

I TE KŌTI MANA NUI O AOTEAROA

IN THE MATTER OF | MŌ TE TAKE a second appeal against conviction

BETWEEN | I WAENGA IA

JULIUS TE HIVAKA

Appellant | Kaipira

AND | ME

THE KING

Respondent | Kaiurupare

**SUBMISSIONS FOR THE APPELLANT
NGĀ TĀPAETANGA MŌ TE KAIPĪRA**

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**SUBMISSIONS FOR THE APPELLANT
NGĀ TĀPAETANGA MŌ TE KAIPĪRA**

MAY IT PLEASE THE COURT | TĒNĀ, E TE KŌTI:

1. On 3 June 2022, a drug deal went wrong. The dealer, Benjamin McIntosh, was shot fatally once by Ethan Dodds, albeit with the direction and course of the bullet being unorthodox for an intended killing.
2. The Appellant, Julius Te Hivaka, was at the drug deal. Mr Te Hivaka knew Mr McIntosh; the two were friendly. Nothing Mr Te Hivaka did or said before or after the killing by Mr Dodds reveals an intention to harm, let alone kill, Mr McIntosh.
3. Messrs Dodds and Te Hivaka were tried together for Mr McIntosh's murder. Both were convicted. Mr Dodds as the principal; Mr Te Hivaka as a party under s 66(2) of the Crimes Act 1961.
4. Justice miscarried. The learned Judge did not direct as required by s 66. There was no direction on the requirement for Mr Te Hivaka to know Mr Dodds was armed. Nor, for s 66(2), was there a direction on the foresight of death, or on the correct element the jury needed to be satisfied of. For each of these reasons individually, the appeal must be allowed.
5. But importantly, justice miscarried because no properly directed jury could convict Mr Te Hivaka of either murder or manslaughter, because there was a lack of evidence concerning his knowledge that Mr Dodds was armed. For this reason, the conviction should be quashed, and a verdict of acquittal entered.

Summary of submissions

Ground one: the necessity of a weapons direction

6. The Crown's case was that Messrs Dodds and Te Hivaka, together with Tamirah Baker, had hatched a plan to rob. For Messrs Dodds and Te Hivaka, the Crown asserted this was a robbery at gunpoint: an armed robbery. Despite presentation throughout in this way, the learned Judge pitched the required common purpose to the jury as a simple robbery.

7. The questions which followed in the question trail did not require the jury to address whether Mr Te Hivaka knew Mr Dodds had a weapon. Because of the lesser common purpose relied on, like this Court held in *Burke v R*, the jury needed to be satisfied that Mr Te Hivaka knew Mr Dodds was armed.¹ It was also important that this was considered before determining whether the shooting occurred in prosecution of the common purpose.²

Ground two: unreasonable verdict

8. There was no direct evidence of a plan to commit an aggravated robbery, nor that Mr Te Hivaka knew Mr Dodds was armed. The Crown case relied entirely on unimpressive inferences.
9. The sole strand of evidence was that Mr Te Hivaka must have carried the bag containing the gun from the house to the car before the drug deal. This was a theory developed well into the trial, with no evidential foundation. In fact, it was at odds with Messrs Te Hivaka and Dodds' evidence and was not consistent with the CCTV footage, which showed Mr Te Hivaka carrying a different bag to that of Mr Dodds' (which had contained the firearm).
10. In consequence, there was no evidence from which a properly directed jury could be satisfied that Mr Te Hivaka knew of the firearm. The Crown's theory was just that—a theory. The only pathway to conviction, if properly directed, was to speculate as to Mr Te Hivaka's knowledge of the firearm.

Ground three: foresight of death

11. The common purpose pathway to murder included both murder via ss 167(b) or 168. The learned Judge found the likely pathway was s 167(b). However, in the direction on s 168 pathway, the learned Judge did not require the jury to be satisfied that Mr Te Hivaka appreciated that death was a probable consequence of the common purpose.
12. The *actus reus* of murder is culpable homicide. Without it, there is no murder. Mr Te Hivaka had to know all the physical and mental elements

¹ *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1.

² It is acknowledged that at the time of the trial this Court had not released its judgment in *Burke v R*, above n 1. While the parties and the Judge were aware that it was before this Court, they did not have the benefit of its guidance. In any event, this failure would have likely been inconsequential if the Judge had directed on the common purpose promoted by the Crown (of an armed robbery). He did not.

necessary for the offence purportedly committed during the robbery. Thus, it was necessary to prove that Mr Te Hivaka knew that death was a probable consequence of the common purpose.

Ground four: foresight of principal's intention

13. The learned Judge presented the case as whether Mr Te Hivaka foresaw grievous bodily injury as a probable consequence, rather than, as s 168 requires, foresight that it was a probable consequence that Mr Dodds meant to do grievous bodily injury. This was a seemingly minor distinction but an important one, because s 168 liability is tied to the intention of the principal (but not necessarily their foresight of death).

Factual background

Undisputed facts

14. On the morning of 3 June 2022, Mr Te Hivaka arranged to meet with his dealer, Mr McIntosh, to purchase some methamphetamine. Messrs McIntosh and Te Hivaka were friends. Mr McIntosh had earlier supplied Mr Te Hivaka with methamphetamine. However, this had been exhausted.
15. Before the deal, Mr Te Hivaka had been in the company of Mr Dodds and Ms Baker. Messrs Te Hivaka and Dodds had consumed the methamphetamine earlier purchased by Mr Te Hivaka. They wanted some more; this led to the above arrangements being made.
16. Mr McIntosh proposed an address to meet—a secluded reserve. The drug deal was for one gram of methamphetamine, worth some \$350. Messrs Te Hivaka and Dodds met with Mr McIntosh. During the drug deal, Mr Dodds fatally shot Mr McIntosh.
17. Those core facts are—as they were at trial—undisputed between the parties.

Crown's narrative

18. The Crown's theory of the case was that before the drug deal Messrs Dodds, Te Hivaka and Ms Baker had hatched a plan to rob Mr McIntosh. The Crown contended that the three had no drugs nor money to pay for new drugs. However, there was also no evidence that Messrs Dodds or Te Hivaka lacked the money for the deal. Instead, the Crown said the three

knew that Mr McIntosh had won some money at the pokies (some \$800) the night before and intended to rob him of his drugs and this money.

19. The Crown contended that this plan involved the use of Mr Dodd's firearm.³ As the Crown's case developed, it contended that Mr Te Hivaka had carried the bag containing the firearm to the car before the drug deal. Again, while he did carry a bag, there was no evidence it held a gun, and it was a different type of bag. The Crown's case was that, from the outset, this was a planned armed robbery with the firearm to be used in that robbery. However, the Crown conceded that Ms Baker likely did not know about the firearm.⁴ If anyone was likely to know of the firearm, it might be her given her relationship with Mr Dodds.

Mr Te Hivaka's position

20. Mr Te Hivaka gave evidence, as did Mr Dodds.
21. Mr Te Hivaka explained that this was a legitimate drug deal for which he had the money to pay. He denied that there was a plan to rob, as the Crown claimed. He explained that he did not know Mr Dodds had a firearm until he produced it in Mr McIntosh's car. When the Crown suggested (for the first time in cross-examination) that he carried the bag containing Mr Dodd's firearm before the drug deal, Mr Te Hivaka denied this.
22. Mr Dodds' position was that the firearm discharged accidentally. During his evidence, he explained that there was no plan to rob Mr McIntosh. He also explained that Mr Te Hivaka did not handle or know of the gun; this having been brought to the scene by Mr Dodds.
23. Relevantly, as to the 'gun bag', the CCTV footage demonstrated that the bag carried by Mr Dodds was black. Critically, Mr Te Hivaka was observed on the CCTV footage carrying a *different* black bag which had a white/light coloured bottom to it.

³ The firearm that was used belonged to Mr Dodds. He accepted this. He also pleaded guilty to a charge of unlawful possession of a firearm on the morning of trial (he was jointly charged with Ms Baker, who defended the charge).

⁴ Case on Appeal, Vol 2, p 113. Also see Case on Appeal, Vol 2, p 187 at [136]. As later returned to, given the asserted joint planning in the asserted robbery, it is difficult to understand how Ms Baker did not know about a firearm, but Mr Te Hivaka did when they were all supposedly together when this robbery was planned.

24. Moreover, there was no evidence that Mr Te Hivaka had any issue with Mr McIntosh. They were clearly on friendly terms. There was also ongoing supply from Mr McIntosh to Mr Te Hivaka. There was no motive for Mr Te Hivaka to want him harmed, let alone killed. Nor is there any evidence that he was aware of Mr Dodds contemplating a shooting and/or had any motive to do so. By contrast, Mr Dodds had his own difficulties with Mr McIntosh and motives; those cannot be shoehorned into the claimed plan to rob.

Procedural background

25. Mr Te Hivaka, jointly with Mr Dodds, was charged with Mr McIntosh's murder on 10 June 2022. Mr Dodds, jointly with Ms Baker, was charged with the unlawful possession of the firearm.
26. Ms Baker was also charged as an accessory after the fact to murder.
27. Mr Dodds' mother, Donna Dodds, was charged with accessory after the fact. She pleaded guilty before trial and was sentenced following the trial.⁵
28. Messrs Dodds, Te Hivaka and Ms Baker proceeded to trial. This commenced in the High Court at Auckland before Lang J and a jury on 26 February 2024. Upon arraignment, Mr Dodds pleaded guilty to unlawful possession of the firearm. The defendants otherwise pleaded not guilty.
29. Following closings and summing up on 12-13 March 2024, the jury retired. It returned guilty verdicts on all charges at 4.40 pm on 15 March 2024.
30. The defendants were each sentenced on 31 May 2024.⁶
31. Mr Te Hivaka appealed his conviction to the Court of Appeal. His sole contention in that Court was that justice had miscarried because the learned trial Judge had not directed the jury that to be satisfied of guilt, they needed to be sure that Mr Te Hivaka knew Mr Dodds had a firearm (as was subsequently required by this Court in *Burke v R*). However, for reasons shortly discussed, the Court of Appeal dismissed Mr Te Hivaka's appeal.⁷

⁵ *R v Dodds* [2024] NZHC 871 (Lang J).

⁶ *R v Dodds* [2024] NZHC 1419 (Lang J); *R v Te Hivaka* [2024] NZHC 1421 (Lang J) (Case on Appeal, Vol 2, pp 205-213); and *R v Baker* [2024] NZHC 1427 (Lang J).

⁷ *Te Hivaka v R* [2025] NZCA 451 (Ellis, Powell and Cull JJ) (Case on Appeal, Vol 1, pp 8-21).

Ground one: the necessity of a weapons direction

32. The first ground of appeal is that Mr Te Hivaka's trial miscarried because the jury were not required to be satisfied that Mr Te Hivaka knew of the presence of a weapon (in this case, a firearm). They were required to consider this issue before considering whether the shooting occurred in the prosecution of the common purpose.

Route to murder

33. Despite being offered three pathways to murder,⁸ the learned Judge was satisfied (based on a jury question) that the jury had found Mr Te Hivaka guilty based on being a party to a joint enterprise to rob where he was aware that a reckless killing was a probable consequence.⁹
34. This is like *Burke*, where multiple pathways to murder were presented, but ultimately the trial Judge was satisfied that guilt had been determined on a s 66(2) basis. It was on this footing that the appeal in *Burke* proceeded.¹⁰

Common purpose

35. In determining whether a weapons direction is necessary, the Court must have regard to the common purpose which the jury was required to be satisfied of.¹¹

What occurred?

36. The Crown, in opening and closing, pitched the common purpose as a plan to rob Mr McIntosh at gunpoint: an armed robbery.¹² In fact, this is how the learned Judge summarised the Crown's case on the common purpose (when addressing Mr Dodds' question trail).¹³

⁸ The first pathway (Option A) was murder as a secondary party from a common purpose in which either a reckless killing or felony murder was a probable consequence. The second pathway (Option B) was aiding or abetting grievous bodily harm to facilitate a robbery (felony murder). The third pathway (Option C) was aiding or abetting a reckless killing.

⁹ Case on Appeal, Vol 2, p 209 at [18].

¹⁰ *Burke v R*, above n 1, at [25] per O'Regan, Williams and Kós JJ.

¹¹ *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [47]-[48]; and *Burke v R*, above n 1, at [243] per Winkelmann CJ, [252] per Glazebrook J and [52] and [141] per O'Regan, Williams and Kós JJ. Also see *Iongi v R* [2025] NZSC 191, [2025] 1 NZLR 900 at [117] per Winkelmann CJ, Williams and Kós JJ.

¹² Case on Appeal, Vol 2, pp 74 at [5] (Crown opening) and 102 (Crown closing).

¹³ Case on Appeal, Vol 2, p 163-164 at [56].

37. However, despite the Crown promoting its case in this way, the learned Judge simply required that the jury be satisfied that Mr Te Hivaka had a common purpose for robbery (not aggravated robbery).

a. Relevantly, the question trail only asked:¹⁴

1. Are you sure that Mr Te Hivaka agreed with Mr Dodds to rob Mr McIntosh?

Note: To “rob” means to steal property using violence or threats of violence to obtain the property.

b. As to his directions, the learned Judge simply said:¹⁵

And again, Question 1 is the same for Mr Dodds but with the roles reversed – “Are you sure that Mr Te Hivaka agreed with Mr Dodds to rob Mr McIntosh?”. Well, if you’ve already found that Mr Dodds didn’t reach an agreement with Mr Te Hivaka, then you won’t take this matter any further. But if you have found that Mr Dodds reached this agreement with Mr Te Hivaka, you’ve then go to consider it again in Question 1. If you’re not sure, you’ll go to Option B, but if you are sure that Mr Te Hivaka into that agreement with Mr Dodds to rob Mr McIntosh, you will go to Question 2 [sic].

38. The situation in *Burke* mirrors the present case:¹⁶

At the trial, the prosecutor used the phrases “mean hiding” and “serious violence” in describing the common purpose. By contrast, the question trail described a different, less serious common purpose—to inflict violence causing non-trivial harm. In light of that, we cannot assume the jury found the common purpose was to cause serious violence.

An error

39. As this Court has explained, “it is for the prosecutor to pitch the common purpose”.¹⁷ This is because, as this Court explained in *Edmonds*:¹⁸

In a group violence case, there will often be a decision to be made as to where to pitch the alleged common purpose in terms of criminality. In this case, the common purpose was pitched at a high level of criminality — an intention to inflict serious violence. But the prosecutor could also have pitched it much lower, for instance to assault the deceased and the other members of his group. The lower the criminality of the alleged common purpose, the easier it will be to establish, but perhaps the harder

¹⁴ Case on Appeal, Vol 2, p 198.

¹⁵ Case on Appeal, Vol 2, pp 170-171.

¹⁶ *Burke v R*, above n 1, at [50] per O’Regan, Williams and Kós JJ (footnote omitted).

¹⁷ At [52] per O’Regan, Williams and Kós JJ: citing *Edmonds v R*, above n 11, at [49].

¹⁸ *Edmonds v R*, above n 11, at [49]: cited with approval in *Burke v R*, above n 1, at [48] and [52] per O’Regan, Williams and Kós JJ.

it will be to show that the ultimate offence was recognised to be a probable consequence of its implementation. The higher the criminality of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that particular defendants formed the intention to prosecute that common purpose, but the easier it will be to infer that such defendants (that is, those who did form that intention) knew that the ultimate offence was a probable consequence of its implementation.

40. Once pitched by the Crown, provided there is a proper evidential foundation, the trial Judge should direct the jury on, and the question trail should reflect, that common purpose, not some lesser common purpose.¹⁹
41. If the learned Judge had presented the question trail and directions consistent with the purpose the Crown pressed at trial, then a weapons direction would be superfluous. That is because, naturally, the jury would have been satisfied that the common purpose, in fact, involved a weapon, and, as such, it then follows it is easier to be satisfied that the shooting happened in the prosecution of the common purpose and that it may be a probable consequence that a murder might occur.
42. However, in this case, like *Burke*, the learned Judge presented the jury with the question trail (and directions on the question trail) which reflected a different, lesser common purpose.²⁰ Rather than an armed robbery (as the Crown had pitched it), the jury needed only to be satisfied beyond reasonable doubt of a robbery. Like *Burke*, given the question that was asked of the jury, this Court can only be satisfied that the jury was sure beyond reasonable doubt that there was a plan to rob. The Court cannot assume that plan involved the use of a firearm.²¹
43. Consequently, as this Court explained in *Burke*:²²

... we must assess the correctness of the directions on the basis that the jury was told the common purpose was to give a hiding (not a mean hiding as the prosecutor had described it). The death of Mr Heappey was caused by Mr Webber stabbing him. The challenge in describing the common purpose in this case arises because, on those facts, Mr Heappey

¹⁹ *Burke v R*, above n 1, at [57] per O'Regan, Williams and Kós JJ.

²⁰ At [52] per O'Regan, Williams and Kós JJ.

²¹ At [50] per O'Regan, Williams and Kós JJ.

²² At [141] per O'Regan, Williams and Kós JJ.

was assaulted in a radically different way to that which had been agreed. The common purpose did not involve the deployment of a lethal weapon.

Weapons direction—a necessity

44. In light of the less serious common purpose, it became necessary for the jury to be satisfied that Mr Te Hivaka knew that Mr Dodds was armed.
45. The Court of Appeal accepted, without dispute, that the question trail in this case did not require the jury to be sure that Mr Te Hivaka knew about the weapon.²³ However, the Court considered no miscarriage arose because:²⁴

... knowledge of a weapon is not an essential element of common purpose liability for murder and the question trail is a jury aid, not a substitute for judicial directions. The focus must, rather, be on those directions themselves.

Weapon necessary to prove a probable consequence

46. It is wrong to say that the requirement for knowledge of a weapon is not a requirement of common purpose liability. It is.
47. As this Court said in *Burke* and *Edmonds*, “it is unwise to stray too far from the actual words of s 66(2)”.²⁵ As s 66(2) provides: “each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose”.
48. As the Court explained in *Edmonds*, where a lesser common purpose is employed, it is often easier to prove but “perhaps the harder it will be to show that the ultimate offence was recognised to be a probable consequence of its implementation”.²⁶
49. Consistent with this, in *Burke*, this Court said:²⁷

[142] In that combination of events, it was necessary for the jury to be directed that they had to be satisfied that Mr Burke knew an assault of the type that actually occurred was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a hiding. To

²³ Case on Appeal, Vol 1, p 16 at [23].

²⁴ Case on Appeal, Vol 1, p 16 at [23].

²⁵ *Burke v R*, above n 1, at [141] per O’Regan, Williams and Kós JJ; and *Edmonds v R*, above n 11, at [47].

²⁶ *Edmonds v R*, above n 11, at [49].

²⁷ *Burke v R*, above n 1, at [142] per O’Regan, Williams and Kós JJ. Also see [240] per Winkelmann CJ and [252] per Glazebrook J.

reach that conclusion, the jury needed to be satisfied that Mr Burke knew Mr Webber had a weapon (not necessarily a knife, but on the facts that was the only weapon in issue). The Judge’s directions needed to make that clear. As mentioned earlier, while the directions did address knowledge of a weapon, they also allowed for the jury to find Mr Burke guilty of manslaughter if he did not know about the weapon but knew that an assault merely causing harm that was more than trivial (but not necessarily serious) was a probable consequence of carrying out the common purpose of giving Mr Heappey a hiding. We consider that was an error. Accordingly, we consider that the appeal must be allowed on this ground as well. (Emphasis added)

50. Consequently, this Court explained that the jury “would have to be satisfied beyond reasonable doubt”, *inter alia*, that:
 - a. “Mr Burke knew Mr Webber was armed”;²⁸ and
 - b. “Mr Burke knew it was a probable consequence of the prosecution of the common purpose of giving Mr Heappey a mean hiding involving the infliction of serious harm that Mr Webber would, in the course of implementing such common purpose, assault Mr Heappey with the weapon”.²⁹
51. The Court explained that for the jury to be satisfied of paragraph 50(b), the jury “needed to be satisfied that Mr Burke knew Mr Webber had a weapon”.³⁰
52. It follows that the jury *was* required to be satisfied that Mr Te Hivaka knew that Mr Dodds was armed. This could have occurred in two ways.
 - a. First, the learned Judge could have required the jury to be satisfied of the higher common purpose (as promoted by the Crown) of an armed robbery. If so, while more difficult to establish, it would be easier to infer that the ultimate offence was a probable consequence.³¹ The learned Judge did not require the jury to be satisfied of this common purpose.
 - b. Second, the learned Judge could have provided a separate question to be satisfied that the jury were sure that Mr Te Hivaka knew Mr Dodds

²⁸ At [240] per Winkelmann CJ, [252] per Glazebrook J and [143(c)] per O’Regan, Williams and Kós JJ.

²⁹ At [143(e)] per O’Regan, Williams and Kós JJ.

³⁰ At [240] per Winkelmann CJ, [252] per Glazebrook J and [144] per O’Regan, Williams and Kós JJ.

³¹ *Edmonds v R*, above n 11, at [49].

was armed. This should have been before question three.³² The necessity of a specific weapons question only arises after consideration of the common purpose.³³

Question trail

53. The Court of Appeal proceeded on the erroneous basis that the question trail is merely an aid. It is not.
54. In *Ahsin v R*, a case which involved the correctness of directions to the jury on s 66(1) and (2), this Court said:³⁴

The legal requirement that a person act with the intention of assisting or encouraging the principal offender was discussed in summing up but omitted by the Judge from the question trail. This was unfortunate because the jury were entitled to think that by working through the written material provided to them they would have considered all the matters that they were required to decide. If a written question trail is given to the jury they are likely to focus on it in their deliberations rather than on the judge's oral directions. It is therefore important that the question trail be both accurate and appropriately comprehensive. (Emphasis added)

55. This case was not straightforward. While the jury had only four charges to consider (six, if you include the manslaughter alternatives), the jury were presented, on each murder charge, with three different routes to conviction. The judicial directions involved the presentation of all these different routes. As this Court said in *Ahsin*, the jury is likely to focus on the question trail. Nor, in this case, can the Court take comfort in the fact that the jury may have annotated their question trails; this is because *after* taking the jury through the question trail, the learned Judge took back the question trails and replaced them with fresh question trails.³⁵
56. Moreover, this Court in *Burke* focused on what the jury determined through the question trail. While it noted the way the Crown presented its case, the Court said, “we cannot assume the jury found the common purpose was to cause serious violence”.³⁶ This is equally applicable here.

³² *Burke v R*, above n 1, at [76]-[77] per O'Regan, Williams and Kós JJ.

³³ At [52] per O'Regan, Williams and Kós JJ. Also see *Edmonds v R*, above n 11, at [48].

³⁴ *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [86] per McGrath, Glazebrook and Tipping JJ.

³⁵ This is noted in the Judge's summing up: Case on Appeal, Vol 2, p 177 at [107]-[108].

³⁶ *Burke v R*, above n 1, at [50] per O'Regan, Williams and Kós JJ.

Judge's suggestions not directions

57. Despite the issues with the question trail, both the Crown and Court of Appeal seized upon what the trial Judge said in summing up to the jury when addressing question four. After stating the question as it appeared, his Honour said:³⁷

[83] And you might think that a critical element here in considering this question for Mr Te Hivaka is whether he knew that Mr Dodds was taking a firearm with him if you conclude that they decided to rob because a reckless killing or a intentional infliction of really serious injury for the purpose of committing the offence of robbery would be a highly unlikely of Mr Te Hivaka's knowledge of those potential consequences would be very hard to establish he didn't know a firearm was to be taken to the scene. If he knew, yes, that they were going there to rob him but just for threats of violence or fists or something like that. Then it would be very difficult for the Crown to prove that he knew that there was going to be a reckless killing or there was a probable consequence. Or that the intentional infliction of really serious bodily injury for the purpose of committing the offence of robbery was a probable consequence. So I suggest to you that if you get this far, a key element is whether you are sure that Mr Te Hivaka knew that Mr Dodds had taken the firearm with him for the purposes of threatening or intimidating Mr McIntosh so they could carry out the robbery. (Emphasis added)

58. The Court of Appeal considered that this direction, when considered in the context of the Crown's case as well as Mr Te Hivaka's defence, meant that the jury would have understood those remarks as the necessary weapons direction required by *Burke*.³⁸
59. Allied thereto, the Court said that the fact that the other options were contained in the question trail made it plain that the jury were being asked to consider whether the shooting was unexpected.³⁹
60. Dealing with the second matter first (in paragraph 59 above), the Court of Appeal's reliance on the other options belies the fact that they came *after* option A. Therefore, once the jury worked their way through option A to find Mr Te Hivaka guilty of murder, they did not need to consider options B and C. So, it is entirely illogical that what appears in the questions for options B and C could have in any way influenced the jury when working

³⁷ Case on Appeal, Vol 2, pp 171-172.

³⁸ Case on Appeal, Vol 1, p 17 at [27].

³⁹ Case on Appeal, Vol 1, p 19 at [31].

through option A's questions. Nor can it be suggested that Mr Dodds' question trail assisted, when the learned Judge specifically said the jury were to put aside the question trails for the other defendants.⁴⁰

61. Returning to the mainstay of the Court of Appeal's reasons (in paragraph 58 above), several points are made.
62. First, the learned Judge was not giving a legal direction. The remarks on this topic open and close with "you might think" and "I suggest to you". Those are not the imperatives of judicial directions on the law, but rather reflect the type of language employed by a learned Judge when wanting to emphasise matters of fact that the jury might want to consider, but being careful (as a Judge must) not to trespass into the domain of fact-finding, which is reserved exclusively for the jury.⁴¹ Thus, it is plain that the trial Judge himself did not consider that he was giving a legal direction but merely a factual steer within the (erroneous) legal framework identified in the question trail.
63. Second, in this regard, the learned Judge's observations merely emphasised the point impressed by the parties that the Crown was contending Mr Te Hivaka knew Mr Dodds had a gun, whereas Mr Te Hivaka had given evidence that he had no such knowledge. As the Court itself observed, this is the context in which the jury would have understood those comments.⁴² However, that cannot save the day. In *Burke*, the defence had submitted at trial that the jury could only find Mr Burke guilty of manslaughter if they were sure he knew Mr Webber had a knife.⁴³ Nonetheless, the judicial directions in *Burke* fell short of what was required. This Court did not resort to counsel's submissions to the jury (which are just that—submissions) to supplant the judicial obligation to give (correct) legal directions. Thus, the

⁴⁰ Case on Appeal, Vol 2, p 156 at [23].

⁴¹ The trial Judge employed similar language when he discussed aspects of the evidence in summing up. For example, in discussing the Crown's contention that Mr Te Hivaka had handled the bag in which the gun was contained, his Honour said: "And then, so you might think from all of that really, and you've seen the footage Mr Mansfield played – you might think from all of that that really there isn't a lot of room to suggest that Mr Te Hivaka carried the gun from the house to the bag, that Mr Dodds, although it wasn't put to him that Mr Te Hivaka had carried it, had accepted that he was the person that carried the bag from the house to the car. So I thought I'd deal with that topic there." (Case on Appeal, Vol 2, p 181).

⁴² Case on Appeal, Vol 1, p 17 at [27].

⁴³ *Burke v R* [2022] NZCA 279, (2022) 30 CRNZ 387 at [68] per Brown and Moore JJ.

fact that the parties presented the case as turning on knowledge of a firearm—as in *Burke*—cannot remedy the failure by the Judge to give adequate legal directions.

64. Third, the comments—even disregarding the phrasing as suggestions—did not state what is required. The learned Judge did not say that to find Mr Te Hivaka guilty, they had to be satisfied that Mr Te Hivaka knew it was a probable consequence that, in the course of implementing the robbery of Mr McIntosh, Mr Dodds would assault Mr McIntosh with a weapon, causing either reckless killing or grievous serious harm in the commission of a robbery.⁴⁴ Rather, the learned Judge conditionally suggested that the jury might consider it “highly unlikely” and “very difficult” to find that it was a probable consequence of the robbery without knowledge by Mr Te Hivaka that Mr Dodds had a firearm. This gloss further distracted from what the jury was actually required to consider. Like *Burke*, it suggested a pathway to conviction without the jury being satisfied of Mr Te Hivaka’s knowledge of a weapon.
65. Fourth, this conditional suggestion can properly be seen as merely a factual suggestion because it does not appear in the question trail. His Honour was otherwise astute to ensure that the jury had the *legal* definition of matters throughout, such as “rob”, “probable consequence” and “reckless killing”.⁴⁵ It is telling that there was no definition in the question trail of this *suggestion* of the need for a weapon. That is because it was nothing more than a summation of the respective cases presented rather than a legal requirement or direction.
66. Fifth, the conditional “you might think” way the Judge employed the need for a weapon meant that the jury did not have to be satisfied beyond reasonable doubt. If the necessity of Mr Te Hivaka’s knowledge was contained in the common purpose or a separate weapons question, then the jury would have been required to be satisfied beyond reasonable doubt.
67. Sixth, in any event, even if these difficulties could be overcome, the words of *Ahsin* ring true. The jury would have focused on the question trail in their

⁴⁴ *Burke v R*, above n 1, at [143(f)] per O’Regan, Williams and Kós JJ.

⁴⁵ See these definitions in Option A of the question trail: Case on Appeal, Vol 2, p 198.

deliberations rather than the Judge’s oral summing up, especially with so many (different) legal issues to consider. In this regard, the absence of a correct question trail is dispositive. Without it, justice miscarried.

68. For completeness, it is observed that the present case can be readily contrasted with *Ford v R*, where the jury was specifically (and explicitly) required to be sure that one of the others was armed.⁴⁶ Thus, even though asked slightly out of order and with a less serious common purpose, the “gap ... was bridged”.⁴⁷ No such bridging occurred in this case, nor could the trial Judge’s suggestion amount to such a bridge.
69. Finally, and alternatively, even if it is accepted that the learned Judge’s directions were sufficient, like *Burke*, the jury were not required to consider the knowledge of the weapon *before* addressing whether the shooting was in the course of the common purpose. In *Burke*, the jury were specifically required to consider the presence of a weapon, but this question was *after* the question about whether the principal’s involvement was in the course of the common purpose.⁴⁸ This Court said:⁴⁹

[76] As noted earlier, the question trail did pose the question to the jury as to whether Mr Burke knew about the knife. But that question came after the question about whether the stabbing occurred in the prosecution of the common purpose. This would have suggested to the jury that whether Mr Burke knew Mr Webber had a knife was not important in answering the question of whether the stabbing was in the prosecution of the common purpose, when in fact it was very important. So, the question as to whether Mr Burke knew about the knife needed to come before the question about whether the stabbing occurred in the prosecution of the common purpose.

70. The Court considered the appeal needed to be allowed for this reason alone.⁵⁰ In this case, the jury had *no* questions on the presence of a weapon. At best, there was simply the learned Judge’s suggestions. But, even then, those directions were in respect of question four, which, like *Burke*, came *after* the question of whether the shooting was in the course of the common

⁴⁶ *Ford v R* [2024] NZCA 239.

⁴⁷ At [64].

⁴⁸ *Burke v R*, above n 1, at [27] per O’Regan, Williams and Kós JJ.

⁴⁹ At [76] per O’Regan, Williams and Kós JJ.

⁵⁰ At [77] per O’Regan, Williams and Kós JJ.

purpose (question three).⁵¹ For this reason, which was not considered by the Court of Appeal, the appeal must be allowed.

Conclusion

71. Drawing these threads together, it is not possible, on the state of the question trail and directions, to be sure that the jury were, in fact, satisfied that Mr Te Hivaka appreciated the offence was a probable consequence of the common purpose of robbery. As in *Burke*, a specific weapons question was required given this lesser common purpose. Moreover, the jury needed to consider whether the presence of a weapon was known *before* considering whether the shooting was in the course of the common purpose. It follows that, if properly directed and required to consider the issues correctly, there is a real possibility that the jury would have returned a different verdict. In any event, deprivation of correct directions makes the verdict unfair. For these reasons, like in *Burke*, Mr Te Hivaka's appeal must be allowed.

Ground two: unreasonable verdict—no evidence of knowledge of a weapon

72. Allied to the first ground, Mr Te Hivaka contends that no properly directed jury could convict because there was no evidence from which an inference could be drawn concerning his knowledge that Mr Dodds was armed.
73. The Crown's theory proceeded on the basis of a plan to rob Mr McIntosh at gunpoint. Despite claiming the plan was hatched with Ms Baker, the Crown contended that Mr Te Hivaka but not Ms Baker knew that it was an armed robbery. There was, however, no evidence beyond the Crown's *theory* to support the inference that Mr Te Hivaka knew of a firearm. It follows that a properly directed jury could not convict Mr Te Hivaka of murder or manslaughter.

Inferences

74. It is well-established that a jury is "entitled to draw inferences, but that such inferences should be logical inferences from proven facts, not mere speculation or guesswork".⁵²

⁵¹ Case on Appeal, Vol 2, p 198.

⁵² *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647. Also see *R v Hart* [1986] 2 NZLR 408 (CA) at 413; and *Do v R* [2024] NZCA 97 at [23]-[25].

75. Recently, in *Longi v R*, this Court explained:⁵³

... where proof of an essential issue in dispute depends on the drawing of an inference from circumstantial evidence then, as the Court of Appeal observed in 1988, in *R v Maxwell*, the judge should:⁵⁴

- (a) direct the jury that they must be sure the inference the Crown advances is the only reasonably available inference (and that it is not sufficient that it shows merely a strong possibility of guilt);⁵⁵ and
- (b) canvass other possible inferences raised by defence counsel (and any inferences which might be drawn from the Crown's failure to adduce direct evidence of the matter in issue).⁵⁶

76. This Court later continued:⁵⁷

... if a case rests on circumstantial evidence from which different and equally available inferences can be drawn, to decide between those inferences would require impermissible speculation.⁵⁸

The Crown's assertion

77. The Crown adduced no direct evidence of the plan to rob. Instead, the Crown relied on inferences that could be drawn from the meetings between the three defendants beforehand and their communications with each other in the lead-up. In particular, the Crown pointed to the messages of Ms Baker advising Mr Te Hivaka (and Mr Dodds) of Mr McIntosh's movements before the drug deal took place.

78. While these may have and, based on the verdicts, ultimately did furnish the jury with sufficient evidence to be satisfied beyond reasonable doubt that there was a plan to rob, it was not possible to draw an inference that these included a plan to do so at gunpoint. If they did, then Ms Baker would have been jointly charged with murder too. But she was not, because as the

⁵³ *Longi v R*, above n 11, at [107] per Winkelmann CJ, Williams and Kós JJ.

⁵⁴ *R v Maxwell* (1988) 3 CRNZ 644 (CA) at 647.

⁵⁵ Citing *R v Horry* [1952] NZLR 111 (CA) at 122.

⁵⁶ See also *Cullen v R* [2012] NZCA 413 at [20].

⁵⁷ *Longi v R*, above n 11, at [110] per Winkelmann CJ, Williams and Kós JJ.

⁵⁸ *Hutchins v R* [2016] NZCA 173 at [31]; *Cullen v R*, above n 56, at [19]; and *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 at [284] per Glazebrook J concurring.

Crown accepted, it was not possible to say she knew about the use of the firearm in the robbery:⁵⁹

Now, a rhetorical question: Did Ms Baker know about the firearm? Probably not, and this is insufficient proof for the Crown to tie her to the murder charge.

79. But the Crown continued explaining how Mr Te Hivaka could be tied to the murder charge:⁶⁰

Did Mr Dodds and Mr Te Hivaka know about the firearm used to shoot Mr McIntosh? You can be sure that each of them did know about the firearm. They were both seen carrying a bag in CCTV footage that the Crown invites you to infer had that firearm in it which was used to kill Mr McIntosh.

No evidence

80. However, the evidence did not establish that Mr Te Hivaka was carrying the bag that contained the firearm. The Crown put this contention to Mr Te Hivaka in cross-examination for the first time.⁶¹ He denied it. It was not consistent with Mr Dodds' evidence on the point.⁶² Critically, nor was it consistent with the CCTV footage.⁶³ There was no other evidence to support the contention.

- a. First, starting with Mr Dodds' direct evidence on the point. He explained that the firearm was at his address in Hillsborough. Before they left that address (to go to the drug deal), Mr Dodds grabbed a bag, removed some old clothes and put some new clothes and the firearm in the bag.⁶⁴ In cross-examination, the Crown tried to suggest that Mr Dodds *and Mr Te Hivaka* carried the bag, to which Mr Dodds replied "no".⁶⁵ When asked if Mr Te Hivaka knew about the gun, Mr Dodds answered "no".⁶⁶

⁵⁹ Case on Appeal, Vol 2, p 113. Also see Case on Appeal, Vol 2, p 187 at [136].

⁶⁰ Case on Appeal, Vol 2, p 113.

⁶¹ While the Crown had opened on either Messrs Dodds or Te Hivaka being the shooter, as the Crown's case developed through trial, it settled on Mr Dodds being the shooter. In the course of this development, for the first time in cross-examination, the Crown promoted the position that Mr Te Hivaka carried Mr Dodds' firearm to the car. In cross-examination of Mr Dodds, the Crown had put this as either of them, which Mr Dodds denied, explaining Mr Te Hivaka did not have the bag.

⁶² This was noted by the Judge in his summing up: see Case on Appeal, Vol 2, pp 180-181 at [116]-[119].

⁶³ This was noted by Counsel for Mr Te Hivaka in his closing address: see Case on Appeal, Vol 2, pp 143-147.

⁶⁴ Case on Appeal, Vol 3, pp 559 and 562. Also see Case on Appeal, Vol 2, p 180.

⁶⁵ Case on Appeal, Vol 3, p 655. Also see Case on Appeal, Vol 2, p 181 at [118].

⁶⁶ Case on Appeal, Vol 3, p 655. Also see Case on Appeal, Vol 2, p 181 at [118].

- b. Second, there was Mr Te Hivaka's evidence on this point. He explained he was not aware of the firearm beforehand.⁶⁷ In cross-examination, the Crown put to him that he carried the bag with the firearm in it to the car; he responded "no".⁶⁸ In re-examination, Mr Te Hivaka explained the bag that he carried to the car was his bag, which was a "Crooks & Castles" branded bag with his personal effects as he was between homes.⁶⁹
 - c. Third, there is the CCTV footage. In closing, Counsel for Mr Te Hivaka provided a table (and showed CCTV footage) which compared the bag carried by Mr Dodds (which was entirely black with a white 'Nike' logo)⁷⁰ with the Crooks and Castles bag carried by Mr Te Hivaka (which was a black bag with a white bottom).⁷¹ They were different.
81. Tellingly, the learned Judge, after referring to the evidence of Messrs Dodds and Te Hivaka set out above, said:⁷²
- And then, so you might think from all of that really, and you've seen the footage Mr Mansfield played – you might think from all of that that really there isn't a lot of room to suggest that Mr Te Hivaka carried the gun from the house to the bag [sic], that Mr Dodds, although it wasn't put to him that Mr Te Hivaka carried it, had accepted that he was the person that carried the bag from the house to the car.
82. Regrettably, the learned Judge did not direct in the way mandated by this Court in *Longi*.⁷³ His Honour did not tell the jury that they must be sure that the inference the Crown advances must be the only reasonably available inference. The learned Judge did not canvass the other available inferences from the evidence (although, as outlined, he did indicate that the evidence tended to suggest that Mr Te Hivaka did not carry the bag, which was the only strand of the Crown's case). Nor did the learned Judge tell the jury that

⁶⁷ Case on Appeal, Vol 3, p 744.

⁶⁸ Case on Appeal, Vol 3, p 763. Also see Case on Appeal, Vol 2, p 181 at [119].

⁶⁹ Case on Appeal, Vol 3, p 763. Also see Case on Appeal, Vol 2, p 181 at [119].

⁷⁰ Case on Appeal, Vol 4, pp 185 (image 14), 210 (image 53) and 211 (images 55 and 56).

⁷¹ Case on Appeal, Vol 4, pp 195 (image 31), 196 (image 33) and 198 (image 37).

⁷² Case on Appeal, Vol 2, p 181 at [119].

⁷³ *Longi v R*, above n 11, at [107] and [110] per Winkelmann CJ, Williams and Kós JJ. Compare Case on Appeal, Vol 2, pp 159-160 at [36]-[40].

where there are equally available inferences, to select between them would require impermissible speculation.

83. In this case, it is accepted there was evidence upon which a properly directed jury could conclude that there was a plan to rob. However, and critically, there was no evidence from which a properly directed jury could infer (as opposed to speculating or guessing) that the plan involved the use of a firearm, or Mr Te Hivaka knew (before the firearm was produced at the scene) that Mr Dodds was armed. Not only was that contention contrary to Messrs Dodds and Te Hivaka's evidence, but it also was not supported by the CCTV footage.
84. Thus, the entire suggestion of an armed robbery was merely speculation. The contention Mr Te Hivaka knew that Mr Dodds was armed was conjecture. It had no factual basis grounded in the evidence.
85. In *Longi*, this Court said:⁷⁴

The Crown case had not displaced the defence inference of non-participation by Manu Longi in the plan developed, at some point, by the other two men. The availability of both inferences on the evidence required the jury to guess, or speculate, as to which was in fact right. As in *Munro* and *Kuru*, therefore, there was no rational basis for the jury to have rejected the defence inference of non-participation in the plan as a reasonable possibility. A properly directed jury could not be sure Manu was aware of the plan by the others to fire a shotgun at a person at Calthorp Close, and had agreed to help them effect that plan.

86. Like *Longi*, in this case, the evidence cannot displace Mr Te Hivaka's evidence that he did not know about the firearm and that he was carrying his own bag from the Hillsborough address. There is no rational basis for the jury to reject Mr Te Hivaka's evidence as a reasonable possibility. Thus, a properly directed jury could not be sure that the plan involved an armed robbery (as distinct from a robbery), nor could it be sure that Mr Te Hivaka knew Mr Dodds was armed.
87. The requirement for Mr Te Hivaka to know Mr Dodds was armed is collective across both s 66(1) and (2) liability. Therefore, there is no alternative path to murder liability without that knowledge. Similarly, for

⁷⁴ *Longi v R*, above n 11, at [91] per Winkelmann CJ, Williams and Kós JJ.

the reasons in *Burke*, manslaughter liability also requires knowledge of the firearm.

88. For these reasons, the verdict of murder should be set aside, and a verdict of acquittal entered.⁷⁵

Ground three: necessity to foresee a culpable homicide

89. In the Court of Appeal, Mr Te Hivaka contended that foresight of death by shooting was required.⁷⁶ In this Court, as his third ground, Mr Te Hivaka reframes the issue. For s 66(2) liability, regardless of whether the principal offence is ss 167 or 168 murder, it must be necessary for Mr Te Hivaka to know that death (that is, a culpable homicide) is a probable consequence.
90. While in *Burke* the majority considered that such a requirement was not necessary for s 66(2) manslaughter,⁷⁷ this Court has not had cause to consider the requirements in the context of murder under ss 66(2) and 168. Liability for manslaughter is fundamentally different to murder: there is no forethought of malice. Even in a s 66(2) murder under s 168, it must be necessary to establish a probable consequence of death; otherwise, the effect is to untether moral culpability from legal liability, which is the antithesis of the criminal law.

The alternative s 66(2) pathway

91. The learned Judge presented the jury with two alternative pathways to liability under s 66(2), either as a common purpose party to murder under s 167(b) or murder under s 168(1)(a). The jury could decide between the two pathways.
92. Regrettably, as returned to later, the learned Judge's question trail and directions (for Mr Te Hivaka) left much to be desired.
93. For now, it is sufficient to note that to convict under the ss 66(2) and 168 pathway, the jury were instructed that they needed to be satisfied that: "Mr Te Hivaka knew ... that the intentional infliction of grievous bodily injury

⁷⁵ Criminal Procedure Act 2011, s 233(3)(a).

⁷⁶ Case on Appeal, Vol 1, p 19 at [32].

⁷⁷ *Burke v R*, above n 1, at [171]-[172] per O'Regan, Williams and Kós JJ. Compare [244] per Winkelmann CJ (dissenting) and [248] per Glazebrook J (dissenting).

on Mr McIntosh for the purpose of committing the offence of robbery [was] a probable consequence of carrying out the agreement to rob Mr McIntosh”.⁷⁸

Culpable homicide is a constituent element of the offence

94. It is elementary that culpable homicide is a constituent part of the offence of murder. This is the requirement of both ss 160 and 168. As s 168(1) opens: “culpable homicide is also murder in each of the following cases”.
95. It is the death of an individual that is the requirement of culpable homicide. This is the requirement of ss 158 and 160. But for death, there can be no murder.
96. In *Burke*, a majority of this Court held that for manslaughter liability under s 66(2) it is not necessary to establish that death (that is, culpable homicide) is a probable consequence of the common purpose.⁷⁹ In doing so, the majority drew comfort from Court of Appeal judgments where it had been held that such foresight was not required for s 66(2) liability for murder under s 168.⁸⁰
97. However, with respect, the line of reasoning relied on does not withstand scrutiny. It commences with *R v Morrison*, which is then approved through *R v Hardiman*, *R v Tuhoro* and *R v Rapira*.⁸¹ Importantly, in *Morrison*, the Court of Appeal was not called upon to consider whether foresight of death was required; the complaint and the Court’s consideration were whether the trial Judge had adequately directed on whether the offence had occurred within the course of the common purpose.⁸² In *Hardiman*, the Court dismissed the need for foresight of death simply relying on *Morrison* for that proposition.⁸³ In *Tuhoro*, the Court affirmed *Morrison* and *Hardiman*,

⁷⁸ Case on Appeal, Vol 2, p 198.

⁷⁹ *Burke v R*, above n 1, at [171]-[172] per O’Regan, Williams and Kós JJ.

⁸⁰ *Burke v R*, above n 1, at [172] per O’Regan, Williams and Kós JJ: citing *R v Rapira* [2003] 3 NZLR 794 (CA). The Court also relied on *R v Jackson* [1993] 4 SCR 573.

⁸¹ *R v Morrison* [1968] NZLR 156 (CA); *R v Hardiman* [1995] 2 NZLR 650 (CA); *R v Tuhoro* [1998] 3 NZLR 568 (CA); and *R v Rapira*, above n 80.

⁸² *R v Morrison*, above n 81, at 159.

⁸³ *R v Hardiman*, above n 81, at 652.

explaining that the contrary authority of *R v Tomkins* was not on the s 168 issue.⁸⁴ Those three authorities were then approved in *Rapira*.⁸⁵

98. Consequently, this line of cases proceeds on a flawed basis, as Winkelmann CJ found in her dissent in *Burke*,⁸⁶ and without focused judicial consideration of the issue and requirements of s 66.
99. Instead, there is an opposing line of authorities starting with *R v Tomkins*.⁸⁷ Cooke J, writing for the Court, said:⁸⁸

Reading that section together with the definitions of “Crime” and “Offence” in s 2(1) of the Act and the provisions of s 160 as to culpable homicide, we think the act constituting the offence for the purpose of s 66 is rightly to be seen, simply and broadly, as culpable homicide.

100. While the Court in *Tomkins* was dealing with murder under ss 66(2) and 167, it does not change the fundamental foundation that the interpretation simply relates to the “act constituting the offence”.⁸⁹ Notably, the definition of “offence” does not change between s 66(1) and (2). Therefore, it is entirely unclear how, in some subsequent decisions, the Court has simply discarded the Court’s holding in *Tomkins*.⁹⁰ In others, including s 168 cases, the Court affirmed *Tomkins*.⁹¹
101. This Court has not had cause to directly consider the requirements of s 66(2) in a s 168 murder case.⁹² However, this Court has on three occasions had regard to consider the requirements, more generally, of s 66(2) liability.⁹³ The Court has consistently held that it must not stray far from the wording of s 66(2).⁹⁴

⁸⁴ *R v Tuhoro*, above n 81, at 572-573.

⁸⁵ *R v Rapira*, above n 80, at [21]-[27].

⁸⁶ *Burke v R*, above n 1, at [217] per Winkelmann CJ (dissenting).

⁸⁷ *R v Tomkins* [1985] 2 NZLR 253 (CA).

⁸⁸ At 256.

⁸⁹ At 256.

⁹⁰ See, for example, *R v Hardiman*, above n 81, at 652; *R v Tuhoro*, above n 81, at 572; and *R v Rapira*, above n 80, at [23]-[25].

⁹¹ See, for example, *R v O’Dell* CA46/86, 28 October 1986; *R v Hirawani* CA134/90, 30 November 1990; *R v Doctor* CA366/92, 20 July 1993; and *R v Te Moni* [1998] 1 NZLR 641 (CA) at 649. *Te Moni*, like here, was a case pressed on alternative murder bases, under s 66(2), including ss 167(b) and 168.

⁹² There have been *obiter* comments: see *Edmonds v R*, above n 11, at [29] and [44]; and *Burke v R*, above n 1, at [172] per O’Regan, Williams and Kós JJ and [219]-[220] per Winkelmann CJ (dissenting).

⁹³ *Ahsin v R*, above n 34; *Edmonds v R*, above n 11; and *Burke v R*, above n 1.

⁹⁴ *Edmonds v R*, above n 11, at [47]; and *Burke v R*, above n 1, at [141] per O’Regan, Williams and Kós JJ.

102. Respectfully, and consistent with the Chief Justice and Glazebrook J's *obiter* dissent in *Burke*,⁹⁵ the "offence" of murder must include a homicide. Necessarily, one which is culpable. Otherwise, by operation of the Crimes Act, there can be no murder. To hold otherwise, as the majority in *Burke*'s *obiter* remarks would do if applied to s 168,⁹⁶ is to cut down the principal offence of murder only to *mens rea* components.
103. In *Ahsin*, this Court explained that to know the offence was a probable consequence of carrying out the common purpose, that "requires *foresight* of both the *physical* and mental elements of the essential facts of the offence".⁹⁷
104. The *actus reus* for s 168 murder is culpable homicide.⁹⁸ It is the condition on which s 168(1) is predicated.
105. But to be guilty of murder under s 168(1)(a), it must be accompanied by the *mens rea* which is "*means to cause grievous bodily injury for the purpose of facilitating the offence*".⁹⁹
106. Consequently, as Winkelmann CJ and Glazebrook J in *Burke* and Cooke J, for the Court, in *Tomkins* held, it is necessary for a secondary party, whether s 66(1) or (2), to be aware that death was a probable consequence of the common purpose. In a ss 66(2) and 168 case, this will establish the physical elements of essential facts for the offence of murder. For without a death, there can be no murder offence.
107. This is not at odds with the caveat in s 168(1), which states that an offender is liable for murder under s 168: "whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue". The reason for this is simple.
108. First, the s 168 exception for foresight applies to the *mens rea* of murder (for the principal), not the *actus reus*. The *actus reus* arises, separately, from ss

⁹⁵ *Burke v R*, above n 1, at [219] and [244] per Winkelmann CJ (dissenting) and [248] and [314] per Glazebrook J (dissenting).

⁹⁶ *Burke v R*, above n 1, at [171]-[172] per O'Regan, Williams and Kós JJ.

⁹⁷ *Ahsin v R*, above n 34, at [102] per McGrath, Glazebrook and Tipping JJ (emphasis added).

⁹⁸ Crimes Act, ss 158 and 160. Also see Mathew Downs (ed) *Adams on Criminal Law – Offences and Defences* (Thomson Reuters, online ed) at [CA167.01].

⁹⁹ Emphasis added. Also see *Adams on Criminal Law – Offences and Defences* at [CA167.02].

158 and 160; it is not affected by s 168, because if it were the statute would explicitly say so. For this reason, the requirement for a secondary party to foresee death arises from the statutory requirement in s 66(2) for the secondary offender to foresee both the physical and mental elements of the offence which eventuated.¹⁰⁰ There can, of course, be no murder without a culpable homicide. Thus, if the secondary party cannot foresee the *actus reus* of a culpable homicide, they cannot foresee the offence of murder.

109. In this way, the requirement for foresight of death for a secondary party charged with murder under s 168 is consistent with the statutory requirements of s 66(2), as outlined in *Ahsin*, which are the physical *and* mental elements of the offence.
110. Second, the application of the caveat in s 168 carries through to the issue of *mens rea* for the secondary party. In considering whether the Crown has proved the secondary party foresaw the *mens rea* of a s 168 murder, the Crown need only establish that the secondary party ‘knew it was a probable consequence of the common purpose that the principal *means* to cause grievous bodily injury in the commission of the robbery’.
111. For determination of the *mens rea*, consistent with s 168, it does not matter that the principal did not foresee death might occur. This readily contrasts with s 167(b) where, for example, the secondary party must know it was a probable consequence that ‘the principal would cause bodily injury more than trivial’ which ‘the principal *knew* was likely to cause death’ and ‘the principal would consciously run that risk of death’. Thus, as distinct from s 168, there must be a subjective appreciation by the principal.
112. Consequently, there is a difference between the liability paths under ss 167 and 168. The focus in foresight is on the *actus reus* in a s 168 context, not the *mens rea* as it would be in a s 167(b) context.

¹⁰⁰ *Ahsin v R*, above n 34, at [102] per McGrath, Glazebrook and Tipping JJ.

Correct application avoids overcriminalisation

113. In short, to prove s 66(2) and 168 murder, it is necessary to prove foresight of a culpable homicide (namely, death). This is what s 66(2) and *Ahsin* require.¹⁰¹
114. In a murder case, there is only one *actus reus*: culpable homicide. To hold, as the Court of Appeal has occasionally done,¹⁰² that this need not be foreseen as a probable consequence of the common purpose is to read in a carve-out to the requirements of s 66(2) that the secondary party *must* know the offence that eventuates is a probable consequence. By removing foresight of death, the Crown has not proved *any* homicide offence.
115. It must be recalled that s 66(2) liability is predicated not on what an offender has done, but simply on what they foresaw as a probable consequence of being part of the joint enterprise. Therefore, it is already a much lower bar, where a secondary party can be more removed.
116. By lowering, as the learned Judge and Court of Appeal did, the requirement to prove foresight of death under ss 66(2) and 168, a secondary party is exposed to *greater* liability than the principal. This is because the principal is the one who commits the unlawful act that causes death; the secondary party need do nothing. It is also because the principal must *mean* to cause grievous bodily injury in the common of the offence (or flight from it); the secondary party need only know that it is a probable consequence of the common purpose. Therefore, by removing foresight of death (from the *actus reus* requirement), the Court is subjecting a secondary party to significantly greater risk of liability for vicarious offending than the principal is subject to.
117. In *Edmonds*, without deciding the point, this Court acknowledged that the state of the Court of Appeal authorities meant that liability of a secondary party under ss 66(2) and 168 could give rise to “over-criminalisation”

¹⁰¹ *Ahsin v R*, above n 34, at [102] per McGrath, Glazebrook and Tipping JJ.

¹⁰² See, for example, *R v Hardiman*, above n 81; *R v Tuhoro*, above n 81; and *R v Rapira*, above n 80.

because they could be found guilty of murder “without having foreseen the probability of death”.¹⁰³ Ultimately, that case did not turn on s 168 liability.

118. As noted, the caveat of foresight (for a principal) in s 168 applies to the *mens rea* (of the principal). If Parliament had intended that the removal of foresight for the principal’s *mens rea* (in s 168) would oust the requirement for a secondary party’s foresight of the *actus reus* of culpable homicide (in s 66(2)), then it needed to do so with clear language. This is consistent with the principle of legality, which was put this way by Lord Hoffmann:¹⁰⁴

... the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

119. It is not possible to reason by inference when the matter at issue would remove the *actus reus* of the offence for a secondary party under s 66(2).
120. When properly applied, consistent with *Ahsin* and *Tomkins*, for murder to be foreseen under s 66(2) it must include a culpable homicide. In this way, the risk of over-criminalisation is avoided.¹⁰⁵

No foresight of death

121. In this case, the jury were given a pathway to convict Mr Te Hivaka, under ss 66(2) and 168, without being required to find that Mr Te Hivaka knew that it was a probable consequence that death would occur.
122. Option A (s 66(2) liability) was presented with the jury being able to each select either liability via foresight of ss 167 or 168.¹⁰⁶ Therefore, the Court cannot be sure that some jurors did not use the s 168 route, and, if they did,

¹⁰³ *Edmonds v R*, above n 11, at [29].

¹⁰⁴ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131: cited with approval in, for example, *Woods v Police* [2020] NZSC 141, [2020] 1 NZLR 743.

¹⁰⁵ It is noted that in Canada, liability under the s 66(2) equivalent for the s 168 equivalent has been limited to those cases where death is foreseeable, but this was done through the requirement that such foreseeability is necessary for “fundamental justice” under s 7 of the Canadian Charter of Rights and Freedoms: see *R v Martineau* [1990] 2 SCR 633; and *R v Logan* [1990] 2 SCR 731. Also see *R v Jackson*, above n 80, where the Court distinguished murder and manslaughter offences for the foreseeability of death.

¹⁰⁶ Case on Appeal, Vol 2, p 198.

they were not properly directed. For this reason, separate from the others, Mr Te Hivaka's appeal must be allowed and the conviction set aside.

Ground four: foresight of principal's intention

123. Finally, and allied to the foregoing ground, the learned Judge's directions for the path to liability under ss 66(2) and 168 were inadequate because the learned Judge did not direct in the terms required by s 168.

Question trail and direction

124. The question trail relevantly provides:¹⁰⁷

Are you sure that Mr Te Hivaka knew EITHER:

(a) that the reckless killing of Mr McIntosh; OR

(b) that the intentional infliction of grievous bodily injury on Mr McIntosh for the purpose of committing the offence of robbery

were probable consequences of carrying out the agreement to rob Mr McIntosh?

125. On this question, other than stating the question,¹⁰⁸ the only direction given by the learned Judge was:¹⁰⁹

[83] And you might think that a critical element here in considering this question for Mr Te Hivaka is whether he knew that Mr Dodds was taking a firearm with him if you conclude that they decided to rob because a reckless killing or a intentional infliction of really serious injury for the purpose of committing the offence of robbery would be a highly unlikely of Mr Te Hivaka's knowledge of those potential consequences would be very hard to establish he didn't know a firearm was to be taken to the scene. If he knew, yes, that they were going there to rob him but just for threats of violence or fists or something like that. Then it would be very difficult for the Crown to prove that he knew that there was going to be a reckless killing or there was a probable consequence. Or that the intentional infliction of really serious bodily injury for the purpose of committing the offence of robbery was a probable consequence. So I suggest to you that if you get this far, a key element is whether you are sure that Mr Te Hivaka knew that Mr Dodds had taken the firearm with him for the purposes of threatening or intimidating Mr McIntosh so they could carry out the robbery.

¹⁰⁷ Case on Appeal, Vol 2, p 198.

¹⁰⁸ Case on Appeal, Vol 2, p 171 at [82].

¹⁰⁹ Case on Appeal, Vol 2, pp 171-172.

Requirement for knowledge of the offender's intent

126. Quite apart from the requirement for foresight of the *actus reus*, in this case the learned Judge materially lowered the requirement for the *mens rea* required under s 168.
127. Section 168(1)(a) provides liability if, *inter alia*, the principal “*means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned*”.¹¹⁰ Thus, Mr Te Hivaka’s liability under ss 66(2) and 168 could only accrue if Mr Te Hivaka knew it was a probable consequence that *Mr Dodds meant* to cause grievous bodily injury in the course of the robbery. Curiously, the learned Judge correctly reflects the requirement in Option B (relating to s 168 murder as a secondary party via s 66(1)), but not on s 66(2).¹¹¹
128. Instead, for s 66(2), the question trail only required “the intentional infliction of grievous bodily injury”. This was confirmed by the learned Judge’s directions.
129. While at first blush it may appear as a distinction without a difference, it is critical to the way in which s 168 liability accrues. Section 168 liability (without the principal’s foresight of murder) arises because the principal *means to cause grievous bodily injury for the commission of the offence*. By directing, as the learned Judge did, the probable consequence was not tied to the principal’s knowledge.
130. In this way, Mr Te Hivaka was liable under the learned Judge’s directions simply by appreciating it was a probable consequence that grievous bodily harm would be deployed in the course of the robbery. The appreciation that *a* grievous bodily injury might occur is quite different from the appreciation that the principal *means to cause grievous bodily injury*.
131. The learned Judge needed to direct the jury in terms of the actual *mens rea* for s 168, which Mr Te Hivaka had to know was a probable consequence of the common purpose. In not doing so, the jury were misdirected. Given

¹¹⁰ Emphasis added.

¹¹¹ Case on Appeal, Vol 2, pp 200 (Option B, Question Three).

that this pathway, under s 66(2), was available to some or all of the jurors, the conviction cannot stand.

Conclusion

132. For the foregoing reasons, the jury were misdirected as to the requirements to convict Mr Te Hivaka of murder (either via ss 167 or 168) as a secondary party under s 66(2).
133. These four errors, individually and collectively, mean that the murder conviction cannot stand and the appeal must be allowed.
134. While ordinarily, a retrial would follow the event. It should not here because there was insufficient evidence of Mr Te Hivaka's knowledge of the weapon to sustain an inference beyond reasonable doubt. The knowledge of a weapon is a constituent requirement for secondary liability under both the ss 66(1) and (2) pathways to murder. For this reason, no properly directed jury could convict Mr Te Hivaka of murder or manslaughter. In these circumstances, a judgment of acquittal should be entered.

Order sought

135. Accordingly, Mr Te Hivaka seeks that the Court allow his appeal, set aside his murder conviction and instead enter a verdict of acquittal.

Auckland, 9 June 2026

Tāmaki Makaurau, 9 Pipiri 2026

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To the Registrar of the Supreme Court of New Zealand

And to the Solicitor-General of New Zealand

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