being, having a poor memory. And so we try and fill in the odd gap, I think that's the way it happened, oh I'm sure about it. Pride, expectation by others - you were there, you should know, oh yeh no I'll tell you about it. So let's, I suggest to you and submit to you, when you're looking at this whole issue, just bear in mind, keep it tucked away in the back of your mind, that what people say is their memories, the product of their recollection and it's going to be the product of a whole variety of influences and factors, not a videotape. Well, Mr Wallace, the Crown says, described the man on the Naiad and says that he had seen that same man on several occasions throughout the night and in the early hours of 1st of January he had a number of dealings with him, and so by the time it came for this man to seek a ride back out to the boat, or his boat, Mr Wallace, by virtue of having had these earlier interactions with him, had seen enough of the man to recognise him as someone that he'd already seen at the bar. Now what did Mr Wallace say about the man at the bar. I'll just briefly cover this because I'm sure it's fairly clear in your minds...."

181-188: A summary narrative of GW's evidence of the whole night, noting features of the evidence that relate to reliability.

188-189: First mention of the montage, and summary of his statements/descriptions given to police, and the making of the indentikit.

181, 184 and 188: GW is certain the man at the bar, in the garden, at the jetty, in the Naiad is *"the same man"*.

189-191:

- 189 says that prior to the montage GW had been shown a video apparently showing Mr Watson. Wasn't prepared to say; picture was too unclear.
- Half way down 189 to half 190: **discussion of Montage B identification** (About the equivalent of a page.)
- 190: General explanation about montages and why they are used for identification and not dock ID.
- Bottom of 190-191: about 8 lines: defence position on Montage B and Crown response
- 191: turns to discuss photo 31 = the Mina Cornelia photo.
- 191: at the bottom, returns to Crown's position on Montage B identification.

192: Crown anticipates trial judge's ID warning and reinforces need to "exercise special caution" with GW's identification. Ends with coincidence: Mr Watson looked much like the man described by GW and the boat is in the same position as *Blade*:

"(I expect His Honour will tell you of the special need for caution in considering the evidence given by Guy Wallace if you consider it to be a visual identification of the Accused. I expect he will tell you to be alive to the possibility that a mistaken) 1

witness may nevertheless be a convincing witness. Warnings of that kind are not unusual, in fact there is a provision of our Crimes Act which makes them obligatory in certain circumstances where evidence is given of a visual identification. And so, and I don't mean any disrespect to the learned Trial Judge in any way by saying this, but the fact that a warning is given of the type like that shouldn't be elevated to the point of somehow or other discounting evidence by someone like Mr Wallace. It simply is a bit of a wake up call to a jury in saying well exercise special caution and if having exercised that special caution you still form the view that the identification is reliable, fair enough, but don't go there until you've exercised this route that involves taking special caution. Now if Mr Wallace is wrong about that, then Mr Watson is pretty unlucky because it means that the last person seen with Ben and Olivia looked pretty much like him and had got on to a boat, not just any boat but one pretty much in the same position as he had moored his. Coincidence? Well Mr Wallace's identification receives some support by Amelia Hope and Rick Goddard.

192-196: Amelia Hope and Rick Godard

Bottom of 195-196: The coincidence of Amelia's description of the receding hairline adds to GW picking him from Montage B.

196: Sarah Dyer and Hayden Morresey

196-200: The summary of Sarah's evidence focusses on the trip in the Naiad; position of the yacht.

200-204: Mr Morresey does not see the lone man's face. Alone; 5' 8"-9", brownish coloured hair, wavy, shoulder level. Describes the boat, and position. 4th statement said it was ketch. Didn't see any boats rafted.

204-206: Guy Wallace – dropping the couple and lone male onto the yacht

GW's identification of Scott Watson based on the **position of the yacht** and being **rafted** – "very significant, and if he had dropped them off somewhere to the north of the jetty, it couldn't be Mr Watson." The raft that *Blade* was part of was the only raft of yachts in that sector.

206 -210: Guy Wallace's description of the ketch

Viewing conditions, descriptions in statements, sketch on 3 Jan with *Ketch?*, points bearing on reliability.

210: circumstantial evidence in support

"Well, I now want to move to what other circumstantial evidence is there that will enable you to add it into the scales to say well does this support Mr Wallace in his identification of the boat or the man, and there's a number of items of evidence which the Crown relies upon as performing that function. Members of the jury, just before I move to a series of separate evidential points which the Crown says support Mr Wallace's identification..."

210: Ros McNeily's description of the man and she identified the man from Montage B by his eyes.

211: Motive

"Now I turn to some other circumstances. We've got Mr Wallace, possibly a boat, possibly a man. He's supported by some other witnesses in relation to that identification, but what are the other circumstances that the Crown relies on."

Then a section on the motive evidence from events prior:

- 3Es giving evidence of prior statements about willingness to harm a woman
- Momorangi Bay: “mad dog” “fuck a dog a chain”; wants to sail to Tonga; go to Furneaux to get babes.

216: Watson had a yacht; Watson on his own

216-231: Conduct on New Year and timings of Scott Watson at Furneaux Lodge

- Numerous witnesses’ summaries: What he did; clothes he was wearing; sexual or unpleasant comments made to people; used the name “Scott”; roll your own cigarettes; sail to Tonga; descriptions of what he looks like. Timings up to about 2am.
- 222: End of the day – Ollie Perkins incident – puts him on shore at Furneaux; Timings from around 3am- 4.30; identifying details Mr Prozac; descriptions; clothing. Said he had a ketch; Scott from Wellington; what people observed at the Lodge and down to the wharf
- 226: Donald Anderson – Naiad trip with lone man at 2am. Position of the yacht; rafted, to other yachts. Adamant it was Scott Watson.
- 229: Mr Antunovic in his opening relied on Anderson as ruling Mr Watson out because Anderson has him on the boat at 2am. (Note: Crown did not comment in Opening on one or two trips back to *Blade*).

231ff: Other circumstantial evidence

- Movements and sightings on New Years Day; deceptive statements (231, 243, 260) and conduct.
- Eerie Bay – alibi timings; painting the cabin of the boat on 2 January.
- Cleaning and wiping down of *Blade*.
- Possession of handcuffs; hatch cover marks; broken lamp; marks on hull of *Blade*.

246-250: Hair – DNA

252: boat squab; defendant’s statements to Police and conduct re. attempt to find Ben and Olivia

253-255: Conversations with prison inmates

255: Elimination of boats at Furneaux and ketch sightings. Crown case: there was no ketch as described by GW in the area near Furneaux –

“one of the core circumstantial planks of the Crown case is the elimination of all of the other boats that can be identified as having been there.”

260: Closing section (in full)

“Conclusion

Well in the end I suggest it comes down to this, members of the jury. The Crown by calling this evidence have demonstrated to you, in my submission, both as to motive and identity and by his admission to others, by the evidence that you have heard, that there can be no reasonable doubt about it. That night the accused, Mr Watson, was going about in his business of looking for a babe and time after time after time his attempts to achieve his objectives had been thwarted and rejected. And the great

irony of it all is that when he got on that boat with Mr Wallace and went out to the Tamarack he would have had no idea at the time that coming back from the Tamarack would be the young couple who were looking for somewhere to spend the night. And as I say, the sad and tragic irony is that having been seeking a woman all night, one finally dropped into his lap. And that was the event that enabled him to then take advantage of that situation and say well you can stay with me. And in my submission to you what he did thereafter can be seen from what he was doing beforehand. And the only impediment to him doing to young Olivia was she might never have dreamed of was Ben. Fairly mild mannered young man, not aggressive. And so what would happen. Mr Watson did what he had been thinking about doing for a while. And what he had surely been thinking about intently all that night, wanting to have his way with a young woman. And all the evidence points to that having happened and all the evidence of his conduct that follows points to him having done it. Both the independent forensic sort of evidence, the eye witness evidence of his movement about the Sounds, his lying to the Police about where he was to conceal his activities that day, and the evidence from these people from the prison who say he told them that he'd done it. And as I said to you when I commenced my address, the more certain you become as you progress through this analysis of the case, that Mr Watson was the man on the Naiad, that he was the one responsible, the less concern you need to have about the reliability of Mr Wallace's ketch, because if it was Mr Watson who was with Olivia and Ben as they got off that boat, then it is Mr Watson who killed them. And so there's no need I suggest to you to look over the horizon for some mystery ketch. There never was a mystery ketch. The mystery ketch is the fiction really, the label given to this description that Mr Wallace came up with. And mystery ketch is a term of the media, mystery ketch is something that the defence have used as a term. But there isn't any mystery I suggest to you any more. No headline writer, no journalist will ever at the time they wrote mystery ketch have heard what you have heard now. And now that you have heard all of this evidence, I suggest to you, there isn't a mystery ketch. Nor is there a mystery man. The man is Mr Watson, he's been sitting over there throughout the trial and he is responsible for the deaths and the killing and the murders of Ben Smart and Olivia Hope. And it's my submission to you that if you just carefully, calmly, quietly, logically and analytically examine this evidence, examine it for what it is, penetrate behind what people say and look at motives, look at circumstances, you will be drawn to one conclusion. And there is only one logical conclusion and it's a compelling one and that the Crown have produced the evidence which proves this man's guilt of these two charges of murder beyond reasonable doubt.

May it please Your Honour."