

SCOTT WATSON

Appellant

v

THE KING

Respondent

**APPELLANT'S SUBMISSIONS IN SUPPORT OF APPEAL AGAINST
CONVICTION**

Next Event: 20 October 2026

Counsel certify that, to the best of their knowledge, these submissions are
suitable for publication and do not contain suppressed information.

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TABLE OF CONTENTS

A SYNOPSIS OF A MISCARRIAGE OF JUSTICE.....	2
SUMMARY OF ARGUMENT: THE APPELLANT’S CASE – MR WALLACE’S IDENTIFICATION WAS INADMISSIBLE AND ITS ADMISSION WAS A FUNDAMENTAL ERROR	6
THE PRE-TRIAL CHALLENGE TO MR WALLACE’S EVIDENCE.....	7
THE EVIDENCE AT TRIAL – A BRIEF COMMENT	8
THE EVIDENCE OF GUY WALLACE AT THE PRELIMINARY HEARING	8
THE EVIDENCE OF GUY WALLACE AT TRIAL	10
THE OTHER WITNESSES ON THE WATER TAXI	11
THE CLOSING ADDRESSES	13
The Crown’s closing.....	13
The remaining witnesses on the water taxi.....	17
The centrality of Montage B – its use with other witnesses.....	18
The defence closing.....	19
THE JUDGE’S SUMMING UP ON MR WALLACE’S EVIDENCE.....	21
THE EXPERT EVIDENCE.....	21
Drs Gary Wells and Adele Quigley-McBride	21
James Ruhfus.....	26
GUY WALLACE’S IDENTIFICATION WAS INADMISSIBLE	26
THE USE OF A SINGLE PHOTOGRAPH BY POLICE	26
IMPROPER PRESSURE ON MR WALLACE	33
OTHER FACTORS INCLUDING MEDIA TAIN’T	34
THE CREATION AND USE OF MONTAGE B.....	36
The photograph selected for Montage B.....	40
The time it took for police to show Mr Wallace Montage B	42
WAS THE COURT OF APPEAL RIGHT TO STRICTLY APPLY 1990 TAMIHERE?	44
WHY THE COURT OF APPEAL IS WRONG ABOUT THE IMPACT OF MR WALLACE’S EVIDENCE ON THE JURY	51
FUNDAMENTAL ERROR – AN UNFAIR TRIAL	55
RELEVANT LAW.....	55
THE EVIDENCE OF GUY WALLACE	57
THE EFFECT OF THE EVIDENCE.....	57
STRENGTH OF THE CROWN CASE WITHOUT THE INADMISSIBLE IDENTIFICATION EVIDENCE	62
COGENCY AND PREJUDICE.....	62
IMPACT ON DEFENCE.....	63
DID JUDICIAL DIRECTIONS CURE ANY DEFECT?.....	63
CONCLUSIONS ON FUNDAMENTAL NATURE OF THE ERROR	66
EVEN IF NOT FUNDAMENTAL	66
RETRIAL?	67
CONCLUSION.....	69

MAY IT PLEASE THE COURT:

A synopsis of a miscarriage of justice

1 The circumstances of this appeal, which has been over a quarter of a century in the making, are “profoundly well known”.¹ Mr Watson was found guilty of murder on 11 September 1999 following an eleven-week trial. The Court of Appeal dismissed his first appeal on 8 May 2000.² The Privy Council declined the appellant special leave to bring a second appeal in November 2003. After rejecting Mr Watson’s first application in 2013, the Minister received a second in 2017, leading to a referral by the Governor-General on 10 August 2020. The Court of Appeal, in a judgment spanning 291 pages, dismissed the appeal.³ On 10 March 2026, this Court granted Mr Watson leave to appeal.⁴ 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 identification evidence of Guy Wallace.

2 Approximately 1500 revellers gathered at Furneaux Lodge in the Marlborough Sounds on 31 December 1997 to celebrate the arrival of the new year. It is not in dispute that 17-year-old Olivia Hope and 21-year-old Ben Smart boarded a yacht moored in the inlet in the early hours of 1 January 1998. They were never seen again, and their whereabouts remains a mystery. The identity of the vessel and, more specifically, whether it was Mr Watson’s small, single-masted sloop of steel construction, *Blade*, or a larger, two-masted ketch made of timber, was contested at trial. The Crown’s central witness, Guy Wallace, refused to resile from what he told police in the immediate aftermath of the disappearance of Ms Hope and Mr Smart - that it was a ketch, which he was able to describe in detail. Mr Wallace’s familiarity with boats reinforced the likelihood he was correct on this key point. That was not, however, the end of Mr Wallace’s link to the key trial issue, namely the identity of the man last seen with Ms Hope and Mr Smart.

3 For the key trial issue, the Crown assured the jury that it could place faith in Mr Wallace’s assertion that the mystery man who accompanied Ms Hope and Mr Smart aboard the yacht was Mr Watson, whom he identified in a photographic montage, “Montage B”, on 20 April 1998, over three months after their disappearance.

¹ *Watson v R* [2022] NZCA 204, [2022] 3 NZLR 1 at [3]: **CB 01 page 306**.

² *Watson v R* CA384/99, 8 May 2000: **CB 02 page 315 - 344**.

³ *Watson v R* [2025] NZCA 455 [Court of Appeal judgment]: **CB 01 page 14 - 304**.

⁴ *Watson v R* [2026] NZSC 15: **CB 01 page 8 - 13**.

- 4 In 2022, the Court of Appeal described Mr Wallace’s identification of Mr Watson as a “crucial part of the Crown’s case”.⁵ In its first decision in 2000, it said that:⁶

[I]t is beyond question that the case against [Mr Watson] depended substantially on the correctness of [Mr Wallace’s] identifications, because if they were incorrect the Crown case was seriously undermined.

- 5 However, Mr Wallace’s identification was and is inadmissible. Its unfair prejudicial effect outweighs its probative value. Mr Wallace’s identification was profoundly contaminated by outside influences early in the investigation. First, the Police showed Mr Wallace a single photograph of Mr Watson in early January 1998, but Mr Wallace did not recognise him. Soon afterwards, on 11 January 1998, the Police pressured Mr Wallace in relation to his identification and told him that Mr Watson was its primary suspect. There was other outside contamination, namely the media saturation in relation to Mr Watson. Finally, the Police created an unfair and improper montage that predisposed Mr Wallace, and others, to select Mr Watson.
- 6 The expert evidence adduced on appeal explained that both the single photo and naming of Mr Watson were examples of a “showup”, because they directly communicated to the eyewitness that a specific person was the suspect.⁷ Simply put, police primed Mr Wallace to identify Mr Watson. The identification was tainted from that point. Yet, the Court of Appeal wrongly reasoned that there was no “sufficiently serious” risk of the displacement effect.⁸
- 7 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.⁹
- 8 The Court of Appeal also understated the impact of media saturation, following Mr Watson being publicly named as the suspect on 13 January 1998.¹⁰ It is incontrovertible that this coverage significantly influenced many of the identifications of Mr Watson using Montage B.
- 9 The admissibility of Montage B was challenged pre-trial on the basis that Mr Watson was photographed with his eyes almost closed, which explained why Mr Wallace associated the appellant’s “hooded eyes” with those of the mystery man.

⁵ *Watson* above n 1 at [12]: **CB 01 page 308**.

⁶ *Watson v R* CA384/99, 8 May 2000 at [26]: **CB 02 page 328**.

⁷ Joint expert report p 5: **CB 01 page 348**.

⁸ Court of Appeal judgment at [760]: **CB 01 page 217**.

⁹ Court of Appeal judgment at [923]: **CB 01 page 264**.

¹⁰ It was, of course, well known in the local area that he was the suspect prior to that date.

In an extremely brief decision,¹¹ Heron J dismissed the challenge. Justice Heron's decision was wrong and he referred to neither the fact that Mr Wallace was shown a single photograph of Mr Watson, nor that the Police named its suspect. Despite these omissions, the Court of Appeal said the trial Judge made no error.¹²

- 10 The photograph of Mr Watson curated for Montage B was singled out by senior investigators because it portrayed Mr Watson's eyes in a way that matched the description provided by Mr Wallace and other witnesses who interacted with the lone man at Furneaux Lodge. The Court of Appeal saw no problem with the strategy adopted by Police,¹³ and nor did it accept that Mr Watson's photograph was dissimilar to the other seven used in Montage B because of the way his eyes were shown. These conclusions were in error.
- 11 Entirely absent from the Court's evaluation of the circumstances that bore on the reliability of Mr Wallace's identification was the effect of the three-and-a-half-month delay between Mr Watson being nominated as police's suspect and the showing of Montage B. This ought to have been a dispositive factor in favour of exclusion, given the contaminative influences brought to bear on Mr Wallace. Instead, the Court failed to exercise its gatekeeping function and reasoned that the jury was equipped to assess the impact of delay.¹⁴
- 12 The Court of Appeal applied 1990 *Tamihere*, which allowed a judge assessing admissibility to consider both the circumstances in which the purported identification was made, and "the cumulative effect of the evidence against the accused".¹⁵ The Court's decision was influenced by the outcome in 1990 *Tamihere*, which it appeared to treat as establishing a high threshold for exclusion.¹⁶ Contrary to what the Court of Appeal concluded,¹⁷ the evidence ought to have been excluded on the discrete basis that the identification was unreliable as methods adopted by police comprise a paradigm example of unfair prejudice outweighing the probative value stemming from "[the showing of] a single photograph or other slanted procedure for identification"¹⁸ and due to the other factors that further exacerbated the unfair prejudice and undermined the

¹¹ *Watson v R* T2693/98, 13 May 1999 at 10: **CB 02 page 95 - 96.**

¹² Court of Appeal judgment at [933]: **CB 01 page 266 - 267.**

¹³ Court of Appeal judgment at [751]: **CB 01 page 213 - 214.**

¹⁴ Court of Appeal judgment at [761]: **CB 01 page 218.**

¹⁵ *R v Tamihere* (1990) 7 CRNZ 594 at 601-602.

¹⁶ Court of Appeal judgment at [757]: **CB 01 page 216.**

¹⁷ Court of Appeal judgment at [931]: **CB 01 page 266.**

¹⁸ *R v Tamihere* (1990) 7 CRNZ 594 at 597.

probative value of the identification. Fundamentally, the identification was too unreliable to be admitted.¹⁹ It was also unfairly obtained.

- 13 This appeal squarely raises a prevailing concern about mistaken identity, which is a leading cause of miscarriages of justice.²⁰ It is well-known that juries put “inordinate weight” on identification evidence.²¹ The Court of Appeal was wrong when it held that the jury was well-equipped to assess the identification evidence for itself.²² This ran contrary to what research says about jurors’ ability to accurately scrutinise identification evidence.
- 14 The approach taken by the Court of Appeal directly clashes with modern scientific knowledge. While the Court referenced what was said in *Ellis v R*²³ about the need to conduct the appellate task through “present day eyes”, its strict adherence to the approach taken in 1990 *Tamihere* failed to properly acknowledge modern science and known risks associated with misidentification.
- 15 The admission of Mr Wallace’s identification was a fundamental error that improperly undermined the fairness of the trial. The Court of Appeal undervalued the importance of Mr Wallace’s evidence to the Crown’s case. It was wrong for the Court of Appeal to find that Mr Wallace’s identification was merely another piece of circumstantial evidence. It was inconsistent with the approach taken by the Crown at trial, where it dedicated much of its closing address to persuading the jury that Mr Wallace’s identification was reliable, and where Mr Watson could be found guilty based on Mr Wallace’s evidence alone. Mr Wallace was the *only* witness who identified Mr Watson as the person who accompanied Ben and Olivia from the water taxi to the yacht, which explained its special treatment by the Crown and the trial Judge.
- 16 Nor did the Court adequately grapple with the fact that the jury was deprived of the evidence that Mr Wallace had been shown a single photograph of Mr Watson.

¹⁹ While the Evidence Act 2006 did not apply at the time of Mr Watson’s trial, it is a sobering fact that the methods adopted by police arguably failed to meet four of the seven conjunctive requirements constituting s 45(3)’s “formal procedure” for obtaining visual identification evidence. Viewed through a contemporary lens, such failures would place the evidential burden on the Crown to prove the reliability of the identification beyond a reasonable doubt in accordance with s 45(2). It was therefore submitted on Mr Watson’s behalf before the Court of Appeal that exclusion of Mr Wallace’s evidence would, “plainly be the result if the case was contemporary, and s 45 of the Evidence Act applied”. The Court of Appeal appeared to accept this at [738]: **CB 01 page 207 - 208**.

²⁰ Eyewitness misidentification is widely documented as the primary factor leading to wrongful convictions, as detailed in the seminal paper, Gary L Wells and others “*Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*” (1998) 22 Law and Human Behavior 603.

²¹ *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [34] and Brandon L Garrett, Chad Dodson, Karen Kafadar, Alice Liu and Joanne Yaffe “Factoring the Role of Eyewitness Evidence in the Courtroom” (2020) 17 Journal of Empirical Legal Studies 556.

²² Court of Appeal judgment at [761]: **CB 01 page 218**.

²³ *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 at [86].

A witness's non-identifications of a suspect is important *exculpatory* evidence.²⁴ Here, the jury was unaware that there was one, and possibly two, further non-identifications of Mr Watson by Mr Wallace. The Court of Appeal's finding that the evidence was unlikely to have had a material effect on the jury's deliberations does not withstand scrutiny. This information would have provided the defence with a powerful tool with which to challenge Mr Wallace's evidence. Any reasonable doubt about Mr Wallace's identification was the end of the Crown case against Mr Watson.

- 17 It is submitted that, given its significance in the context of the trial, the wrongful admission of Mr Wallace's evidence was a fundamental error of the type most recently discussed by this Court in *Tamihere v R*.²⁵ Mr Watson's trial was unfair.

Summary of argument: The appellant's case – Mr Wallace's identification was inadmissible and its admission was a fundamental error

- 18 The identification of Mr Watson by Mr Wallace was inadmissible. Its probative value was plainly outweighed by its unfair prejudicial effect. The factors that irretrievably tainted the identification process include the improper use of a single photograph, interrogative pressure from police, unprecedented media saturation, and the unfair construction of Montage B.
- 19 First, the use of a single photograph by police was (and is) a highly undesirable investigative strategy that risks the displacement effect, whereby a witness subconsciously substitutes the person shown for their actual memory of the offender. In January 1998, police showed Mr Wallace a single black and white photograph of Mr Watson. This procedure lacked a formal record, and the Independent Police Conduct Authority (IPCA) later found it to be highly undesirable and in breach of established legal principles. Mr Wallace did not recognise Mr Watson.
- 20 Second, the identification is inadmissible because of the improper pressure placed on Mr Wallace during his interview with Detective Fitzgerald on 11 January 1998. The detective explicitly identified Mr Watson as the suspect, claimed that other barmen had already identified him, and suggested that Mr Wallace was intentionally misleading police. The detective also primed Mr Wallace by asserting that his verbal description matched Mr Watson's appearance. Further, it was

²⁴ Joint expert report p 5: **CB 01 page 348**.

²⁵ *Tamihere v R* [2026] NZSC 22.

contrary to the requirements of the 1997 Police Manual that forbade officers from influencing witness opinions or suggesting a suspect.

- 21 Third, the inadmissibility stems from the contaminating effect of intense pre-trial media attention. Extensive television and print coverage of Mr Watson made a fair identification parade practically impossible, causing his defence counsel to decline to agree to his participation in one. This media saturation led witnesses to attribute poor behaviour to Mr Watson that had not been mentioned in their early statements.
- 22 Finally, the identification was inadmissible because of the biased and unfair creation and use of Montage B. Police constructed this montage using a photograph of Mr Watson taken on 12 January 1998 where his eyes were half closed, while the other seven subjects had their eyes open. Senior officers selected this photo because they believed it more closely resembled the description of the lone man at the Lodge. This design choice led to a much higher rate of identification, with 27 of 53 witnesses identifying Mr Watson from Montage B, compared to only eight of 43 witnesses who identified him from Montage A. The IPCA properly criticised the construction and presentation of Montage B, concluding that the failures to follow proper guidelines exposed the integrity of the investigation to justifiable criticism.
- 23 Given all of these factors, Mr Wallace's purported identification of Mr Watson was inadmissible. This was a fundamental error, given that Mr Wallace's evidence had the potential to singlehandedly prove the Crown case. Its centrality is immediately seen when the way in which it was dealt with by the Crown is isolated and analysed.

The pre-trial challenge to Mr Wallace's evidence

- 24 Heron J issued a series of rulings on 13 May 1999, which included his decision addressing a challenge to the admissibility of Montage B.²⁶ The reasons for enabling the Crown to adduce the evidence were brief, and are contained in the Court of Appeal's judgment.²⁷
- 25 It is submitted, quite simply, that Heron J was wrong (and he was not in possession of all of the information that this Court now has) and the identification by Mr Wallace should have been ruled inadmissible.

²⁶ COA case book: **CB 02 page 94 - 96.**

²⁷ Court of Appeal judgment at [726]: **CB 01 page 204.**

The evidence at trial – a brief comment

- 26 The Court of Appeal’s judgment contains an overview of the evidence adduced at trial.²⁸ These submissions will not repeat what is familiar. Contained in the casebook is the synopsis of the evidence included in the Court of Appeal submissions.²⁹
- 27 Mr Watson’s trial ran from June to September 1999, and the Crown called around 500 witnesses and the defence called 26. The notes of evidence occupy 3500 pages. The defence approach at trial was driven by the Crown’s focus on the purported identification of Mr Watson by Mr Wallace as the person in the water taxi with Ms Hope and Mr Smart, and the fact (ultimately accepted by the Crown) that the appellant was taken to *Blade* earlier in the night. On the defence thesis, this meant that Mr Watson could not have been the lone man who Mr Wallace dropped to a yacht along with Ms Hope and Mr Smart. Other potential trial contests were largely eschewed. It was a complex trial and much has been written about it since.
- 28 These submissions now focus on some of the evidence of Mr Wallace (and others) in more detail, given the importance to the disposition of this appeal.

The evidence of Guy Wallace at the preliminary hearing

- 29 The submissions filed in the Court of Appeal provide a detailed summary of Mr Wallace’s evidence at the preliminary hearing (depositions hearing), which began on 24 November 1998, regarding the “lone man” seen at Furneaux Lodge on New Year’s Eve, 1997.³⁰
- 30 The depositions evidence covered Mr Wallace’s role and his initial observation of the lone man. Mr Wallace was working as a barman, maintenance handyman, and water taxi driver.
- 31 Around 9:00 pm, a lone man positioned himself at the end of the bar (“Reg’s Corner”), served by Mr Wallace and Rozlyn McNeilly. The man told Mr Wallace he was from Picton, although Mr Wallace later admitted in cross-examination that he was only “reasonably sure” about this detail.³¹

²⁸ Court of Appeal judgment at [6]-[30]: **CB 01 page 19 - 24**. That is not a substitute for the notes of evidence.

²⁹ **CB 01 page 992 - 1150**.

³⁰ **CB 01 page 1037 - 1044**.

³¹ However, Mr Wallace placed the time of the arrival of the mystery lone man much earlier than Mr Watson was ashore given the *Mina Cornelia* photograph, the Waswo photograph and the evidence of other people on the boat.

- 32 The prosecutor telegraphed the Crown's theory that Mr Watson was this lone man. Mr Wallace testified that he believed the person he now knew as Mr Watson was drinking at the bar from 8:00 pm onwards.
- 33 Mr Wallace gave a description of the lone man. Mr Wallace described the man as "very scruffy", with "dark hair", and "a good couple of weeks growth" on his face, describing it as halfway between a beard and an unshaven look.
- 34 Mr Wallace described the clothing. He recalled the man wearing jeans, sandals, and a shirt, but could not recall any colours.
- 35 Mr Wallace noted that he had worked with Scott Watson's mother in 1992 at the Beach Comber Motor Inn in Picton, although he could not recall ever meeting Mr Watson himself in that context.
- 36 Mr Wallace was adamant under cross-examination that the lone man he served at the bar was the same man who boarded his Naiad water taxi and was subsequently dropped off to a ketch with Mr Smart and Ms Hope. He stated there was absolutely no possibility of a mistake.
- 37 Mr Wallace was questioned about an identikit sketch he helped police compile on 9 January 1998. He explained that the man had "far more stubble" than depicted and that he had struggled to get the correct, more "windswept" hair shape.
- 38 Mr Wallace recalled an intense conversation with a defence investigator, Carl Berryman, in February 1998, but could not remember the details or whether he had explicitly told him the man on the Naiad was not Mr Watson.
- 39 Mr Wallace gave evidence about being shown video footage of Mr Watson by a TV1 reporter, Julie Roberts. While he had told her "[t]hat is not the man, by that footage," he explained at the hearing that this was due to the exceptionally poor quality of the video rather than a definitive exclusion.
- 40 In a crucial exchange, defence counsel showed Mr Wallace a photograph of Mr Watson taken on the vessel *Mina Cornelia* on New Year's Eve. When defence counsel asserted that the photo was taken around 10:00 or 10:30 pm (showing Mr Watson with short hair and no facial hair), Mr Wallace admitted: "[w]ell, if that is the case then it wasn't Scott Watson that I dropped off."
- 41 To repair the identification evidence, the prosecutor questioned Mr Wallace during re-examination about viewing Montage B at the police station in April 1998. Mr Wallace said that he was initially drawn to two photos (numbers three and five), but ultimately identified number three as the lone man. He discounted

number five because the man was “a wee bit tubbier in the face”, and due to the “beard syndrome”. Defence counsel objected to the prosecutor’s continued line of questioning during re-examination and Mr Wallace’s evidence concluded.

The evidence of Guy Wallace at trial

- 42 The Court of Appeal submissions also comprehensively summarise the evidence that Mr Wallace gave during the trial.³²
- 43 Mr Wallace gave evidence of the general appearance of the lone man and recalled that he stood out at the bar because he was very scruffy. While most people had made an effort to tidy themselves up for New Year’s Eve, this individual had not. Mr Wallace estimated the man’s age to be around 32.
- 44 In relation to hair, Mr Wallace described the man as having dark, wavy, unkempt hair that was shoulder length at the back, covering his neck, and covering his ears at the sides.
- 45 In relation to the lone man’s face and height, Mr Wallace said he was unshaven with a few days of hair growth. His height was estimated to be around five feet eight inches or five feet nine inches, which made him shorter than Mr Wallace.
- 46 To Mr Wallace, the most distinctive feature of the man’s face was his eyes. Mr Wallace described them as dark brown and untrustworthy. He noted that they were pretty slanty and had a closed aspect, being almost half closed.
- 47 Mr Wallace said that he had no doubt that the lone man who later boarded his water taxi was the man he had served in the bar.
- 48 Mr Wallace said that the man was wearing blue jeans, sandshoes, and a shirt that Mr Wallace believed was the Levi’s brand because he recalled seeing a small red or orange label in the chest area.
- 49 Mr Wallace believed that the man was drinking spirits, bourbon, steadily. Mr Wallace gained the impression that the man was a fisherman or a tradesman.
- 50 In relation to the identikit sketch, Mr Wallace said that he assisted police in compiling a computer sketch on 9 January 1998. He spent up to an hour with the police officer choosing templates for face shapes, eyes, and hair. Because the computer templates could not precisely capture the windswept hairstyle he wanted, a police artist added pencil drawings over the hair in his presence. Pencil

³² CB 01 page 1044 - 1054.

was also used to touch up the facial hair to make the stubble prominent because the man had a pale face.

- 51 Mr Wallace said that in April 1998 he was shown Montage B and was advised by police to take his time. He was initially drawn to photos three and five. Mr Wallace discounted photo five, which had a shadowy unshaven look, in favour of photo three because it was overall more similar to the man at the bar. Mr Wallace was pretty definite about his identification of the man in photo three, explaining that the eyes in that photo had a very mistrusting, half closed look that struck him more than anything else.
- 52 Mr Wallace admitted that only photos two and three in the montage depicted men with half closed eyes. He also acknowledged that for photo three to be a perfect likeness, the individual would need to have longer hair and more facial hair than what was depicted in the photograph.
- 53 During cross-examination, Mr Wallace was asked by defence counsel about a photograph taken on the vessel *Mina Cornelia* on New Year's Eve. He was told that the photograph was taken before 10 pm that evening. Mr Wallace agreed that the man in the photograph had no facial hair and his hair was too short. He ruled out the man in that photograph as being the person at the bar.
- 54 Mr Wallace was also questioned about video footage of Mr Watson shown to him by television reporter, Julie Roberts. He explained that he had said he did not recognise the man because she had demanded a yes or no answer and the quality of the video footage was too poor to make a definite identification.
- 55 At the conclusion of the evidence, the Judge asked Mr Wallace to look at Montage B and to address if the facial hair shown in photo three was a shadow rather than a beard. Mr Wallace agreed that it was a shadow, which was why he had expressed caution regarding the identification.

The other witnesses on the water taxi

- 56 The Court of Appeal submissions provide a fulsome summary of aspects of the evidence of the other witnesses in the water taxi.³³ During his evidence, Mr Morressey provided a brief description of the mystery man. He estimated the man's height to be about five feet nine inches and his age to be between 25 and 35 years' old. Mr Morressey only saw the man from behind as they walked down to the wharf, so he could only describe the back of his hair. He recalled that the

³³ CB 01 page 1054 - 1061.

hair was dishevelled, wavy, and a brownish colour. He did not see enough of the man's face to determine whether he had a beard.

- 57 Mr Morressey said the man was wearing long pants and a long sleeved top or shirt, but he could not recall the colours, his footwear, or any other items of clothing. During cross-examination, defence counsel confirmed that Mr Morressey's first impression was that the man had wavy hair of about shoulder length that needed a cut. Although his description closely matched the one provided by Mr Wallace, the jury was not told that Mr Morressey had been shown Montage B in April 1998 and had stated that none of the individuals matched his memory. He noted that identifying the man was very difficult because he only saw him from behind.
- 58 Mr Morressey's description of the mystery yacht broadly matched the account of Mr Wallace. He recalled that the vessel was white, then another colour, and then white again. He noted that the cabin was located behind the mast.
- 59 During cross-examination, Mr Morressey affirmed his belief that the mystery boat was a ketch that was sitting on its own rather than rafted to other vessels. He described it as quite a long boat, and rising a considerable height from the water. He recalled that the deck was high enough that he had to lift himself up twenty to thirty centimetres from the water taxi to grab the stanchion. Passengers had to step onto the inflated side of the water taxi and then step up to reach the deck.
- 60 Mr Morressey believed the boat had two masts because he saw ropes coming off the main mast that were sagging and going up toward the front of the vessel. He admitted under questioning by the Court that he did not actually see a second mast because he did not look that far. Under re-examination by the prosecutor, Mr Morressey accepted that he had only referred to the vessel as a yacht in his January police statements, and first used the term ketch during a television interview in February 1998. The Judge also had the witness affirm that he had little experience with boats.
- 61 Mr Morressey was adamant that the yacht was not *Blade*, which was a single masted sloop. When shown photographs of *Blade*, he immediately declared that it was too small, too low, lacked a stripe, and had a lee cloth around the back, and thereby positively ruled it out.
- 62 The remaining three water taxi passengers provided only vague descriptions of the lone man and the yacht. Amelia Hope did not see the lone man's face but described his hair as dark, short, and sitting flat on his head rather than being

spiky. She was shown Montage B in May 1998 and remarked that only the hair on photograph number one looked similar, but she did not see the man's face at all. Amelia Hope described the man's hair having a receding aspect. Another witness, Sarah Dyer, recalled only that the man was of average height, was neither old nor very young, and spoke with a normal Kiwi accent. Richard Goddard did not provide a description of the lone man.

The closing addresses

The Crown's closing

63 The prosecutor framed the issue for the jury in the following way:³⁴

Put simply, the issue in this case is whether the Crown can prove beyond reasonable doubt that Scott Watson is responsible for the murder of Ben and Olivia. They were last seen getting on to a yacht in the company of a young man who had offered them a bed for the night on his boat. And so in effect the issue in this case is one of identity. Can the Crown prove beyond reasonable doubt that the identity of that man is the accused Scott Watson. That's the key issue.

64 The centrality of Mr Wallace's "identification" is demonstrated by the fact that it was the first substantive topic to which the Crown turned. The prosecutor dedicated 13 pages to Mr Watson's identification, before turning to the evidence that he said corroborated his testimony.³⁵ The 2000 Court of Appeal said "[...] in closing the Crown placed a considerable weight on Mr Wallace's identification of the appellant, analysing his evidence in some detail."³⁶ The Crown immediately squared up to the fact that it submitted that Mr Wallace's identification of Mr Watson as the lone man was reliable, whereas his description of the yacht was not. The prosecutor framed the issue in the following way:³⁷

[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].**

[Counsels' emphasis]

65 The prosecutor told the jury that the Crown did not invite it to find the charges proved in reliance on Mr Wallace's identification alone. But that was the thrust of the submission and the reality of the case. This is evidenced by:³⁸

³⁴ Crown Closing, COA 170: **CB 02 page 170**.

³⁵ Crown Closing, COA 180-192: "So I suppose a good starting point would be Guy Wallace wouldn't it": **CB 02 page 180 - 192**.

³⁶ Court of Appeal in 2000 at [25]: **CB 02 page 327**.

³⁷ Crown Closing, COA 180: **CB 02 page 180**

³⁸ Above n 37.

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].

[Counsels' emphasis]

- 66 The prosecutor emphasised that Mr Wallace's visual identification was enhanced by the length of time that he had the lone man under observation at the bar, and the fact he "stood out" because of his unkemptness.³⁹ In his first reference to Montage B, the prosecutor emphasised the importance of Mr Watson's eyes to Mr Wallace's recognition:⁴⁰

He said the man when he saw him seemed to have dark brown, pretty slanty eyes, and he made this comment about they didn't look trustworthy to him, well that's an interpretation perhaps, but no doubt he was trying to convey something about the man's eyes and perhaps you might see something of it in montage B.

- 67 A way in which the Crown sought to bolster the reliability of Mr Wallace's identification evidence was by cross-referencing it to his descriptions of the other occupants of the water taxi.⁴¹ In what was a key theme, the prosecutor contrasted the brevity of Mr Wallace's opportunity to observe the yacht when he dropped off Ms Hope, Mr Smart and the lone man, which culminated in the submission that the task of identifying a person is simpler compared to an inanimate object:⁴²

Compare the short opportunity to observe that vessel and its features with the significant number of opportunities and the duration of them that Mr Wallace had to observe the man that he describes from that Naiad, number 5 in his boat. So you might think, having encountered him several times during the night, having served him at the bar several times, having met him down at the jetty, having talked to him there, having taken him or walked with him down to the end of the jetty, etc, that there was much greater opportunity for him to imprint a more reliable recollection of what that person's appearance was like, than the short time he took when he was alongside this vessel dropping people off. And I suppose it's relevant and you might think it is and you may disagree, but there may be some significance in the fact that one recognition

³⁹ Crown Closing, COA 181-182: **CB 02 page 181 - 182.**

⁴⁰ Crown Closing, COA 183: **CB 02 page 183.**

⁴¹ Crown Closing, COA 184-185: **CB 02 page 184 - 185.**

⁴² Crown Closing, COA 187-188. **CB 02 page 187 - 188.** The Crown attacked the reliability of Mr Wallace's evidence that he had observed a ketch at COA 206-211: **CB 02 page 206 - 211.**

is of a person with all of the subtleties of recognition that go on with the way in which we recognise one another, and the other is an inanimate object, a vessel, amongst a whole lot of vessels at a time where there were a whole lot of vessels around.

- 68 The prosecutor downplayed the efficacy of the identikit procedure, and its bearing on the reliability of Mr Wallace’s identification when contrasted to the use of Montage B:⁴³

And so dealing with this issue of identification, Mr Wallace was shown a montage later in April 1998 and he was asked by the Police if he could see and identify amongst the group of people whose photographs were on that montage the man who had been, he’d been talking about, who he interacted with on New Years Eve. Now remember he had already made statements describing the man, he made a series of statements to the Police describing his appearance, and he’d already been asked to assist the Police in the preparation of an identikit picture which he’d done as early I think as the 9th of January, exhibit 154. *He didn’t spend a lot of time preparing that identikit, less than an hour apparently, and obviously those identikits have some obvious limitations and you need to choose from a template of established hairstyles, face shapes, nose shapes, eye shapes, configurations, etc. And he wasn’t overly happy with the result of the identikit picture and he asked the identikit operator or person to draw in some more stubble on the face.* I think you can see if you look at the original the lead pencil marks that appear. And in the end I suggest you need to review that whole business of the identikit picture and its likeness or similarity to anyone with considerable caution. Identikit pictures are a tool I suppose used by investigators to try and get some sort of impression of the person they are seeking. They’re never anywhere like a photograph, and you might think that if they happen to look like any particular individual, then that is something of a bonus because they are just composites and it is my submission to you, don’t be put off by any suggestion or invitation you receive from the defence, oh look at this identikit, it doesn’t look anything like him. Well, perhaps not, but does any identikit picture ever look like anybody much.

- 69 Counsel interpose that the italicised portion of the address did not accurately capture Mr Wallace’s evidence that the identikit was, apart from the amount of stubble shown, a good likeness to the man. Also, new disclosure received from the Crown on 30 May 2023 demonstrates another error. Contrary to what the prosecutor said, the sketches were prepared freehand by the police artist, “rather than generated by software”.⁴⁴

- 70 In the same portion of the closing, the Crown invited the jury to dismiss the fact that Mr Wallace had been shown imagery of Mr Watson by a representative of the media:⁴⁵

And Mr Wallace had also been approached by the media and shown a video prior to looking at the montage and he had been asked to look at this video and see whether he could say anything about the person in the video which was apparently a view of Mr Watson, and Mr Wallace, fairly cautiously and no doubt appropriately said well he wasn’t prepared to say one way or another, he said the picture was unclear and was too unclear for a yes or no answer.

⁴³ Crown Closing, COA 188-189: **CB 02 page 188 - 189.**

⁴⁴ See Crown Law’s letters of 30 May 2023 and 15 March 2024: **CB 01 page 1444 - 1447; and CB 01 page 1460.**

⁴⁵ Crown Closing, COA 189: **CB 02 page 189.**

- 71 The prosecutor turned to Montage B. The Crown again emphasised Mr Wallace's reliance upon the fact that Mr Watson's eyes matched those of the lone man. He said in full:⁴⁶

So in April 1998 he was shown this montage B and he identified, in my submission to you, number 3, a picture of Mr Watson as the man he had dropped off with Ben and Olivia. Now the photograph as you know wasn't taken on New Years Eve, that is the photograph of Mr Watson on montage B, it was taken in January, several weeks after, a couple of weeks after, so it was contemporary in one sense but it wasn't entirely contemporary was it. In the photograph Mr Watson's hair is shorter than Mr Wallace's recollection of the man's hair on the night. In the photograph the man does not have the same amount of stubble as Mr Wallace recalled Mr Watson had on the night. ***But Mr Wallace said his eyes are similar, the partially closed look was familiar to him, and you might think that the photograph wasn't taken or was unlikely to be taken when Mr Watson was affected by alcohol. So in the photograph, which was presumably taken when he was sober and he's got this sort of slightly semi-closed eye look about him, and that's something that Mr Wallace recalled from the night.*** Mr Wallace said that when he looked at montage B he was initially attracted to photo 5, but discovered that and concluded having looked at it that he was "pretty definite" that the man in photo 3 is the man on his water taxi. Now when the defence cross examined him, as you would expect, they were trying to sort of push him away from that a bit, trying to get him to qualify that level of being pretty definite, and he was asked a question such as, all you can really say is that the face in photographs 3 and 5 stood out to you more than any of the others, and he said, that's right. Well yes it did stand out. But he went on to say that he discounted number 5 and settled on number 3. What he said was, that when the Police Officer, having given you (Wallace) some time to consider montage B, this was when he was re-examined, asked you whether you could recognise anybody, which picture did you point out to them as being someone you thought resembled the man at the bar, number 3. ***And what were you able to, how sure, how positive were you in the way you expressed your recognition of that man in relation to the man in the bar. Well, very sure, like the eyes had a very mistrusting look. So his key phrases I suggest to you are "pretty definite", and then after being challenged by the defence about this comes back with, well, very sure.***

- 72 The prosecutor invited the jury to infer that the key differences regarding Mr Watson's hair length and facial hair in Montage B vis-à-vis Mr Wallace's description of the lone man were the product of the appellant's efforts to change his appearance:⁴⁷

So what's the significance of saying to him, to Mr Wallace, that this man would need other features to look like the man on the night. We're not suggesting the montage B photograph was taken on 31st of December. ***You'd expect a few changes wouldn't you. You might expect them particularly from someone who had in mind changing his appearance too, someone who might have thought, well perhaps I'll tidy my act up a bit after 31st December, cut my hair.*** We had a witness to that effect who saw him early in January. Was he doing that just to turn a bit of a new leaf and look a bit tidier after a bit of rougher time on the boat, or perhaps there was something a little bit more to it than that.

- 73 The Crown referred to the fact that there had not been a dock identification in court, and why this enhanced the reliability of the use of a montage to secure Mr Wallace's identification.⁴⁸ The prosecutor then turned to the photograph of Mr

⁴⁶ Crown Closing, COA 189-190: **CB 02 page 189 - 190.**

⁴⁷ Crown Closing, COA 190 and see too 191: **CB 02 page 190 - 191.**

⁴⁸ Crown Closing, COA 190: **CB 02 page 190.**

Watson taken on the *Mina Cornelia*, and why it was of insufficient quality to conclude that the appellant was clean-shaven:⁴⁹

And it's being suggested I suppose that this photograph shows a close to, if not clean shaven Scott Watson, therefore Mr Wallace is talking about someone else. ***Now does the person in the photograph look totally clean shaven to you. Does the photograph in fact reproduce accurately what he did look like that night. It seems that from the evidence others in the photograph did have stubble and others are clean shaven, but in every case there are degrees of shadow, colouration and the like that may be an artefact of the photograph, an artefact of the light, and may have nothing to do with whether there was discolouration as a result of the presence of stubble or absence of stubble.*** If this was a flash camera as has been explained in evidence, obviously with a short depth of field it's unlikely to be capturing a great deal of detail, and in my submission to you if you look at it, it shows a measure, or a sufficient measure of discolouration such as is consistent with there having been something in the way of whiskers.

- 74 The prosecutor contrasted the frailties of the quality of the *Mina Cornelia* photograph to the superiority of Montage B, and why the latter “identification” enabled the jury to be sure that Mr Watson was the murderer:⁵⁰

And I suggest to you, any reliance on photo 32 to rule Mr Watson out would be without any real foundation at all. Now you may be asked to look at the enlargements, some of you probably are aware, enlarge a poorly resolved photograph and you get a bigger poorly resolved photograph, you don't get any better detail as a result of the process of enlargement. ***So it's the Crown contention that as a result of Mr Wallace's evidence that he was "pretty definite" and "very sure" the photograph in montage B, because he'd had several opportunities to see this man and speak to him, because he'd interacted with him, accepting there was a bit of a time lapse before he looked at montage B, he has nevertheless recognised and identified Mr Watson, and what are the implications of that? It means that if he's right about that, then Mr Watson is the man on the Naiad with Ben and [Olivia].***

- 75 The Crown anticipated the Judge's visual identification direction, and undermined or weakened that warning by submitting that while caution was required, the giving of the warning should not be “elevated to the point of somehow or other discounting evidence by someone like Mr Wallace”.⁵¹

The remaining witnesses on the water taxi

- 76 In the next section of the closing, the prosecutor submitted why, “Mr Wallace's identification receives some support by Amelia Hope and Rick Goddard”.⁵² The prosecutor emphasised Ms Hope's description of the lone man's receding hairline, which he compared to Mr Watson's hair.⁵³
- 77 Turning to the evidence of Ms Dyer and Mr Morressey, the prosecutor submitted that the latter was unreliable, inviting the jury to adopt a now-outmoded

⁴⁹ Crown Closing, COA 190-191: **CB 02 page 190 - 191.**

⁵⁰ Crown Closing, COA 191: **CB 02 page 191.**

⁵¹ Crown Closing, COA 192: **CB 02 page 192.**

⁵² Crown Closing, COA 192: **CB 02 page 192.**

⁵³ Crown Closing, COA 195: **CB 02 page 195.**

demeanour based assessment of the way in which the witness gave his evidence.⁵⁴ Understandably, the Crown expended effort attacking Mr Morressey's evidence that the yacht to which the trio was dropped was larger than *Blade* and had two masts.⁵⁵

The centrality of Montage B – its use with other witnesses

78 The Crown placed particular emphasis on the evidence of Rozlyn McNeilly. To recapitulate, she was the Lodge's bar manager, stationed alongside Mr Wallace. The witness assisted with the production of an identikit that closely matched that of Mr Wallace. When shown Montage B in March 1998, Ms McNeilly identified Mr Watson on the basis that his "slanted" eyes were "exactly the same" as the man she had served.⁵⁶ She observed that Mr Watson's hair was shorter. About her evidence, the prosecutor said:⁵⁷

She said that she first saw that person there at about 12.30ish, described him as having scruffy unkempt hair, brown weather beaten face, dark brown colour of hair just below the ears, olive complexion, 30 to 35, hadn't shaven for the day, sort of 5 o'clock shadow, his eyes, they were slanted, the sort of half closed sort of. His eyes were a prominent feature of her observation of him. She said that his lips attracted her attention, she said they were skinny, she saw his hands and they were sort of bony, and he was smoking rallies, roll your own cigarettes, and she thought wearing a jersey, a darkish jersey ... And she subsequently was shown montage B and ***she said that she picked out number 3, recognising number 3 to be the person that she said resembled the man she had been talking about and she said it was his eyes which drew her attention to photo number 3.*** She said the hair in the photograph was shorter than the man that she could recall on the night. In terms of whiskers and stubble she said that the appearance in the photograph was similar. ***The eyes she said in the photograph were exactly the same.***

79 Under the heading, "Watson's conduct on NYE",⁵⁸ the Crown dealt with the identification evidence given by those who allegedly interacted with Mr Watson on the afternoon of 31 December 1997, through until the morning of 1 January. The prosecutor's address was replete with references to Montage B, referring on no less than 11 occasions to the fact that it had been shown to a witness.⁵⁹ On

⁵⁴ Crown Closing, COA 197: **CB 02 page 197.**

⁵⁵ Crown Closing, COA 200-204: **CB 02 page 200 - 204.**

⁵⁶ Rozlyn Kathleen McNeilly, at NOE 1512: **CB 03 page 1512.**

⁵⁷ Crown Closing, COA 210: **CB 02 page 210.**

⁵⁸ It was during this section that the Crown first explicitly discussed its two-trip theory, at COA 220: **CB 02 page 220** which was developed further in the next section, "Donald Anderson – Naiad trip – man alone" at COA 226-231: **CB 02 page 226 - 231.**

⁵⁹ At COA 218: **CB 02 page 218**, COA 219: **CB 02 page 219**, COA 220: **CB 02 page 220**, COA 221: **CB 02 page 221**, COA 222: **CB 02 page 222**, COA 224: **CB 02 page 224** and COA 225: **CB 02 page 225.** The witnesses were: Michael Cronin, Amanda Edgen, Oliver Perkins, Roselyn McNeilly, Simon Todhunter, Chris Bismin and Hannah Fox.

the Crown's case, an "identification" secured using Montage B enhanced its inherent reliability.⁶⁰

The defence closing

- 80 Reinforcing the centrality of Mr Wallace's "identification" of Mr Watson, defence counsel listed it first in his 12 "circumstances" that he said comprised the Crown's case. Counsel submitted:⁶¹

Number one, they say, Mr Wallace purported to identify Mr Watson as the man on the night. Number two, the missing couple were delivered to a yacht out to the left of the jetty, and that's what you might call evidence of opportunity. Number three: that the presence of two hairs, said to be from Olivia Hope, and said to be found on the tiger blanket, implicate the accused. Number four: that the accused has lied about his movements on 1 January 1998, to cover-up disposal of bodies and other destruction of evidence. Number five: that the accused changed the outward appearance of his boat, by repainting it and removing the windvane. Number six: that the accused cleaned the interior of his boat, in a substantial fashion. Number seven: there are these scratches on the hatch cover. Number eight: there is a missing squad cover, and holes in two pieces of foam. Number nine: the police have never been able to locate the accused's shirt that he wore that night. Number 10: the accused admitted involvement, to and at . Number 11: he was a man with a motive; a man on a mission, they say, with a stated intention in respect of females. Number 12: the Crown have set about excluding as many other boat operators in the immediate vicinity on New Year's Eve as possible. That's 12 points by the Crown that the defence perceive the case to be.

- 81 Importantly, however, the defence submitted that only three of the 12 points relied upon by the Crown were determinative. Counsel submitted:⁶²

The essence of the defence answer, ladies and gentlemen, is this: only three of those factors are capable of demonstrating an association between the accused and/or his boat and the missing couple. That's the identification by Mr Wallace, the two hairs found on the blanket, and the so-called cellmate confessions. And the defence answer, ladies and gentlemen, is this: if those three circumstances collapse, there is no case and you don't really need to even trouble yourself with going through all of the other circumstances. So, only three, as the defence perceive the situation, have that vital importance.

- 82 Counsel immediately turned to Mr Wallace's evidence and described the dilemma inherent in the Crown's case in the following way:⁶³

Let's turn, firstly, to deal with Mr Wallace and his identification of the accused. He was one of the last people, other than Mr Morrissey and Ms Dyer, to see the missing couple. So, what he had to say about those circumstances, you would immediately recognise, has to be absolutely vital. The Crown acknowledged this. The Crown made no bones of that; made no secret of it. What the Crown effectively have tried to do, ladies and gentlemen, is selectively promote his identification of Mr Watson as the man on the boat; and selectively demote his identification of the boat concerned. They say the person that Mr Wallace is talking about is correct; the boat that he's talking about is wrong.

⁶⁰ The prosecutor referred to the fact that the witness Hannah Fox was shown both Montage A and Montage B, which was harnessed in a way that suggested this enhanced her reliability: see COA 225: **CB 02 page 225**.

⁶¹ Defence Closing, at AM 1, 527: **CB 04 page 527**.

⁶² Defence Closing, at AM 1, 527-528: **CB 04 page 527 - 528**.

⁶³ Defence Closing, at AM 1, 528: **CB 04 page 528**.

- 83 Defence counsel closely reasoned why he said Mr Wallace's evidence that he had observed a ketch was reliable.⁶⁴ He then turned to why the man whose image was contained in the identikits prepared by Mr Wallace, Ms McNeilly and other members of staff, could not be Mr Watson. This, in the defence submission, hinged on the *Mina Cornelia* photograph. Counsel said:⁶⁵

You may recall, and as my learned friend, the prosecutor, addressed you over the last couple of days, he asked you from time to time, to stop and have what he described as a reality check. I agree with him. Let's stop. Let's get real. ***This man, Exhibit D, could not be that man, photo 32. Let's just get real about this. How you can turn that into that is a remarkable feat, you may think. It can't be done.***

But it gets worse than that, ladies and gentlemen. Mr Phipps and Ros McNeely, also working in the bar, produced this CompuSketch. Ros McNeely told you it was a fair and accurate resemblance. Mr Phipps said he was 65% sure, or confident, or something like that. This process took them about two and half hours, we were told. This man, let's get real, can't be the man in photo 32. It's another act that only those people who roll off Niagara Falls are capable of. People in barrels. It just can't be done. ***You cannot make that person the person in photo 32.*** It just can't be done. So, when you talk about getting an air of reality, can I suggest you, ladies and gentlemen, that is just blunt reality. Hard, cold reality.

- 84 This culminated in the defence submission that:⁶⁶

Now, what I say to you, ladies and gentlemen, is that the identification by Mr Wallace of the accused Watson is so pitifully weak that it should be ignored. But, in fact this description of the person, and the circumstances under which he encountered this person excludes Mr Watson. So, from something which the Crown suggest is the identification of Mr Watson as the man on the Naiad, the defence's answer is that that identification is not only pitifully weak, but in fact excludes Mr Watson.

He told you that the person was scruffy in appearance, five-foot-eight to five-foot-nine. His hair was unkempt, dark, a wee bit wavy, just above the shoulder, covering neck and ears and long at the back of the neck. When CompuSketch D was produced, Mr Wallace added in more head hair. He said that the person was unshaven with prominent stubble on a relatively pale face and when CompuSketch D was produced, with his pencil, he added in more stubble. He said the person was wearing a shirt with a Levi label. He saw it. He said the man had told him he was from Picton, but under cross-examination from my learned friend, Mr Antunovic, he accepted there was an element of doubt mind about this.

- 85 Defence counsel squarely engaged with the singular appearance of Mr Watson in Montage B:⁶⁷

[And] the Crown rely on montage B, which you've got a copy of. He was shown montage B on the 20th of April 1998; the length of this trial effectively between the time that he had the encounter with this particular person on the boat near the Hobie Cat in the Naiad and the occasion when he was shown this by the police. Fifteen weeks, I think it calculates out at.

He said that he was drawn, as I understood his evidence, to number three and number five, but it was the slanty, untrustworthy eyes of number three that held sway for him and he was asked by my learned friend Mr Antunovic, and it's there for you to see. What other person in this montage created by the police has slanty eyes? So, this feature that Mr Wallace recalled was something which he was

⁶⁴ Defence Closing, at AM 1, 528-530: **CB 04 page 528 - 530.**

⁶⁵ Defence Closing, at AM 1, 530-532: **CB 04 page 530 - 532.**

⁶⁶ Defence Closing, at AM 1, 533-534: **CB 04 page 533 - 534.**

⁶⁷ Defence Closing, at AM 1, 532: **CB 04 page 532.**

drawn to. But then he told you, for it to be number three, the person would need more hair. Obviously, he would. He would need more stubble. Obviously, he would.

He told you that, when he was first shown this photograph, number 32 [the *Mina Cornelia* photo], at the preliminary hearing in Blenheim, he excluded Mr Watson. Quite rightly. He could not rationalise him because you cannot. They are incapable of being rationalised. You cannot conjure that to that. And that is identification, the Crown say. It is pitifully weak, and in my submission to you, is incapable of implicating the accused and, in fact, there's things about it which I now turn to, which exclude him.

86 The defence also drew attention to the media's attempt to have Mr Wallace identify Mr Watson.⁶⁸

Brought out in another way, Mr Wallace was shown by some well-intentioned television presenter, no doubt, some video footage of the accused, Mr Watson, and, while Mr Wallace had reservations about the quality of the material (which would be a shock to those at TVNZ), he was prepared to say it wasn't him. So, the submission, ladies and gentlemen, is this: the man in the bar encountered by Mr Wallace, the man near the HobieCat encountered by Mr Wallace, the man in the Naiad with Mr Wallace was not Mr Watson. It cannot be him.

The Judge's summing up on Mr Wallace's evidence

87 The Court set out the Judge's direction in its judgment dismissing Mr Watson's first appeal.⁶⁹ While the direction conformed with the requirements of s 344D of the Crimes Act 1961, it was deficient in a number of respects, aspects perhaps explicable by the fact that the Judge was not aware that Mr Wallace had been shown a single photograph. It was also deficient in one important respect when viewed through a modern lens, which is reflected in the enhanced warning now contained in s 126 of the Evidence Act 2006. As this Court affirmed in *Fukofuka v R*,⁷⁰ s 126(2)(a) includes a mandatory requirement that the jury be told that the risk of a miscarriage of justice arising from misidentification is not merely theoretical.⁷¹

The expert evidence

Drs Gary Wells and Adele Quigley-McBride

88 Given the parameters of the appeal, these submissions address the first part of the experts' report.

89 The report provides a helpful general overview of the relevant principles regarding visual identification founded on modern scientific research. Soberingly,

⁶⁸ Defence Closing, at 533-534: **CB 04 page 533 - 534**.

⁶⁹ *Watson* above n 2 at [21]: **CB 02 page 325**. See the summing up at COA 271-272: **CB 02 page 271 - 272**. Mr Wallace's identification was addressed at COA 276-277: **CB 02 page 276 - 277** and those of other witnesses at COA 283: **CB 02 page 283**. The fairness of the Police's use of photographs was briefly addressed at COA 287: **CB 02 page 287**.

⁷⁰ *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1.

⁷¹ Above n 70 at [31], [35] and [38].

the report outlines the prevalence of mistaken identifications, and the bearing these have on the safety of convictions:⁷²

Based on controlled experiments, psychological scientists have long warned that eyewitness identification evidence is less probative¹ than people generally think. The advent of forensic DNA testing and the use of DNA to test claims of innocence has added to the controlled experimental data to corroborate the serious problems that sometimes exist in eyewitness identification cases. Forensic DNA testing has served as a proving ground for what is now a well-known concern that mistaken eyewitness identification is the primary cause of convictions of the innocent. Reliable publicly-available data-bases indicate that approximately 70% of DNA-based exonerations have been cases of mistaken eyewitness identification.

- 90 Dr Wells is an internationally leading expert on visual identification. That is not hyperbolic. He and six other authors, including the expert instructed by the Crown, Margaret Kovera, published a scientific review paper in 2020:⁷³

[Representing] the consensus of eyewitness scientists around the world, [outlining] nine conditions in collecting and preserving eyewitness identification evidence that are critical to the reliability of the evidence.

- 91 Five of the nine conditions are relevant to this appeal. The report explains:⁷⁴

Particularly relevant for purposes of the current case are the following items outlined in that article. These items (shortened here) are:

1. An eyewitness identification procedure should avoid whenever possible presenting the eyewitness with a single individual or photo of just one individual (a procedure often called a “showup”). Instead, a proper identification procedure must use a lineup in which the suspected person (or photo of that person) is embedded among fillers (non-suspect persons). These fillers must fit the eyewitness’s description of the suspect.
2. The person administering an identification procedure should not know which person is the suspect in that procedure (called a “double-blind procedure” or “blind” administrator).
3. Witnesses should be explicitly warned that the culprit might not be in the lineup at all. Witnesses should not be told that someone in the lineup has been arrested.
4. A clear, verbatim record should be made of the witness’s verbal statements associated with a lineup. Paraphrasing the eyewitness should not be done. An eyewitness identification procedure and any statements made immediately after the identification represent a critical evidentiary moment. Hence, ideally the procedure should be video recorded.
5. No identification procedure should be repeated with the same witness and suspect (e.g., asking a witness to view a lineup containing a suspect that they saw previously in a showup or placing the same suspect among new lineup fillers and showing that lineup to the same eyewitness).

- 92 The “showup problem” is of particular relevance to this appeal. The authors explain that:⁷⁵

One of the most basic of all principles in eyewitness identification is the fact that the chances of mistaken identification of innocent suspects is increased by the use of a showup rather than a proper lineup. There are two central reasons why an identification

⁷² Wells and Quigley-McBride report, p 3: **CB 01 page 346**. Footnotes in original omitted.

⁷³ Wells, G. L., Kovera M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020). *Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence*. Law and Human Behavior, 44, 3-36: Wells and Quigley-McBride report at p 4: **CB 01 page 347**.

⁷⁴ Page 4-5: **CB 01 page 347 - 348**.

⁷⁵ Page 5: **CB 01 page 348**. Counsels’ emphasis. Footnotes in original omitted.

from a showup has low probative value compared to a lineup. *First, a showup is highly suggestive to the eyewitness in the sense that it directly communicates to the eyewitness that this specific person is the suspect. In effect, a showup reveals to the eyewitness the hypothesis of the police, thereby serving as a form of pressure to make an identification of that individual at this time or a later time even if that individual is a poor match to the witness's memory.* The second reason that an identification from a showup yields low probative value compared to a lineup is because the fillers in a lineup manage to “siphon” eyewitness choices away from an innocent suspect.

- 93 To recapitulate, Mr Wallace told police that he did not recognise Mr Watson on two, and possibly three, occasions before he “identified” him through Montage B in April 1998. The report cogently addresses the relevance of ignoring such non-identifications in the following way:⁷⁶

When an eyewitness who definitely saw the culprit rejects a lineup or showup (i.e., indicates that they do not see anyone who looks like the culprit), that rejection is *exculpatory* evidence. In other words, non-identifications by eyewitnesses who are likely to identify the culprit if they had the opportunity suggest a lower probability that the suspect is the culprit. This means that an identification from a lineup by one eyewitness should be judged as less credible if another eyewitness looks at that same lineup and indicates that the person they saw is not in the lineup. Under some circumstances a non-identification totally cancels the incriminating value of an identification ... There is a tendency, however, for people to undervalue non-identifications relative to affirmative identifications and largely ignore the non-identifications as though they were non-events with no evidentiary value.

- 94 The next general issue described in the report as the “non-blind testing problem” is germane given that Mr Wallace was spoken to on several occasions by officers who were aware that Mr Watson was a/the suspect. The authors explain that the “double-blind” safeguard is mandatory in the majority of US states, and it was first recommended in the early 1990s – thus predating this case. Appositely, the authors observe that:⁷⁷

In case it is not obvious by this point, it should be noted that a showup procedure can never be conducted in a double-blind manner and, in fact, is not even a single-blind procedure— when using a showup, it is obvious to both the eyewitness and the administrator which person is the focus of the investigation.

- 95 Explaining the inclusion of s 45(3)(d) in the Evidence Act 2006, the authors discuss the “pre-lineup instruction problem”, which is that:⁷⁸

Often, eyewitnesses presume that if the police are showing them a lineup then the culprit must be in that lineup—their task is to figure out which person it is. As a result, eyewitnesses may pick the person who *most* looks like their memory of the culprit, even if that person is not a good match to their memory ... Being able to recognize the *absence* of the culprit in a lineup is perhaps the most difficult problem of all in eyewitness identification. This is why it is essential that eyewitnesses be warned prior to viewing a lineup that the culprit might not be any of the people in the lineup and that the correct decision might be “the person I saw isn’t there.” A pre-lineup instruction of this type helps reduce the propensity for eyewitnesses to make affirmative identifications from culprit-absent lineups, which is one of the oldest findings in eyewitness science. Not surprisingly, this instruction is undermined if the eyewitness is told that a suspect has

⁷⁶ Page 5-6: **CB 01 page 348 - 349.** Emphasis in the original. Footnotes omitted.

⁷⁷ Page 6-7: **CB 01 page 349 - 350.**

⁷⁸ Page 7: **CB 01 page 350.** Emphasis in the original.

been arrested or in some other way comes to believe that the police have the “right guy” in the lineup (e.g., suggestive language from the police administrator).

- 96 The report explains the criticality of securing verbatim eyewitness statements, given that notwithstanding the brevity of the typical eyewitness identification procedure, “... that brief period of time looms very large in the fate of a criminal case”. The typical problems that arise, especially when the lineup administrator was not blind, are described.⁷⁹
- 97 The “repeated-suspect effect problem” requires particular emphasis. The authors’ explanation will be set out in full, given its importance to the appeal:⁸⁰

Metaphorically, eyewitness memory can be thought of as a form of trace evidence, albeit a trace that exists in the mind of the eyewitnesses. This memory trace, however, cannot be copied or split up into smaller samples for others to test. More importantly, every instance in which someone’s recognition of an item (such as a face) is tested will create a memory for the tested item.

Thus, a lineup (or showup) is not just a test of the witness’s memory, as it is also an event that creates memories incidentally (i.e., without intention; as a byproduct of performing the identification task). In an initial lineup test, for example, the eyewitness elaboratively processes each face in light of their memory for the crime in an attempt to see if one stands out as being a close match to the culprit. If it is a fair lineup procedure (each person fits the description of the culprit) and the culprit is not among the lineup members, then each lineup member has an equal chance of being the closest match to the eyewitness’s memory. *But, after participating in a fair lineup procedure, the eyewitness will now have new memories of the faces in the lineup that are incidentally encoded and associated with the crime context. If the eyewitness is then shown a second lineup that contains the original suspect from the first lineup and a new set of (never previously seen) filler faces, the eyewitness will feel a sense of recognition for the suspect (but not the fillers) emerges. But, this is not because the suspect is guilty. This stronger memory signal in the second lineup for the suspect (but not the fillers) is purely the result of repetition but, if that suspect is innocent, there is a high risk they will be misidentified in the second lineup.* A detailed description of this process and its nuances has been published recently, but the general problem has been documented for many years.

- 98 Importantly, the authors outline that empirical evidence shows that the repeated-suspect effect is exacerbated:⁸¹

... if the initial lineup is biased (the innocent suspect fits the description of the culprit better than do the fillers) as evidenced by inflated rates of mistaken innocent suspect identifications in a second lineup if the first lineup is biased. These inflated rates of picking the innocent suspect occurred on the second lineup even among eyewitnesses who did not identify the repeated individual from the first lineup. *This research also showed evidence for a second process that can give rise to the repeated-suspect effect—social influence. Specifically, many eyewitnesses showed awareness that one (and only one) person was repeated in the second lineup and felt some pressure to pick that person.* Finally, this same research showed that the repeated-suspect effect is cumulative. *Specifically, repeating the innocent suspect (again embedded among different fillers) in a third lineup yielded more mistaken identifications of that innocent suspect than did the second lineup.*

⁷⁹ Page 7: CB 01 page 350.

⁸⁰ Page 8: CB 01 page 351.

⁸¹ Pages 8-9: CB 01 page 351 - 352.

- 99 The report addresses the consequences of weak memory on the reliability of an identification. It describes the well-known “*Turnbull*” factors,⁸² and then goes on to say that:⁸³

[Less] well understood and appreciated are the *consequences* of having a weak memory. A natural assumption for people to make is that an eyewitness with a weak memory would be particularly cautious about identifying anyone from a lineup. But, in fact, the science clearly shows that poor witnessing conditions (compared to good witnessing conditions) actually increase the rates at which eyewitnesses make mistaken identifications from lineups. At first glance, this scientific observation seems counter-intuitive to people. A key to understanding how this happens is to keep in mind that a weak memory (e.g., from poor witnessing conditions) also reduces the ability of the eyewitness to *reject* the idea that an innocent person was the person they saw. In eyewitness identification, the ability of eyewitnesses to use their memory of the culprit in order to reject an innocent person is very important. Accordingly, weak memories tend to increase the rate of mistaken identifications.

- 100 The authors state that eyewitness confidence at the time of identification is the most well-known “reflector variable”; and that low confidence identifications are “fraught with error”. Relevantly, given Mr Wallace was told to take his time and focused on Montage B for over a minute before stating his preference for Mr Watson’s photograph:⁸⁴

... extensive data from both controlled lab experiments and from real-world police lineups show that accurate identifications are made relatively quickly whereas mistaken identifications are much slower. By quickly we mean a matter of mere seconds in time versus something that takes 30 seconds or a minute or more. This is because reliable recognition memory is a largely “automatic” process rather than something that requires deliberation. Another reflector variable that points to unreliability in an identification is “wavering.” By wavering we mean that the eyewitness indicates indecision between two or more lineup members (e.g., “Well, both photo 2 and photo 5 have the same nose as the person I saw”).

- 101 The confidence with which a person presents in court can be misleading. The authors explain that:⁸⁵

[By] the time eyewitnesses appear at trial, they have been asked about their identification many times, knew that the suspected person had been charged, participated in witness preparation, and received extensive feedback. Thus, at this point, the eyewitnesses were confident in their (mistaken) identifications—often extremely confident. In effect, these mistaken eyewitnesses evolved from being shaky and uncertain about whether the suspect was the culprit to being positive, despite the fact that memory does not get better with time and that their identifications were in fact mistaken.

- 102 Further, it was an agreed fact in the Court of Appeal that the Crown expert, Dr Kovera stated:

Taken together, in my opinion, there is substantial evidence that there were factors present in this case that could have adversely affected [Mr Wallace’s] ability to make a correct identification. In part, my concern with the reliability of the identification stems from the suggestive practices with which the police collected the identification evidence (suspect biased lineup composition, nonblind administration of the photo

⁸² *R v Turnbull* [1977] QB 224, [1976] 3 All ER 549.

⁸³ Page 9: **CB 01 page 352.**

⁸⁴ Page 10-11: **CB 01 page 353 - 354.**

⁸⁵ Page 12: **CB 01 page 355.**

array procedure, and repeated identification attempts with the same suspect and witness).

*James Ruhfus*⁸⁶

103 Mr Ruhfus is a digital technology specialist. He was instructed to assess the quality of the *Mina Cornelia* photograph⁸⁷ depicting Mr Watson on 31 December 1997 by reference to the lighting, compression and other considerations he found to be relevant. Specifically, Mr Ruhfus was, “... informed that the facial hair of an identified individual within the photograph (Mr Watson) and in the CCTV footage was of particular interest”.

104 Mr Ruhfus conducted his assessment using “a digital copy of a photograph and taken from the original photographic negative”. He states that:⁸⁸

Mr Watson himself looks to be clean shaven, or at least with the absence of stubble. Actual stubble would be captured by the well-lit and high-resolution photograph. His hair is dark so there is good contrast between it and his light skin. The viewer should also note the detail in Mr Watson’s eyebrows. The photograph captures this nuance well.

105 The gravamen of Mr Ruhfus’s evidence about the quality of the photograph is that:⁸⁹

In my opinion, based on the amount of nuanced visual information evident within the photograph – including different hair types – should there have been visible stubble evident on Mr Watson at the time the photograph was taken, the photograph (and subsequent scan that we now view) would capture it.

106 The Crown instructed its own expert to review Mr Ruhfus’s evidence. Importantly, the Crown advised that its expert, having reviewed the negative of the photograph, accepts that “Scott Watson appears clean shaven” and that it did not intend to adduce evidence rebutting that from Mr Ruhfus.⁹⁰

Guy Wallace’s identification was inadmissible

The use of a single photograph by police

107 Under New Zealand common law, courts had a discretion to exclude evidence when its prejudicial effect is out of proportion to its true evidential value.⁹¹ It has

⁸⁶ Whose report is dated 30 June 2023, Annexed as Exhibit A to the affidavit of James Ruhfus, sworn 8 August 2023: **CB 01 page 459 - 469**.

⁸⁷ Exhibit 32: **CB 01 page 465**.

⁸⁸ Affidavit of James Ruhfus, sworn 8 August 2023, Exhibit A, at 4.6: **CB 01 page 466**.

⁸⁹ Affidavit of James Ruhfus, sworn 8 August 2023, Exhibit A, at 4.8: **CB 01 page 467**.

⁹⁰ Which was addressed in memoranda filed by the appellant on 29 November 2023 and the Crown on 30 November 2023.

⁹¹ *R v Russell* [1977] 2 NZLR 20 (CA) at 27. This is the basis on which the admissibility of such evidence is determined in the common law jurisdictions of Australia: *Festa v R* (2001) 76 ALJR 291 (HCA).

also been said that this is “an application of the general jurisdiction to exclude evidence obtained unfairly.”⁹²

- 108 In deciding whether to exercise the discretion to exclude evidence, the Court may be motivated by a desire to guide future police practices. Thus, in *R v Ormsby*, the Court of Appeal stated:⁹³

But in deciding how to exercise his discretion the Judge may take into account not only the case being considered but the need to maintain effective control over police procedure generally.

- 109 In this case, it is indisputable that police showed Mr Wallace a single photograph of Mr Watson in January 1998. Indeed, the use of a single photograph for identification purposes was a theme, and clearly an intentional investigative strategy, as the IPCA’s report affirms. The IPCA concluded:⁹⁴

A Police document of 7 January 1998 records an intention to show a photo of Scott Watson in order to ‘confirm or eliminate from inquiry’, and subsequent Police records indicate that Guy Wallace was shown the photograph. There is, however, no transcript or other formal record of the interaction, and it is not known which officer was responsible.

Police records also confirm that a single photograph of Scott Watson was shown to other key witnesses in early January 1998. Of those shown the photograph, three identified him as the ‘sleazy man’ who had been at Furneaux Lodge.

...

Finding: In the light of these factors and well-established legal principles in place at the time, the Police’s actions in showing a single photograph to Guy Wallace were highly undesirable. Again, whilst there is no direct evidence of any intention on the part of Police to influence witnesses inappropriately, the comments I have made in paragraph 27 above equally apply here. As I have noted, the standards and principles guiding identification of suspects from photographs were formalised in 1998. In particular, s 45(3)(b) of the Evidence Act now requires certain minimum standards for identification evidence, including the requirement for photograph montages to include no fewer than seven photographs of individuals other than the suspect.

- 110 It is clear that Mr Wallace did not recognise Mr Watson when shown the single photograph in January 1998. As the IPCA said, it is unsatisfactory that no contemporaneous record of the procedure was made. However, Detective Sergeant Moore spoke to Mr Wallace after he was shown Montage B and created a jobsheet on 27 April 1998 that relevantly provides:⁹⁵

⁹² *R v Tamihere* [1991] 1 NZLR 195 at 198.

⁹³ *R v Ormsby* [1985] 1 NZLR 311 (CA) per Somers J at 313. This was not novel, it had previously been said that the police must not attempt to point the defendant out beforehand to someone who is then asked to identify the defendant: *R v Dickman* (1910) 5 Cr App R 135. The police were required to act with “exemplary fairness”: *R v Dwyer* [1925] 2 KB 799 at 803 per Lord Hewart CJ. It was held to be wrong, for example, for an identification parade to be composed in a way that none of the other men on parade could possibly be mistaken for the suspect: *R v Jeffries* [1949] NZLR 595.

⁹⁴ Independent Police Conduct Authority Response to Complaint About Operation Tam (17 May 2010) [IPCA Report] at [30]-[31]: **CB 01 page 1416**; and [33]: **CB 01 page 1417**.

⁹⁵ Jobsheet of Detective Sergeant Moore dated 27 April 1998: **CB 01 page 1371 - 1372**.

I then talk to WALLACE about the statement he made to Detective FITZGERALD on video re being shown a photograph of a person when he was at the Op "Tam" base completing a compusketch.

IS Guy do you recall saying to Tom (FITZGERALD) when he interviewed you on video that I showed you a photo of a male?

HS Yeah.

IS Well, I don't think it was me but where were you when you were shown the photo?

HS I was there doing that compusketch and someone saw me in the corridor between the yacht room where the photos of the yachts are and the room we did the compusketch.

IS What did they say when they showed you the photo?

HS They just asked if I knew this guy and I said I didn't.

IS Is that all?

HS Yeah — they said that the photo was about 4-5 years old and he could have changed — but I still didn't know him.

IS And that was a black and white photo?

HS Yeah.

111 The Court of Appeal in 1990 *Tamihere* described the test for exclusion of “a single photograph or other slanted procedure for identification” as traditionally turning on the unfair prejudicial effect of the evidence outweighing its probative value.⁹⁶ However, it clarified that, “[i]n New Zealand this is an application of the general jurisdiction to exclude evidence obtained [unfairly]”.⁹⁷ Later, the Court said that, “We do not overlook that, as was said in [*R v Ormsby*], a material consideration in these cases is the need to maintain effective control over police procedure [generally]”.⁹⁸

112 1990 *Tamihere* described the “displacement effect” in the following way:⁹⁹

A danger in a witness identifying the accused on being shown a single photograph, or on seeing him in a situation where it is plain that he is the suspect or the person charged, is that the witness may tend, perhaps subconsciously, to think that the accused must indeed be the person implicated in the crime whom he saw at the material time. A mere general resemblance may then convince the witness of the correctness of his or her identification. Yet, if invited to select one from a group of persons of somewhat similar appearance or in a situation where there is nothing to point to a particular individual as being the person thought by the police to have committed the crime, the witness may not be able to make an identification or may prove to be mistaken. The single photograph, or a realisation that the person now observed is suspected of or charged with having committed the crime, may create a displacement effect in the mind of the witness.

Such considerations have led the Courts to disapprove of the showing by the police of only one or only a few photographs to a potential witness in order to obtain

⁹⁶ At 597, citing *R v Russell* [1977] 2 NZLR 20 and *R v Ormsby*, above n 93.

⁹⁷ At 597.

⁹⁸ At 602-603.

⁹⁹ At 596-597.

identification evidence, and also of purely courtroom identifications and the like. If the risk of unfairness to the accused is serious, the evidence is likely to be excluded. The desirability of a properly conducted identification parade, providing a true test of the ability of the witness to pick out the person who has previously been seen in incriminating circumstances, has been repeatedly stressed. Also, a distinction has been drawn between the detection process, when the police may not yet even have a suspect and when the use of single photographs may be unobjectionable, and the stage at which the police are gathering evidence for a prosecution. As the present case illustrates, a hard-and-fast line cannot always be drawn between these stages; ***but broadly it can be said that the showing of a single photograph to a witness in an attempt to strengthen the prosecution's identification evidence, or the use of any other procedure likely to influence the witness in the direction of a particular identification, are especially likely to be regarded as tainting the evidence and requiring exclusion.***

[Counsels' emphasis]

- 113 As Fisher J said in 1997 in *R v Lewis*, the risk of misidentification is particularly acute where the witness has been predisposed to select the accused because he or she has been shown a single image of him or her on an earlier occasion.¹⁰⁰
- 114 *Ormsby*¹⁰¹ is a well-known single photograph case where the Court of Appeal outlined the uncontroversial proposition:¹⁰²

In the instant case the use of only one photograph indicates that the detection process had ended.

That singular use is an outstanding feature of the present case. While we cannot rule out the possibility that in some exceptional circumstances the use of a single photograph during the course of detection may be capable of justification the authorities make it clear that this is generally quite unacceptable. All this is well understood by the Police [...].

- 115 Another salient case is *R v McIntosh*.¹⁰³ Tipping J was asked to exclude certain identification evidence on the well-settled grounds that it was unfairly obtained and its prejudicial effect outweighed its probative value. The relevant identification was not a single photograph but, rather, like *Tamihere*, an informal identification parade conducted in a courtroom when the defendant was appearing on an unrelated charge. There were no other people visible for comparative purposes, and it must have been at least implicit to the witness from the circumstances that the police suspected the man to be responsible for the crime. Tipping J noted that the Crown prosecutor accepted that this was analogous to a single photograph case and said:¹⁰⁴

There are elements of prejudice outweighing probative force and general unfairness in such circumstances as are present in this case. Indeed, the power of a trial Judge to exclude otherwise admissible evidence on the ground that its prejudicial effect outweighs its probative force is really a manifestation of the trial Judge's power, indeed

¹⁰⁰ *R v Lewis* HC Auckland T59/97, 11/6/97, Fisher J.

¹⁰¹ *R v Ormsby*, above n 93.

¹⁰² *R v Ormsby*, above n 93, at 312.

¹⁰³ *R v McIntosh* High Court, Invercargill Registry, T 8/90, 22 August 1990.

¹⁰⁴ *McIntosh* pp 8 - 9.

his duty, to ensure that the Accused receives a fair trial, not only during the course of the trial but in respect of the processes and procedures leading up to the trial.

- 116 Relevant to the instant appeal, Tipping J dealt with the problem of relying upon other evidence to bolster the identification when he said:¹⁰⁵

In my judgment the probative force of such identification is relatively small and there is potential prejudice but in addition to that I do not regard the procedure as fair. The combination of circumstances is such that in my view the evidence should not be allowed to go before the jury.

[...]

The difficulty with that is that it is impossible to know to what extent the excluded identification influenced the depositions identification or indeed might influence the identification sought in this court.

- 117 The identification of Mr Watson utilised no less egregious improper procedures, including the showing of a single photograph to Mr Wallace. The unfair prejudicial effect, limited (if any) probative force and general unfairness in what occurred is obvious. It tainted any future identification because, like *McIntosh*, it is impossible to say to what extent the single photograph influenced Mr Wallace's identification of Mr Watson from Montage B (even if the issues with the way in which the montage was constructed and what transpired prior to the purported identification are momentarily put aside).
- 118 It is acknowledged that the intent of s 206 of the Evidence Act 2006 is to declare that the formal procedures described in s 45(3) cannot retrospectively supplement or replace the identification processes in place at the time of Mr Watson's trial. However, the (sparse) requirements contained in the 1997 Police Manual, against which the Court of Appeal measured matters, were not the law and did not provide a reasonable assurance of reliability.¹⁰⁶ It is submitted that the way in which the test described in 1990 *Tamihere* is applied must reflect what is known in 2026 about the risks associated with misidentification. That invites a two-step process:
- (a) First, a court must be cognisant of *why* the additional safeguards in s 45(3) Evidence Act 2006 were enacted, and recognise that they provide an important benchmark against which to assess the reliability of an identification procedure conducted before the Evidence Act came into force. That is not to say that in a historic case, non-adherence to the procedures in the Evidence Act will comprise an automatic error capable of causing a miscarriage of justice. However, omissions of a step or steps

¹⁰⁵ *McIntosh* pp 9 - 10.

¹⁰⁶ *Police Manual of Best Practice* (New Zealand Police, 1997): **CB 01 page 2396 - 2407**. Court of Appeal judgment at [715]: **CB 01 page 200 - 201**.

in s 45(3) guide the assessment of unfair prejudice and probative value, or reliability. Indeed, the nine 2020 recommendations referenced by the experts in their report enhance the assessment of reliability. Albeit, they do not usurp the requirements of the law but, contrary to what the Court of Appeal reasoned, nor does the 1997 Police Manual.¹⁰⁷

- (b) Second, a court must appreciate issues with identification evidence, including *why* s 45(2) was enacted to alter the approach regarding the relevance of extrinsic evidence contained in *Tamihere*. This hinges on the established risk that jurors may over-weight a single visual identification when determining guilt.

- 119 It is submitted that the Court of Appeal was plainly wrong in its assessment of the unfair prejudice and probative value of Mr Wallace’s identification and the errors disclose a fundamental gap in its reasoning. It is inconceivable that a court, with its fundamental duty to do justice (so that the integrity of the justice system is maintained), would allow unreliable evidence to be admissible merely because there was supposed technical compliance with the Police Manual.
- 120 The admissibility test in 1990 *Tamihere* is sufficiently malleable to take account of scientific advances since the original trial, and does not require this Court to closely grapple with the introduction of s 45 of the Evidence Act.
- 121 It is an unassailable conclusion that Mr Wallace’s evidence was contaminated by the sustained efforts by police to have him positively identify its primary suspect, Mr Watson, which included the showing of a single photograph to Mr Wallace who was, even at that early stage, clearly the key witness.
- 122 While not setting a legal standard, the 1997 Police Manual established a key requirement that, regardless of the identification method adopted, police must not “influence by any opinion”, or “suggest to the witness which person is the suspect”.¹⁰⁸ Plainly, that requirement was explicitly contravened on two, and possibly three, occasions. This was the breach that irretrievably tainted Mr Wallace’s subsequent identification of Mr Watson using Montage B. Thus, the Court’s conclusion that “the requirements of the 1997 Manual were substantially complied with” does not withstand scrutiny.¹⁰⁹
- 123 The starting point is that Mr Wallace, the crucial witness, was shown a single photograph of Mr Watson early in January 1998, when the investigation was in

¹⁰⁷ Court of Appeal judgment at [714]: **CB 01 page 200**.

¹⁰⁸ *Police Manual of Best Practice* at p 315 and 317: **CB 01 page 2401** and **CB 01 page 2403**.

¹⁰⁹ Court of Appeal judgment at [927]: **CB 01 page 265**.

its infancy, did not recognise him as the lone man, and said he was not the person shown in his identikit. The Court of Appeal attempted to downplay the significance of the showing of a single photograph on the basis that it was taken in 1990.¹¹⁰ That overlooked that the usage of a single photo of Mr Watson with Mr Wallace was not an outlier, and it had secured a positive response from at least one other witness.¹¹¹ It engaged the clear risk of the “displacement effect” described in 1990 *Tamihere*. In modern parlance, it was the first “show up”, and *exculpatory*. It was not the last.

- 124 The decision to show Mr Wallace a single photograph of Mr Watson is not a mere investigative misstep by an overzealous unidentified officer who failed to follow instructions. The Police approach was both calculated and persistent. Presenting Mr Watson as the sole suspect is the starkest of examples of a “show up” described by Drs Wells and Quigley-McBride.¹¹² Importantly, the implicit message to Mr Wallace was that the person in the Naiad was Mr Watson who was also the person in the single photograph. Even before further pressure was placed upon Mr Wallace (expanded upon below), this predisposed Mr Wallace to select Mr Watson.
- 125 The single photograph was the first matter that plainly tainted Mr Wallace’s identification, especially when the accumulation of prejudicial matters is taken into account. It was part of a number of issues that individually and cumulatively produced an unfairly prejudicial identification of low probative value that should have been excluded.
- 126 There were highly unsatisfactory deficiencies in the way in which police documented its visual identification procedures conducted with Mr Wallace. This prevented the Court of Appeal from reaching a definitive conclusion that he was shown Montage A, but the Court is entitled to conclude that he was. If so, that was the third, exculpatory, show up.¹¹³

¹¹⁰ Court of Appeal judgment at [760]: **CB 01 page 217 - 218**.

¹¹¹ Oliver Perkins. The Crown elicited that Mr Perkins initially identified Mr Watson on 8 January 1998 when he was shown a single photograph of the appellant, and then again when he was shown Montage B on 1 April (NOE 1689-1690: **CB 03 page 1689 - 1690** and 1694: **CB 03 page 1694**). At 1689, he said that “I rem the eyes as well”. See his cross-examination at NOE 1691: **CB 03 page 1691**, where the witness confirmed that the only photograph he was shown was of Mr Watson). Mr Perkins’ “identification” was critical to the Crown’s two-trip theory.

¹¹² Joint report at p 4: **CB 01 page 347**.

¹¹³ In the present case, the failure of the police to comply with basic recording obligations has resulted in a dispute about the circumstances in which Mr Wallace was shown photographs. The absence of a proper record places this Court in the difficult position of having to determine what occurred on the basis of little evidence. In appropriate cases, as was noted in different circumstances in *Chetty v R* [2018] 1 NZLR 26 (SC) at [47], the determination of disputes could be determined in favour of the defendant given Police failures to comply with basic reporting obligations.

127 The third, and possibly fourth, exculpatory show up was when Mr Wallace was shown imagery of Mr Watson by the media on 3 February 1998.

Improper pressure on Mr Wallace

128 The usage of a single photograph cannot be considered in isolation. The Court of Appeal submissions describe the improper interrogative pressure brought to bear on Mr Wallace by Detective Fitzgerald.¹¹⁴

129 A critical gap in the Court of Appeal’s analysis is the interview that then-Detective Fitzgerald held with Mr Wallace on 11 January 1998, and the improper interrogative pressure he brought to bear.¹¹⁵ The officer conveyed in the most explicit of terms that Mr Watson was police’s suspect. The way in which the Detective spoke to Mr Wallace in that interview made it plain that Police *knew* that Mr Watson was the man in the single photo. The Detective told Mr Wallace that he had intentionally misled Police when he said the appellant was not the mystery man. Detective Fitzgerald told Mr Wallace that “all the other barmen” had identified Mr Watson as the “sleazy man”. The officer’s comment about the positive identification of Mr Watson by others raises two possibilities: either that he misled the witness about the state of the Police’s case, or, if it was not a lie, then it meant that other witnesses had been shown a single photograph of Mr Watson, too (since Montage A was still being constructed on 11 January).¹¹⁶

130 While the appeal does not hinge on it, it is an inescapable conclusion that Detective Fitzgerald misled Heron J when he testified on 5 May 1999 that he was not aware that Mr Watson was a suspect when he interviewed him on 12 January 1998.¹¹⁷ The way in which he described Mr Watson during his lengthy interview with Mr Wallace on 11 January leaves no room for doubt that the appellant was a, if not the, suspect.

¹¹⁴ **CB 01 page 1026 - 1031.**

¹¹⁵ Detective Superintendent Fitzgerald (retired). The Court is entitled to take judicial notice of the officer’s propensity for misleading suspects: see *R v NW* [2021] NZHC 2444, (2021) 30 CRNZ 772, Simon France J (which addressed the Complex Investigation Phased Engagement Model interview technique developed by Detective Fitzgerald). The Judge held that the interviews using this technique, which were supervised and directed by Detective Fitzgerald, were manipulative and oppressive. RN’s murder charge was dismissed. See, too, *Fawcett v R* [2017] NZCA 597 (where this Court quashed Mr Fawcett’s conviction for murder) and the subsequent decision of the High Court in *R v Fawcett* [2021] NZHC 2406, where the Judge concluded that the defendant’s statements were unreliable. Detective Fitzgerald both interviewed Mr Fawcett himself, and oversaw the unfair interviews conducted by other officers. Finally, see *R v Perry* [2016] NZSC 102, where this Court was critical of the way in which Detective Fitzgerald undermined the appellant’s right to silence by giving him advice about the merits of making a statement. See, in particular, the dissenting judgment of Glazebrook J at [62]-[65] and [88]-[89].

¹¹⁶ The Court of Appeal identified three who were shown the single photo, at [574]: **CB 01 page 166.**

¹¹⁷ Cross-examination of Detective Fitzgerald at **CB 04 page 469.**

- 131 Detective Fitzgerald primed Mr Wallace to identify Mr Watson as the “sleazy man” he served at the Lodge by telling him that his description matched Mr Watson’s when he said that Mr Watson had scruffy, unkempt and wavy hair on 1 January, and was unshaven.
- 132 Clearly, the Detective’s “description” of Mr Watson’s appearance on the night was designed to dispel the physical discrepancies between Mr Wallace’s identikit and the appellant’s presentation in the photograph. To interpolate, what Detective Fitzgerald told Mr Wallace – that Mr Watson was unshaven on 1 January 1998 – is contradicted by Mr Ruhfus’s evidence about the quality of the *Mina Cornelia* photograph, and what it depicts.
- 133 Detective Fitzgerald explicitly told Mr Wallace that Mr Watson was the “sleazy man”. However, there were taints from other sources, too. The IPCA was satisfied that because Operation Tam was conducted in the small Marlborough community, it was common knowledge that Mr Watson was a suspect. It concluded:¹¹⁸

Finding: There is no evidence of Police deliberately or systematically circulating rumours so as to prejudice the community against Scott Watson. There is, however, considerable evidence that the media reported statements from witnesses and others in the community identifying Scott Watson and discussing lines of inquiry, despite repeated Police pleas for media to abstain from doing so. The unprecedented and unrelenting nature of the media focus throughout the inquiry can only have served to make an already complex and difficult investigation even more so.¹¹⁹

- 134 The extensive pressure placed upon Mr Wallace by the Police was akin to showing him a single photograph (as had already occurred) and saying: “this is our man. Identify him. Identify him or else. Others have identified him. You need to do so too.” The taint associated with this improper pressure perfected what was already an irretrievably flawed identification procedure.

Other factors including media taint

- 135 There was a media frenzy surrounding the disappearance of Ms Hope and Mr Smart and the subsequent trial of Mr Watson.¹²⁰ It was not in contest at the trial that Mr Wallace was shown imagery of Mr Watson by a media representative on 3 February 1998, which was taken after he was arrested on an unrelated charge (stealing a dinghy), when he was taken to court.¹²¹ As the IPCA recorded, when

¹¹⁸ IPCA report at [74]: **CB 01 page 1422.**

¹¹⁹ Although, it should be noted that there was a suspect profile making its way around the local area: **CB 04 page 514.**

¹²⁰ For an excellent description of the level of interest, see Cate Brett *Control of the Crime Story: Free Speech vs Fair Trial* (University of Canterbury, Christchurch, 2001) 25.

¹²¹ The many sources available to the media to verify that Mr Watson was a suspect are described in the IPCA report at [111]: **CB 01 page 1427.**

Mr Wallace was shown the imagery and asked if Mr Watson was the mystery man, he replied, “I’d have to say no”.¹²² There was, however, other significant media influence.

- 136 The IPCA’s finding about the tainting effect of media coverage is corroborated by Mr Watson’s decision to decline to participate in an identification parade. On 27 February 1998, trial counsel advised police that they objected to Mr Watson’s placement in a parade, “... given his visual identification by the electronic media since mid-January and given the circulation in the Blenheim - Picton area of a “broad sheet”, including a photographic image of him, any such identification parade would be unfair and pointless”.¹²³ This objection was repeated on 9 April 1998 following a further request by police. Soon afterwards, Mr Wallace was shown Montage B. What needs to be restated is that, by this stage, Mr Wallace had already been shown a single photograph and also told by Detective Fitzgerald that Mr Watson was the suspect. Any identification parade was fruitless for those reasons.
- 137 Such was the media interest that prior to the preliminary hearing, the Solicitor-General issued a warning to the media on 16 November 1998 stating that “this case has attracted widespread media interest”, and, “[t]here will be evidence in this case about the identity of a person who was seen in circumstances alleged to be material to the prosecution”. The statement said that, “publication of any photograph or other detailed description of personal characteristics of Mr Watson may prejudice his right to a fair trial”.¹²⁴
- 138 The influence that pre-trial media coverage had was the subject of evidence.¹²⁵ Mr Watson’s singular presence in the media precipitated witnesses attributing to him poor behaviour that had either not been mentioned in statements taken early in the investigation, or where there had been no earlier formal identification procedure.¹²⁶
- 139 The media’s focus on Mr Watson as the suspect compounded the taint already embedded in the identification processes adopted in relation to Mr Wallace. First, there was the inherently suggestive use of a single photograph. Second, there was

¹²² IPCA Report at [114]: **CB 01 page 1428.**

¹²³ Letter of Bruce Davidson to DSS Rae dated 27 February 1998: **CB 01 page 1370.**

¹²⁴ Media statement of John McGrath, Solicitor-General, dated 16 November 1998: **CB 01 page 1373.**

¹²⁵ The appellant attempted to produce examples of the media saturation through the affidavit of Mr James Brown, but that was not received and this Court did not grant leave on the point.

¹²⁶ See Phillippa Holstein at NOE 1549: **CB 03 page 1549**; Lois Knowles at NOE 1554: **CB 03 page 1554**; Simon Bell at NOE 1563: **CB 03 page 1563**; Janine Morrison at NOE 1715-1716: **CB 03 page 1715 - 1716** and Jack Stanley at NOE 3472: **CB 03 page 3472.**

the pressure exerted by Detective Fitzgerald to accept Mr Watson was the man Mr Wallace saw. Each of these three factors (the single photograph, the pressure to identify, and the subsequent media coverage naming Mr Watson as the suspect) did not operate in isolation, but had a compounding effect. By the time that Mr Wallace was shown Montage B, his act of identification could not be regarded as an independent or reliable act of recognition. It reflected, at best, a reinforced association created by the very process the Crown submits was reliable.

The creation and use of Montage B

140 Police constructed three photographic montages that included Mr Watson, which the IPCA referred to as A1, A2 and B.¹²⁷ Each comprised eight photographs. It does not appear to be in dispute that A1 and A2 were effectively identical, and can be referred to simply as “Montage A”.¹²⁸ A full length photograph of Mr Watson taken on 8 January 1998 was used in Montage A.¹²⁹

141 Montage B was first used on 17 March 1998.¹³⁰ While the officer who collated it was not able to say which date it was constructed,¹³¹ the IPCA report said the date of creation was 20 February 1998.¹³²

142 The IPCA described the genesis of the use of Montage B in the following way:¹³³

Montage B was shown to witnesses in March and April 1998. This was after Scott Watson had been identified in the media following circulation of a suspect profile of him (see below); and after the key witness Guy Wallace had been asked to identify Scott Watson from a single photograph (see below); and by television reporters from a video. Montage B resulted in either definite or tentative identification by some additional witnesses.

143 A point that remains in contention is whether Mr Wallace was shown Montage A, as well as Montage B. The IPCA acknowledged that:¹³⁴

There are some inconsistencies in Police records in relation to the montages. In particular, there is conflicting evidence as to whether Guy Wallace was shown one or two montages.

144 The IPCA’s specific finding regarding the lack of clarity around whether Mr Wallace was shown one or two montages aligns with its wider criticism of the way in which police conducted formal identification procedures. This meant that

¹²⁷ CA Add Mat Vol 2 at 116: **CB 05 page 116.**

¹²⁸ See Add Mat Vol 2 at 115: **CB 05 page 115.**

¹²⁹ Which was taken by a Detective Sanders: see AM 1, 478: **CB 04 page 478.**

¹³⁰ See the pre-trial evidence of the officer who collated Montage A, Detective Jeannie McCornick, at AM 1, 478: **CB 04 page 478.**

¹³¹ Constable David Laurence Brunton, at AM 1, 484: **CB 04 page 484.**

¹³² IPCA report at [18]: **CB 01 page 1414.**

¹³³ IPCA report at [18]: **CB 01 page 1414.**

¹³⁴ IPCA report at [19]: **CB 01 page 1414.**

“there are also no clear records of what witnesses were asked or told when they were shown the montages”.¹³⁵ Its overall conclusion was that:¹³⁶

Finding: The construction of the montages, the methods used for presenting the montages to witnesses, and the limited documentation around witness responses, were all highly undesirable, particularly given the importance of suspect identification in this case. Whilst an exhaustive examination of Police records does not reveal any deliberate intention or conscious plan on the part of Police to influence witnesses inappropriately, nor provide tangible evidence of serious misconduct, the various failures to adhere to common law principle and to the guidance in the Police Manual of Best Practice has exposed the integrity of the investigation to justifiable criticism and to the drawing of inferences about intention and motivation. It also rendered any evidence obtained vulnerable to challenge, as subsequently occurred at both the trial and on appeal.

- 145 It is not in dispute that the photograph ultimately used in Montage B was taken on 12 January 1998 by Detective Fitzgerald, which was the day when he interviewed Mr Watson at the Picton Police Station.¹³⁷ During the pre-trial hearing held on 5 May 1999, Detective Fitzgerald was cross-examined about why he had taken photographs of Mr Watson when police already had images of him taken on 8 January. He asserted that it was his standard procedure to photograph all witnesses he spoke to.¹³⁸ Perplexingly and unconvincingly, the Detective asserted that he was unaware that Mr Watson was a suspect when he spoke to and photographed him, notwithstanding the special efforts he took to ensure that a statement was taken from the appellant that day.¹³⁹ This explained why he provided no caution to the appellant.
- 146 Detective McCornick’s evidence was that she received the photograph from Detective Fitzgerald, transported it to Christchurch and delivered it to Constable Brunton, who was the officer responsible for collating Montage B.¹⁴⁰ Constable Brunton gave evidence that he received the photograph used in Montage B from Detective McCornick. He said that he played no role in deciding which photograph to use in Montage B.¹⁴¹
- 147 Detective McCornick conceded in response to a question by the Judge during the pre-trial hearing that she had not been asked to transport to Christchurch another “full face photo” taken by Detective Fitzgerald, which was included in the

¹³⁵ IPCA report at [20]: **CB 01 page 1414.**

¹³⁶ IPCA Report at [27]: **CB 01 page 1415 - 1416.**

¹³⁷ Detective Fitzgerald said he took five photographs with a polaroid and an unspecified number with a 35mm camera. Whereas the polaroids were taken in the video room, the 35mms were taken in the side-room of the watchhouse: see AM 1, 463 and 468: **CB 04 page 463** and **CB 04 page 468.**

¹³⁸ Detective Thomas John Fitzgerald, at AM 1, 467: **CB 04 page 467.**

¹³⁹ Detective Thomas John Fitzgerald, at AM 1, 469: **CB 04 page 469:** He said he was unaware that police had circulated a suspect file on Mr Watson the previous day, 11 January 1998. This was produced as an exhibit at AM 1, 514: **CB 04 page 514.**

¹⁴⁰ Detective Jeannie Anne McCornick, at AM 1, 478-479: **CB 04 page 478 - 479.**

¹⁴¹ Detective Senior Sergeant Edward Walter John Rae, at AM 1, 484: **CB 04 page 484.**

photograph booklet used at the hearing.¹⁴² As is apparent, the photograph to which the Judge referred the witness depicts Mr Watson with his eyes open.¹⁴³

148 Detective Senior Sergeant Rae said that the photograph selection decision was made jointly by him, Detective Inspector Pope and Detective Sergeant Moore.¹⁴⁴ The IPCA referred to a jobsheet created by an unnamed officer on 3 March 1998 to “make up a better montage using a more accurate photo of Watson”.¹⁴⁵ It did not ascertain what was meant by this statement, but the answer to that question can be derived from evidence given during the pre-trial hearing.

149 Critically, DSS Rae said that the preference for the photograph used in Montage B, rather than the other photo taken by Detective Fitzgerald that showed Mr Watson with his eyes open, hinged on the description provided by the persons present at Furneaux Lodge. He said:¹⁴⁶

It came down to the two photos in the bottom right hand corner and from my point of view the one to the right of that used in the montage described more accurately what was described by witnesses in the bar at Furneaux Lodge. So after discussion the consensus was that that photo was to be used and it was sent by Con McCornick to Christchurch, she was already going down.

150 In the cross-examination of DSS Rae, there was the following brief exchange about why Montage B had been created:¹⁴⁷

Q. Whose decision was it to create a second montage?

A. As I said it was a collective decision because after the interview on the 12th clearly our interest were greatly heightened in Mr Watson compared to what they had been before.

151 What follows is taken from the IPCA’s report, and appears unimpeachable:¹⁴⁸

In relation to the montages.-

- In A1 and A2, Scott Watson was the only subject with visible tattoos. Some of the witnesses who were shown these montages had already said the ‘sleazy man’ had tattoos;
- In A1 and A2, all subjects were photographed against an identical background at Blenheim Police Station;
- In A1, A2 and B, all subjects had short to medium length hair. This is consistent with descriptions of the ‘sleazy man’, and also with the initial description given by Guy Wallace of the man last seen with Ben and Olivia, but inconsistent with identikits of the ‘mystery man’ (Guy Wallace’s descriptions are further addressed below);

¹⁴² Detective Jeannie Anne McCornick, at AM 1, 479: **CB 04 page 479.**

¹⁴³ The photographs are side-by-side at AM 1, 512: **CB 04 page 512.**

¹⁴⁴ Detective Senior Sergeant Edward Walter John Rae, at AM 1, 485: **CB 04 page 485.**

¹⁴⁵ IPCA report at [18]: **CB 01 page 1414.**

¹⁴⁶ Detective Senior Sergeant Edward Walter John Rae, at AM 1, 485-486: **CB 04 page 485 - 486.**

¹⁴⁷ Detective Senior Sergeant Edward Walter John Rae, at AM 1, 488: **CB 04 page 488.**

¹⁴⁸ IPCA report at [16]: **CB 01 page 1413.**

- In A1, A2 and B, Scott Watson was the only subject who had been present at Furneaux Lodge that evening; and
- Montage B uses a photograph of Scott Watson which you suggest shows his eyes half-closed, while other subjects have their eyes open.¹⁴⁹

- 152 In *R v Luce*,¹⁵⁰ the Court of Appeal upheld an improper montage argument. The submission was that the identification evidence was unfair because the photograph of the appellant was the only one in the montage that matched the description that a key witness had provided to police.
- 153 The Court of Appeal said that the prejudice created by the montage could have been avoided “by the inclusion of photographs of males dressed in a similar fashion and colour scheme to the appellant at the same location with the venue regardless of whether a meeting was in progress.”¹⁵¹ Such an approach would have given the key witness “a meaningful choice and in the event he selected [the appellant] his identification [...] would have had considerable probative value.”¹⁵²
- 154 That scenario was contrasted with what occurred, namely that the photograph of the appellant was the only photograph that the key witness could choose because of the way in which he stood out. The Court said, “this was akin to a situation where a single photograph of an accused is made available to a complainant or witness for identification purposes.”¹⁵³ The Court determined that the evidence should not be admitted and stated that it had “very limited probative value and any probative value that it might have is far outweighed by the likely prejudicial effect.”¹⁵⁴ The Court also held there was a real risk of unfairness.
- 155 Like *Luce*, Montage B is akin to a single photograph.
- 156 Mr Wallace was shown Montage B at Blenheim Police Station on 20 April 1998 by Detective Sergeant John Hamilton.¹⁵⁵ The statement outlines that Mr Wallace attended the station, “... at the request of the police to view a series of photographs to try and identify the person I have previously described being on the Naiad boat with me on New Year’s morning”. The officer told Mr Wallace to take his time.

¹⁴⁹ Mr Watson’s photograph is also clearly the highest quality picture in the montage

¹⁵⁰ *R v Luce* (CA 434/05, 7 March 2006).

¹⁵¹ *Luce* at [16].

¹⁵² *Luce* at [16].

¹⁵³ *Luce* at [17].

¹⁵⁴ *Luce* at [19].

¹⁵⁵ A copy of Mr Wallace’s statement is annexure “K” in the affidavit of William Harvey dated 29 February 2024: **CB 01 page 1480 - 1481.**

- 157 In his undated statement,¹⁵⁶ DS Hamilton explained the formal procedure adopted in respect to the showing of Montage B to Mr Wallace in the following way:

He had come to the station at the request of the police to view a series of photographs to try and identify the person he had previously described being on the Naiad boat with him on New Year's morning the 1 January 1998.

Before viewing the photographs I asked him to take his mind back to the night in question.

I handed him a copy of montage "B", previously produced as exhibit number

When he opened the folder he appeared immediately drawn to photos number 3 and number 5.

He studied the photos for about a minute and a half, and photograph 3 stood out for him more than any of the others. I told him it was an important matter and that he should take his time.

I understood from what he said, photograph number 3 was of the man who was in the bar and on the boat with him. I questioned him about photograph 3 and sought from him comments as to why he had selected that photograph.

I also asked him why he had discounted photograph number 5 and he outlined his reasons to me.

From his comments I understood that he had discounted the person shown in photograph 5 as being the man in the bar and on the naiad with him when he took Ben Smart and Olivia Hope from the Tamarack.

- 158 For completeness, it is important to emphasise that Montage B was a significant investigative tool. In a footnote, the IPCA recorded that:¹⁵⁷

53 witnesses were shown Montage B which contained the photograph of Watson with his eyes half closed. 27 of the witnesses shown Montage B positively identified Watson as the man they had described.

- 159 In contrast, the IPCA's analysis makes clear that the use of Montage A resulted in a substantially smaller number of positive identifications of Mr Watson. It said:¹⁵⁸

Only 8 of the total 43 witnesses that were shown either Montage A1 or A2 positively identified Watson as being the "sleazy man".

The photograph selected for Montage B

- 160 The Court of Appeal wrongly endorsed the approach adopted by police to use the "hooded eyes" image because it depicted the appellant in a way that matched his "hypothesised appearance on New Year's Eve, as informed by the descriptions of witnesses".¹⁵⁹ This conclusion is plainly wrong. On its face, the

¹⁵⁶ Which is annexure "L" in Mr Harvey's affidavit: **CB 01 page 1482 - 1483.**

¹⁵⁷ IPCA Report, p 7: **CB 01 page 1414.**

¹⁵⁸ IPCA Report, p 7 (in the footnote): **CB 01 page 1414.**

¹⁵⁹ Court of Appeal judgment at [751]: **CB 01 page 213 - 214.**

Court endorsed a manipulative stratagem by police, concocted because the usage of a single photograph (and, potentially, Montage A) had not netted a positive identification by Mr Wallace. The very point of a truly probative recollection and recognition was undermined by a carefully curated photograph. There was only one person for Mr Wallace to pick and that was Mr Watson. The Court of Appeal is wrong.

- 161 The Court, like Heron J, dwelled on whether the way in which Mr Watson was depicted was an accurate representation. It contrasted the photograph used in Montage B with another taken on the same day, as well as the 1990 photograph. With respect, this was a somewhat reductive approach given the paucity of comparative materials.
- 162 The Court of Appeal said that it was “important to avoid the overstatement of a single characteristic” – eyes. Such a statement can be true, but in this case it downplays the importance that the description of eyes played in the identification process. It is not merely that the eyes are a single characteristic but that Mr Watson is the only one depicted who was at Furneaux, is the same person in the single photograph, is the same person the media had been discussing for approximately three months and is the only one depicted with this characteristic. The selection of a photograph of Mr Watson with “hooded eyes” predisposed Mr Wallace to select the appellant when shown Montage B. It matters not that it may not have had the same persuasive effect on every witness to whom it was shown,¹⁶⁰ if anything it proves the point: the unfairness of the montage predisposed people to select Mr Watson.
- 163 What is known is that the way in which Mr Watson’s eyes were depicted had a dispositive influencing effect on Mr Wallace’s selection of the appellant’s picture. That answers the question that the Court posed itself at [752] of the judgment regarding predisposition.
- 164 The way that Mr Watson’s eyes were presented in Montage B also influenced other important witnesses to select his photograph. For example, Roz McNeilly, who worked in the Lodge’s main bar, selected Mr Watson, saying it was his eyes that drew her attention.¹⁶¹
- 165 Contrary to what the Court of Appeal appeared to decide, police were not required to go to “extraordinary or impracticable lengths” to ensure that the men

¹⁶⁰ Court of Appeal judgment at [753]: **CB 01 page 214 - 215.**

¹⁶¹ Court of Appeal judgment at [800]-[801]: **CB 01 page 228.**

shown in Montage B had eyes of similar appearance.¹⁶² *Luce* is instructive in this regard.

- 166 This Court is as well placed as the Court of Appeal to undertake the “fact-dependent evaluative exercise” of whether the eight men shown in Montage B were of similar appearance.¹⁶³ 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. Plainly, that was *the* characteristic at the forefront of his mind.

The time it took for police to show Mr Wallace Montage B

- 167 The Court of Appeal’s judgment does not directly engage with the fact that there was a three and a half month delay between Mr Wallace’s observation of the lone man (and Mr Watson being identified as police’s suspect) and being shown Montage B.¹⁶⁴ This was a critical oversight.
- 168 Section 45(3)(a) of the Evidence Act makes clear, “a formal procedure is a procedure for obtaining visual identification evidence ... that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency”. The Court of Appeal arguably decided that because this was not a requirement in the 1997 Police Manual, it was not relevant to its assessment. If so, it conflicted with the Court’s earlier, demonstrably correct observation that it was required to “have regard to the developments in eyewitness science that have occurred since Mr Watson’s trial”, because “if we consider the admission of identification unsafe in light of modern eyewitness science, it is no answer that the identification would have passed muster against eyewitness science in 1999”.¹⁶⁵ The science behind the enactment of s 45(3)(a) is one such development, and an important one given its placement in the subsection.
- 169 The delay was plainly a relevant circumstance in which Mr Wallace’s identification was made, and impacted on its reliability. It is not a question of retrospectively applying s 45(3)(a) to Mr Wallace’s identification, but instead recognising that investigative delay may be germane to the assessment of reliability. The Court of Appeal failed to account for a key development in eyewitness science when it omitted delay from its list of circumstances relevant to the reliability of Mr

¹⁶² Adopting what was said in *Ab Soon v R* [2012] NZCA 48 at [23], which is in the Court of Appeal judgment at [752]: **CB 01 page 214**. It is not accepted that photos 2 and 6 depict hooded eyes.

¹⁶³ *Ab Soon v R* [2012] NZCA 48 at [23].

¹⁶⁴ In its section “What were the circumstances relevant to Mr Wallace’s identification evidence?” at [764]-[775]: **CB 01 page 219**.

¹⁶⁵ Court of Appeal judgment at [735]: **CB 01 page 206 - 207**.

Wallace's identification. The delay before Mr Wallace was shown Montage B was not benign. Mr Wallace was subjected to the contaminative influences of police and the media. The latter was acknowledged by both the Crown and defence in their closing addresses, with the prosecutor describing the "perhaps unprecedented media interest and attention" the case had attracted.¹⁶⁶ This was a factor that persuasively demonstrated that Mr Wallace's identification was unreliable.

The way in which Mr Wallace selected Mr Watson when shown Montage B

- 170 Confronting the research that accurate identifications in simultaneous lineups (such as that conducted using Montage B) are made within 30 seconds, the Court of Appeal attempted to provide reasons why Mr Wallace paused for a minute and a half before he selected Mr Watson's image from Montage B.¹⁶⁷ It was a speculative exercise. What it overlooked is the relevance of the fact that – regardless of why he said he discounted the man in photograph five – Mr Wallace was drawn to *two* photographs, and conducted a comparison. Accordingly, the Court of Appeal was unfair to categorise as misleading Drs Wells and Quigley-McBride's opinion that this is an example of wavering.¹⁶⁸ Contrary to what the Court of Appeal held, Mr Wallace did "not settle right away on one photograph and [paid] attention to more than one photograph".¹⁶⁹
- 171 This, too, was a circumstance in which the purported identification was made that showed its unreliability.
- 172 For completeness, it is submitted that, contrary to what the Court held, the fact that Mr Wallace's purported identification was not reliant on a "fleeting glance" is not curative,¹⁷⁰ given the way in which his identification using Montage B was contaminated. A fleeting glance is not the only indicator of unreliability.
- 173 The Court of Appeal's conclusion that Mr Wallace did not acquiesce to external pressure to identify Mr Wallace does not withstand scrutiny.¹⁷¹ First, assigning a purportedly independent officer to oversee the showing of Montage B to Mr Wallace could not neutralise the taint that attached to earlier conduct designed to influence his selection of the police's suspect. Second, the fact that Mr Wallace did not "mould his account to match the Crown case" in every respect

¹⁶⁶ Court of Appeal judgment at [566]: **CB 01 page 164.**

¹⁶⁷ Court of Appeal judgment at [670]-[673] and [774]: **CB 01 page 190 - 191** and **CB 01 page 221.**

¹⁶⁸ Court of Appeal judgment at [673]: **CB 01 page 190 - 191.**

¹⁶⁹ Court of Appeal judgment at [673]: **CB 01 page 190 - 191**

¹⁷⁰ Court of Appeal judgment at [924]: **CB 01 page 264 - 265.**

¹⁷¹ Court of Appeal judgment at [926]: **CB 01 page 265.**

sidestepped the fact that he had done so in the one way that truly mattered: by identifying Mr Watson as the lone man, which is sufficient (in and of itself) to prove the Crown case.

- 174 Montage B was inappropriately created and predisposed Mr Wallace to pick Mr Watson as the person he purported to have seen on the Naiad with the deceased. Montage B offered no viable alternatives against which Mr Wallace's selection could genuinely be tested. As such, its probative value was slight, while the unfair prejudice it generated was high. Furthermore, the Police's curation of the hooded eye photograph meant that the unfairness was manifest and was the product of a cynical police ploy, rather than mere oversight or inadvertence.
- 175 This cynical police conduct invokes the necessary judicial oversight of police behaviour that courts have spoken about for some time.¹⁷² As early as 1949, the Court of Appeal in *Jeffries*¹⁷³ made plain that it is wrong to compose a parade in a manner where none of the other participants could realistically be mistaken for the suspect. Montage B contravened this requirement. The Police failed to act in an exemplary manner. Quite the opposite, which is why this Court is required to intervene to protect the integrity of the system.

Was the Court of Appeal right to strictly apply 1990 Tamihere?

- 176 While enactment of s 45 of the Evidence Act 2006 postdates Mr Watson's trial, the reasons for its inception provide important context for this appeal. As the Court of Appeal said in *R v Edmonds*:¹⁷⁴

The expanded procedures in s 45 of the Evidence Act were introduced because of the increasing body of evidence showing that inaccurate identification evidence has been responsible for a number of miscarriages of justice. As noted by the New Zealand Law Commission in its Miscellaneous Paper on eyewitness identification, in research on wrongful convictions in the United States from the year 1900, eyewitness misidentification was a factor in 52 percent of these cases: *Total Recall?: The Reliability of Witness Testimony* (NZLC MP13 1999) at [28]. With the advent of DNA technology, it has also been established that approximately three quarters of the convictions that have been proved wrongful by DNA evidence in the United States were based on faulty eyewitness testimony: see Fraser and others "The Police Line-up and Its Impact on the Justice System" [2009] Crim L Q 333 at 334.

¹⁷² *R v Ormsby*, above n 93, at 313.

¹⁷³ *R v Jeffries*, above n 93.

¹⁷⁴ *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [33].

177 *Edmonds* also noted the concern that juries put “inordinate weight” on identification evidence; “particularly”, but not exclusively, those of strangers after a “fleeting glance”.¹⁷⁵ It also observed:¹⁷⁶

That identification evidence is unreliable is partly because of distortions arising throughout the investigation and collection processes of such evidence and partly because of the inherent unreliability of perception and memory.

178 It is submitted that the exclusion of Mr Wallace’s evidence would plainly be the result if the case was contemporary, and s 45 of the Evidence Act applied. This is because there were failures in relation to four of the seven conjunctive requirements comprising s 45(3)’s “formal procedure” for obtaining visual identification evidence. Specifically, police failed to show Mr Wallace a montage containing “no fewer than 7 other persons who are similar in appearance to the person to be identified”;¹⁷⁷ “as soon as practicable after the alleged offence is reported to an enforcement agency”;¹⁷⁸ to inform the witness that “the person to be identified may or may not be amongst the persons in the procedure”;¹⁷⁹ and to ensure that Mr Wallace’s identification was “the subject of written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure”.¹⁸⁰ These failures would place the burden on the Crown in accordance with s 45(2), which provides:

If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

179 In contrast to the approach that can be taken under s 45(1), which enables a court to take into account “any other evidence in the case which supports or raises concerns about the accuracy of the identification”,¹⁸¹ s 45(2) limits the assessment of reliability to the circumstances in which the identification was made. This Court said in *Harney v Police* that:¹⁸²

All the circumstances in which the witness claims to have recognised the defendant and which may have enhanced or detracted from the quality of the recognition (lighting, distance, duration of observation, eyesight of the witness etc) will need to be

¹⁷⁵ At [34] It singled out the “notoriously unreliable” fleeting glance identifications of strangers.

¹⁷⁶ At [35]. See, too, *R v Turaki* [2009] NZCA 310 at [47], where the Court said research has shown traditional means of helping juries to assess such evidence, such as judicial directions and cross-examination, are of limited assistance in determining whether an identification is accurate or not.

¹⁷⁷ Evidence Act 2006, s 45(3)(b).

¹⁷⁸ Evidence Act 2006, s 45(3)(a).

¹⁷⁹ Evidence Act 2006, s 45(3)(d).

¹⁸⁰ Evidence Act 2006, s 45(3)(e).

¹⁸¹ *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [32].

¹⁸² At [30].

taken into account. The remarks in the leading English case of *R v Turnbull*, although discussing directions to a jury, are apposite to a consideration by a judge under s 45:

“How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

180 *Harney* affirmed that the formal procedures contained in s 45(3) of the Evidence Act are not a safeguard against misidentification. Apposite to this appeal, the Court stated that:¹⁸³

The judge’s mind should also be turned to whether the identification may have been contaminated in some way, either at the time of the offending or later, perhaps because of an opinion as to identity expressed by someone else to the witness.

181 This aptly describes what happened in Mr Watson’s case, on manifold occasions.

182 This Court in *Ellis v R*¹⁸⁴ affirmed that, by dint of s 5(3) of the Evidence Act 2006, the rules of evidence that applied at the time of Mr Watson’s trial in 1999 apply to this appeal. Also relevant is s 206 of the Evidence Act, which provides that:

Identification already carried out

Subpart 6 of Part 2 (identification evidence) does not apply in relation to an identification made before the commencement of that subpart.

183 The specific concern addressed by this Court in *Ellis* is that a literal interpretation of s 5(3) of the Evidence Act would have, “... the 2006 Act applying to proceedings heard before its enactment [which] could see the courts mired in endless appeals based on a failure to apply an Act not yet in force”.¹⁸⁵ It applied s 32 of the Legislation Act 2019 to adopt a more restrictive interpretation.

184 Applying *Ellis*, neither the formal procedures introduced by s 45(3), nor the test for admission of disputed identifications contained in s 45(2), applies to Mr Wallace’s evidence. However, this Court endorsed the point that when it comes to an appeal advanced on the basis of “fresh evidence of changes in practice, knowledge or science, not reasonably available to the trial court, but which is before the court of appeal”,¹⁸⁶ it is “impossible to conduct that review other than through present day eyes”.¹⁸⁷

¹⁸³ At [31].

¹⁸⁴ *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 at [86].

¹⁸⁵ At [82].

¹⁸⁶ *Ellis* at [87].

¹⁸⁷ *Ellis* at [90], citing *R v Fell* [2001] EWCA Crim 696 at [85].

185 In *Fell*, to which this Court referred in *Ellis*, the Court of Appeal of England and Wales cited with approval the following approach that synthesises the law that applied at the time of trial and the contemporary position:¹⁸⁸

This court has to decide whether these convictions are safe or unsafe. To do that we must apply the substantive criminal law that was in force at the time of the trial in 1988. However, we judge the conduct of the investigation of the case, the conduct of the trial, the directions to the jury and the reliability of the evidence on which the jury acted in accordance with the standards that this court now applies, c.f. *R v Mills* [1998] AC 382 per Lord Hutton at page 397 C-G and *R v Bentley* not reported but decided on the 30th July 1998 by this court presided over by the Lord Chief Justice."

186 Relevant to the instant appeal, the Court of Appeal in *Fell*, in accordance with earlier authority, applied the modern law regarding the admissibility of statements; *not* that in play at the time of the appellant's trial.¹⁸⁹ This seemingly contradicts the approach adopted by this Court at [86] of *Ellis*. However, the point that the assessment undertaken by an appellate court takes place "in accordance with the standards that this court now applies" directly confronts the danger of applying an outmoded legal test, and thus entrenching a miscarriage of justice.

187 There is a pathway by which the reasoning in *Fell* might be applied, which is described in the Court of Appeal's decision in *Taylor v R*.¹⁹⁰ As the Court said, "It is a general principle of the common law that although a judgment declares the law retrospectively as well as prospectively, a litigant who once lost a case she would have won had the law been understood then as it is understood now, cannot go back and start again".¹⁹¹ However, it described the "principle exception", which is where a litigant's rights have not yet been finally determined, because a right of appeal still lies; thus the finality principle does not apply.¹⁹² This exception arguably applies to Mr Watson.

188 There is a broader principle in play. The Court in *Taylor* cited with approval what was said by the English and Welsh Court of Appeal in *R v Cottrell*,¹⁹³ which is that:¹⁹⁴

The declaratory theory of the common law appears remote from the practical realities which should underpin the administration of criminal justice. Nevertheless the common law is not fossilised and one of its strengths is that it is indeed flexible and capable of development, and misconceptions and misunderstandings of legal principles can and should where necessary be corrected and elucidated.

¹⁸⁸ *Fell* above at [86].

¹⁸⁹ At [97].

¹⁹⁰ *Taylor v R* [2018] NZCA 498, [2019] 2 NZLR 38. The Court of Appeal was addressing whether to grant leave to appeal out of time.

¹⁹¹ At [4].

¹⁹² At [5].

¹⁹³ *R v Cottrell* [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

¹⁹⁴ *Taylor* at [14], quoting *Cottrell* at [60].

189 Reverting to a 1999 lens. The law that applied at the time of Mr Watson’s trial is described in 1990 *Tamihere*.¹⁹⁵ There is a key distinction between the law that applied at the time of Mr Watson’s trial and s 45(2) of the Evidence Act. The Court in *Tamihere* endorsed an approach that enables consideration both of the circumstances in which the purported identification was made that bear on the quality of the opinion given by the witness (an application of the *Turnbull* factors), as well as the “cumulative effect of the evidence against the accused”.¹⁹⁶ In this respect, the law in the 1990s mirrored what is now captured in s 45(1) of the Evidence Act.

Why the Court of Appeal was wrong to take into account other evidence in its assessment of reliability

190 The Court of Appeal judgment conflated the distinct processes associated with determining admissibility and the downstream application of the proviso in s 385 of the Crimes Act 1961, which is only enlivened *if* an error capable of affecting the result is identified *and* it is not a fundamental error such as to render the trial unfair.¹⁹⁷ Notwithstanding that the Court did not expressly apply the proviso, the structure of the judgment suggests that it approached the appeal on the basis of explaining why it was sure of Mr Watson’s guilt by conducting a wide-ranging examination of *all* of the evidence presented by the Crown. While 1990 *Tamihere* directs that the “cumulative effect of the evidence against the accused” be assessed, it is an approach at odds with the contemporary test for a miscarriage of justice.

191 The Court of Appeal’s application of 1990 *Tamihere* focused on the probative value of Mr Wallace’s evidence. However, its conclusion that Mr Wallace’s identification was sufficiently reliable to be heard by the jury is plainly wrong.¹⁹⁸ The Court of Appeal’s analysis regarding the other distinct “material” basis for exclusion, unfairness, which is focused on the maintenance of control over general police procedure, was perfunctory and also plainly wrong.¹⁹⁹

192 It is tolerably clear that the Court of Appeal treated 1990 *Tamihere* as establishing a high threshold for exclusion; more stringent than that under the Evidence Act.²⁰⁰ It is respectfully submitted that 1990 *Tamihere* was wrongly decided. Given what

¹⁹⁵ *R v Tamihere* [1991] 1 NZLR 195, (1990) 7 CRNZ 594.

¹⁹⁶ At 601 and 602.

¹⁹⁷ Court of Appeal judgment at [738]: **CB 01 page 207 - 208**.

¹⁹⁸ Court of Appeal’s judgment at [776]-[912]: **CB 01 page 222 - 261**, under the heading “Analysis of other supporting evidence”.

¹⁹⁹ *Tamihere* at 602-603.

²⁰⁰ Court of Appeal judgment at [757]: **CB 01 page 216**.

is known about the contaminative risks of show ups, the trampers' identifications were palpably unreliable. Treating the facts and result in *Tamihere* as an admissibility benchmark in the way that the Court of Appeal did serves to accentuate rather than mitigate the error in approach. The short point is that the taints in Mr Wallace's identification went far beyond those in 1990 *Tamihere* in any event. Mr Wallace's identification suffers from the single photograph displacement; explicit police pressure to adopt Mr Watson as the suspect; a significant delay during which there was also sustained media promotion of Mr Watson as the suspect; and a montage that failed to serve its purpose of providing other viable options for Mr Wallace to choose.

193 A recent example demonstrates how the Court of Appeal's decision stands at odds with the approach taken under the Evidence Act when a police officer influences a witness to identify a specific suspect. In *X v R*,²⁰¹ his Honour Andrew J allowed an appeal following a referral by Te Kāhui Tātari Ture | Criminal Cases Review Commission because the witness only identified the appellant *after* she had received an indication that he was the suspect. The Crown accepted the appeal must be allowed.

194 If exclusion to maintain effective control over police procedure was not required in Mr Watson's case, then it is difficult to envisage an example when the discretion would be exercised. The evidence should have been excluded on this basis.

195 A key aspect to the Court of Appeal's judgment was the conclusion that:²⁰²

This is not a case where misplaced reliance on an overconfident eyewitness appears to be the fulcrum on which the jury's verdict turned.

196 It is submitted that this conclusion is sharply at odds with what happened at Mr Watson's trial. The following points are made:

- (a) Entirely missing from the Court of Appeal's analysis is the fact that Mr Wallace was the *only* person who identified Mr Watson as the man who accompanied Ben and Olivia when they left the water taxi. The Crown's case was capable of being proved solely by Mr Wallace's evidence.
- (b) The Crown began with Mr Wallace's evidence and dedicated a substantial portion of its closing address to persuading the jury why his identification of Mr Watson using Montage B was reliable. That undermines the

²⁰¹ *X v R* [2024] NZHC 467, 22 April 2024.

²⁰² Court of Appeal judgment at [932]: **CB 01 page 266**.

conclusion that Mr Wallace’s evidence was not the “fulcrum” of the Crown’s case. This is made clear by the submission that:

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 comment at the end of the submission did not detract from the invitation that the jury begin and end its deliberations with Mr Wallace’s identification. The prosecutor would not have made the submission if its case was that Mr Wallace’s identification was merely a moderately probative link in a chain of evidence.

- (c) The focus that the Crown brought to bear on Mr Wallace’s evidence explained the way in which Mr Watson’s trial counsel responded in his closing address.
- (d) During its deliberation, the jury asked to have Mr Wallace’s evidence describing the man in the garden bar read to it, which included the reference to the man’s “untrustworthy” eyes and his presence on the jetty before the witness commenced the fateful water taxi journey.²⁰³ This tends to reinforce the importance of the identification using Montage B, given the linkage that Mr Wallace drew between his description of the lone man’s eyes and Mr Watson’s photograph.²⁰⁴

197 As discussed earlier, it is submitted that the Court of Appeal undervalued in its analysis that proven miscarriages of justice have arisen because jurors relied upon a single misidentification to find guilt. It follows that an approach that enables a court to draw upon evidence extrinsic to the circumstances in which the identification was made by a witness resulting from defective procedures does not square up to the known risk of miscarriage. It will result in asymmetry if the Court endorses an approach to the assessment of reliability that conflicts with that contained in s 45(2) of the Evidence Act because of the age of the case. The risk of miscarriage is static, even if the procedures that are designed to secure a reliable identification have improved.

²⁰³ NOE 2155 and 2160: **CB 03 page 2155** and **CB 03 page 2160**.

²⁰⁴ COA 310: **CB 02 page 310**. The jury asked, “can we please have the evidence of Guy Wallace re-read regarding seeing a man in the garden bar and the associated references to the pub pet rigger of beer in the fridge”. The jury also asked to hear Neil Watt’s evidence again. He was the security officer who asked a man to climb off a water taxi before Mr Wallace took his naiaid out with the two couples.

198 An appellate review conducted through “present day eyes” necessarily recognises that the approach adopted in pre-Evidence Act decisions, like 1990 *Tamihere*, is not reflective of the special risks associated with misidentification.²⁰⁵

199 Tipping J said in *McIntosh*:²⁰⁶

[t]he proposition that some evidence which ex hypothesi is highly prejudicial and of little probative value to the extent that it ought to go out if standing alone can be saved because there is other unchallenged evidence which tends to prove the same point, has in my view some danger of circularity. How is one ever to know if one leaves the objectionable evidence in whether it might have been that evidence which finally tipped the balance in favour of the Crown and that may be so in spite of the giving of any necessary warnings. There will then be a risk that the final nail will be one of prejudice not proof.

200 As Tipping J implicitly recognised, identification evidence holds special dangers of prejudice.

Why the Court of Appeal is wrong about the impact of Mr Wallace’s evidence on the jury

201 The starting point is that the jury was not aware of one, and possibly two, exculpatory non-identifications of Mr Watson by Mr Wallace.

202 The Court of Appeal appeared to suggest that Mr Watson’s trial counsel made the tactical decision not to adduce evidence that Mr Wallace was shown a single photograph of the appellant. This was notwithstanding the evidence from Mr Watson’s junior trial counsel, Nicolette Levy KC, that the defence was not aware that Mr Wallace was shown a single photograph, and they would have used it had they known. The Court of Appeal rejected Ms Levy’s evidence on the basis that what she said was not replicated in affidavits sworn by senior trial counsel, who were competent and compellable.²⁰⁷ This was notwithstanding the fact that Ms Levy testified that she affirmed the accuracy of her recollection with senior counsel. Four points are made:

- (a) The Court’s decision to doubt the veracity of Ms Levy’s evidence on the basis that she might not have been privy to the tactical decisions made by senior counsel does not reflect the reality of trial preparation. Taking a hardline on admissibility was not fair. If the Crown truly doubted that senior counsel had endorsed Ms Levy’s recollection, it could have applied to cross-examine her or both of Mr Watson’s senior trial counsel. Instead, it relied on procedure over substance to resist admission.

²⁰⁵ *Ellis* at [90].

²⁰⁶ *R v McIntosh* above at p 13.

²⁰⁷ Court of Appeal judgment at [581]: **CB 01 page 167 - 168.**

- (b) That trial counsel was not aware of the non-identification is cogently affirmed by the fact that Mr Davidson wrote to Crown Law *after* the trial advising that the information was revelatory.²⁰⁸
- (c) The Court’s conclusion that it was “clear” that the defence had disclosure of the fact that Mr Wallace was shown a single image does not mean, given counsel’s letter to Crown Law, that it *knew* it. It begs the question why the letter was written, if reference to the single photo was omitted for tactical reasons.
- (d) This was not trial counsel error.²⁰⁹ As this Court said in *R v Sungsuman*, it is often possible to analyse a ground involving the admission or absence of evidence without examining the quality of trial counsel’s conduct.²¹⁰ That aligns with the primary function of an appeal, which is to determine whether there was a miscarriage of justice, which is focused on outcome, and where the cause is simply context.²¹¹ It was submitted before the Court of Appeal that the Crown had a duty to introduce all exculpatory non-identification evidence. It did not meet that duty at trial, or, for that matter, before Heron J when the admissibility of Montage B was challenged. On the latter point, contrary to what the Crown submitted in the Court of Appeal, the issue was plainly *not* “fully litigated” at the pre-trial hearing.²¹² The Court of Appeal viewed the error from the wrong direction when it focused on defence counsel error.

203 Building on the point at (d), the Crown sought to downplay the importance of Mr Wallace’s non-identification of Mr Watson when shown imagery of him by the media in February 1998 by emphasising its poor quality. It would have been a far more formidable task to explain away two non-identifications, which tends to explain why the Crown did not introduce the fact that Mr Wallace was shown the photograph in January 1998.

204 The Court of Appeal was dismissive of the fact that Mr Wallace was shown a single photo by police, concluding it “was unlikely to have had a material impact over and above the other material before the jury”.²¹³ This was speculative and

²⁰⁸ The relevant portion of the letter is set out in the Court of Appeal’s judgment at [582]: **CB 01 page 168.**

²⁰⁹ Court of Appeal judgment at [762]: **CB 01 page 218 - 219.**

²¹⁰ *R v Sungsuman* [2005] NZSC 57, [2006] 1 NZLR 730.

²¹¹ At [68]-[69]. This Court said in *R v Scurrah* CA159/06, 12 September 2006 when summarising the effect of *Sungsuman*, that the characterisation of trial counsel’s conduct is subservient to the obligation to assess “trial process” to determine whether the alleged error could have affected the outcome.

²¹² Court of Appeal judgment at [744]: **CB 01 page 210.**

²¹³ Court of Appeal judgment at [761]: **CB 01 page 218.**

assumed that the jury would have treated the event in isolation, rather than assessed the effect on reliability of two non-identifications.

- 205 Another point requires emphasis. The Court of Appeal made the valid point that Mr Wallace was a “crucial” witness, but “also a challenging one”.²¹⁴ It postulated that the extent of the challenge to the reliability of Mr Wallace’s identification using Montage B comprised “a deliberate defence strategy to avoid undermining Mr Wallace’s credibility in the eyes of the jury” in relation to his steadfast evidence that he had dropped Ben, Olivia and the lone man to a ketch.²¹⁵ What the Court’s analysis overlooked was that the approach taken by defence counsel reflected the ruling made by Heron J in relation to Montage B. It is not speculative to state that the approach taken at trial would have been altogether different had the Judge excluded the identification.
- 206 There were self-evident risks associated with introducing Detective Fitzgerald’s interview on 11 January with Mr Wallace. Its value to undermine the reliability of Mr Wallace’s subsequent identification was offset by the risk associated with the jury being swayed by the officer’s forceful opinion that Mr Watson was the lone man. This reinforces why the Judge was wrong not to exercise his gatekeeping discretion and exclude Mr Wallace’s identification. The jury was deprived of this information that substantially added to the defence case that Mr Wallace’s identification was the contrived product of moral pressure; not spontaneous recognition based on genuine memory.
- 207 The Court of Appeal described this case as being an example of the notorious discrepancies and inaccuracies contained in descriptions provided by eyewitnesses. However, the Crown unfairly attempted to blunt the anomalies between Mr Watson’s objective appearance on New Year’s and how he was described by Mr Wallace. The prosecutor undermined two key features of the defence case:
- (a) First, the prosecutor’s submission to the jury was that Mr Watson may have changed his appearance between 1 January 1998 and when he was photographed for Montage B on 12 January. Indeed, it was a submission that was directly contradicted by the evidence adduced describing Mr Watson’s appearance on New Year’s Day, and one for which there was no evidential foundation.

²¹⁴ Court of Appeal judgment at [766]: **CB 01 page 219.**

²¹⁵ Court of Appeal judgment at [762]: **CB 01 page 218 - 219.**

- (b) Second, the Crown went so far as to say in closing that any reliance on the *Mina Cornelia* photo “to rule Mr Watson out would be without any real foundation at all”.²¹⁶

- 208 It is submitted that the Court of Appeal was wrong that Mr Ruhfus’s evidence does not cogently counteract the way in which the Crown exploited the quality of the *Mina Cornelia* photograph. The Judge’s brief comment that Mr Watson appeared clean-shaven was no substitute for what the Court described as “reasonably compelling” evidence that highlights the inaccuracy in the Crown’s submission.²¹⁷ Nor, given the importance that facial hair took at trial, is it an answer that facial hair descriptions tend to be “almost always inaccurate”.²¹⁸ The Court of Appeal was right that what the *Mina Cornelia* photo “actually showed ... was ultimately a matter for the jury”.²¹⁹ The Crown’s submission affected that assessment.
- 209 The analysis in these submissions undermines the Court of Appeal’s conclusion that the “weaknesses of Mr Wallace’s identification were squarely before the jury”,²²⁰ and that the jury was “alive to the key factors [which the Court described as the *Mina Cornelia* photograph, media exposure, the compusketch and the three-and-a-half delay before Mr Wallace was shown Montage B] tending to suggest Mr Wallace’s identification of Mr Watson from Montage B could not be relied upon”.²²¹ The Court, however, later appeared to reflect upon the Law Commission’s research described in *Edmonds* that jurors “have difficulty assessing the reliability of such [identification] evidence”²²² when it said that, “Had the trial been held today, with the benefit of expert evidence, the jury could have been better informed about the potential contaminating effect of the media coverage in [particular]”.²²³ It excused the consequentiality of this by “putting to one side the fact of identifications from Montages”, and relying instead upon the remainder of the evidence.
- 210 Given what is known about the way jurors approach eyewitness evidence, it is doubtful that those at Mr Watson’s trial put Mr Wallace’s identification to one side in the way that the Court did. Especially given the Crown intertwined Mr Wallace’s evidence with the evidence of others. As the Court recognised,

²¹⁶ Crown closing, COA 191: **CB 02 page 191.**

²¹⁷ As the Court of Appeal held at [780]: **CB 01 page 223.**

²¹⁸ Court of Appeal judgment at [791]: **CB 01 page 225.**

²¹⁹ Court of Appeal judgment at [782]: **CB 01 page 224.**

²²⁰ Court of Appeal judgment at [773]: **CB 01 page 221.**

²²¹ Court of Appeal judgment at [761]: **CB 01 page 218.**

²²² *Edmonds* above at [34].

²²³ Court of Appeal judgment at [843]: **CB 01 page 244.**

contamination, which was the central reliability concern, is something that is likely to require the assistance of an expert. There were triple flaws. The evidence that the jury heard about the contaminative events to which Mr Wallace was subjected was incomplete. Second, the identification was unreliable and the unfair prejudice clearly outweighed the probative value. There was significant unfairness in relation to the identification. Thirdly, the jury was provided with no help whatsoever to appreciate the relevance of contamination. All three reasons affirm why Mr Watson was the victim of a miscarriage of justice.

Fundamental error – an unfair trial

211 The admission of Mr Wallace’s unreliable identification evidence rendered the trial unfair. This was a fundamental error, precluding any application of the proviso. In any event, even if the error were not fundamental, the proviso remains unavailable as the trial turned heavily on the jury’s assessment of witness credibility and reliability, and Mr Watson’s guilt is not inevitable on a retrial.

Relevant law

212 If the Court identifies a miscarriage of justice, it must determine whether it is open to apply the proviso in s 385(1), which enables it to dismiss the appeal only if it is sure beyond a reasonable doubt of the appellant’s guilt.²²⁴ The proviso’s sparing use is required to ensure compliance with the right enshrined in s 25(h) of the New Zealand Bill of Rights Act 1990.²²⁵

213 This Court in *Matenga* held that the proviso may be applied only if the appellant’s guilt at a further trial would be, “inevitable, in the sense of being the only reasonably possible verdict”.²²⁶ Writing for the Court, Blanchard J said that the Court “must itself feel sure of the guilt of the accused”.²²⁷

214 *Matenga* distinguished between a case where a jury would be entitled to convict from one where guilt is inevitable.²²⁸ It agreed with the High Court of Australia in *Weiss v R*²²⁹ that it is not for an appeal court to speculate about what the jury at the trial might or might not have done.²³⁰ Importantly, it departed from *Weiss* by holding that the Court must set aside the jury’s guilty verdict because it “may have

²²⁴ *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145; *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [31]–[36].

²²⁵ *Haunui v R* [2021] NZSC 153, (2021) 1 NZLR 189 at [68].

²²⁶ *R v Matenga*, above n 224.

²²⁷ At [31].

²²⁸ At [35].

²²⁹ *Weiss v R* (2005) 224 CLR 300.

²³⁰ At [37].

been influenced by the existence of the miscarriage”.²³¹ However, it altered its conclusion in *Lundy*, when it said that, “[t]he appellate court may take the jury’s decision into account when assessing whether an error amounted to a miscarriage and whether it was incurable”.²³²

215 This Court said in *Lundy* that where the miscarriage of justice arises from the wrongful admission of evidence, then it must feel sure that a guilty verdict was inevitable had the trial proceeded without the evidence being called.²³³

216 This Court in *R v Condon* endorsed the point made by the Privy Council in *R v Horse*,²³⁴ which is that the description in *Randall v R*²³⁵ of the threshold that must be reached for a trial to be unfair “is one of general application”. The range of factors that might render a trial unfair is not closed.²³⁶ *Condon* provides that:²³⁷

A verdict will not be set aside merely because there has been an irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair, as Lord Bingham made clear in a passage in *Randall*, which was referred to with approval in *Horse*. He said that it is at the point when the departure from good practice is ‘so gross, or so persistent, or so prejudicial, or so irremediable’ that an appellate Court will have no choice but to condemn a trial as unfair and quash the conviction as unsafe. In *Horse* it was said that this approach is one of general application.

217 It is settled that a trial can be rendered unfair if the jury hears wrongly admitted evidence.²³⁸ This Court was clear in *Lundy* that this is the second consideration, should the appellate Court conclude that it is sure of the appellant’s guilt.²³⁹ In *Guy v R*,²⁴⁰ Elias CJ and Glazebrook J approved the approach taken by the High Court of Australia in *Wilde* and observed:

The threshold on which it may be concluded that a trial is unfair is set at a high level; the operation of the proviso is “not to be stultified”. But, in considering whether a trial is indeed fair, the inquiry is on the right to fair trial itself, not the proviso question whether the appellate court is satisfied of the guilt of the accused on the basis of the evidence.

218 Whether the wrongly admitted evidence has made the trial unfair depends on an assessment of its significance in the context of the trial.²⁴¹ This Court in *Lundy* described an “incurable error” threshold and held that:²⁴²

²³¹ At [33].

²³² *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [29].

²³³ *Lundy* at [326].

²³⁴ *R v Horse* [2006] 1 NZLR 433.

²³⁵ *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 (PC).

²³⁶ *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [26].

²³⁷ At [77]–[78].

²³⁸ Which was the issue considered in both *Wilde v R* (1988) 164 CLR 365 and *Horse*.

²³⁹ *Lundy* at [365].

²⁴⁰ *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [35].

²⁴¹ The Court of Appeal in *Lundy* at [376] and this Court’s judgment at [38]–[39].

²⁴² At [42]. Footnotes omitted.

The authorities establish that when considering the significance of inadmissible evidence in the context of the trial, an appellate court may inquire into whether the evidence went to an issue on which the verdict turned, how strong was the Crown case otherwise, how cogent or prejudicial was the evidence and whether it was met by defence evidence, what impact the inadmissible evidence had on the conduct of the defence case, how counsel handled the evidence, and whether the trial judge's directions mitigated or cured the irregularity. As explained above, it may be possible to take into account what the actual jury did with the evidence, if that is ascertainable.

219 Citing other jurisprudence, this Court in *Tamihere v R* said:²⁴³

There is “no rigid formula” or “single universally applicable description” for what constitutes a fundamental error. This Court in *Lundy* accordingly observed there was no “taxonomy of errors”.

220 In *Tamihere*, this Court cited *R v Southon* as a helpful illustration of a case where the wrongful admission of evidence was found to have been a fundamental error.²⁴⁴ *Tamihere* was, itself, an example of a fundamental error, given the admission of perjured cellmate evidence. *Tamihere* also analysed the inadmissible evidence in relation to the factors identified in [42] of *Lundy*, identified above.

The evidence of Guy Wallace

221 The following section repeats points already made, but they require emphasis. The Crown case was a circumstantial one. However, central to that circumstantial case was Mr Wallace's identification of Mr Watson, being the most direct evidence of guilt presented. The identification was highly important evidence going to the key issue. The prosecutor did not avoid the temptation to invite the jury to decide that it was enough in its own right to prove the Crown case. It went to the very root of the trial. As the Court in *Tamihere* stated:²⁴⁵

[w]e accept that in cases where the evidence is peripheral, or of minor significance to the case, the conclusion that no fundamental error has occurred. As Elias CJ and Glazebrook J said in *Guy v R*, it will be “a question of degree”. Here the evidence was of an alleged confession and a more thorough consideration of the matters identified in *Lundy* was necessary.

222 Mr Wallace's identification of Mr Watson as the murderer was not peripheral or of minor significance to the Crown case.

The effect of the evidence

223 The identification of Mr Watson by Mr Wallace was treated by the Crown as evidence of guilt. It was, singularly, a piece of evidence capable of establishing the Crown case.

²⁴³ *Tamihere v R* [2026] NZSC 22 at [73], footnotes omitted.

²⁴⁴ *Tamihere* at [75] – [77].

²⁴⁵ *Tamihere* at [92], footnotes omitted.

- 224 *Edmonds*, already cited, makes it clear that jurors treat evidence of the identification of the defendant as weighty evidence and give it disproportionate importance.²⁴⁶
- 225 Mr Wallace's identification was also said to corroborate the two hairs found on the tiger blanket. Whilst there were (and remain) significant frailties with that evidence, the Crown was able to lend weight to its cogency in reliance on the Wallace identification.²⁴⁷ This was not factored into the Court of Appeal's analysis.
- 226 The importance of Mr Wallace was immediately drawn to the jury's attention in the Crown's opening address. The prosecutor referred to "a man called Guy Wallace"²⁴⁸ who had been a water taxi driver who had dropped off a young couple consistent with Ms Hope and Mr Smart. In opening, the prosecutor said that "[f]rom what Guy Wallace told the police this person is likely to be the single man who accompanied [Olivia Hope and Ben Smart] onto his yacht in the early hours of 1 January 1998."²⁴⁹
- 227 The prosecutor's closing address dealt with Mr Wallace's identification at length. The very experienced prosecutor said "[s]o I suppose a good starting point would be Guy Wallace wouldn't it."²⁵⁰ Then the prosecutor presented the Crown argument for Mr Wallace being wrong about the boat but right about the man.²⁵¹
- 228 The prosecutor then said:

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.

²⁴⁶ McQuiston-Surrett, D., Douglass, A. B., & Burkhardt, S. G. (2008), "Evaluation of facial composite evidence depends on the presence of other case factors", *Legal and Criminological Psychology*, volume 13, issue 2, pages 279–298.

²⁴⁷ Crown closing address: **CB 02 page 247**.

²⁴⁸ Crown opening address: **CB 02 page 141**.

²⁴⁹ Crown opening address: **CB 02 page 149**.

²⁵⁰ Crown closing address: **CB 02 page 180**.

²⁵¹ It does, it is submitted, need to be remembered that the defence does not need to prove that Mr Wallace is wrong about the boat. It is merely for the defence to raise a reasonable doubt. If it was a reasonable possibility that the Ms Hope and Mr Smart were dropped off at a ketch, then that would be a reasonable doubt.

229 This prominent passage is a clear indication of how central Mr Wallace's evidence was to the Crown case. As the prosecutor made clear, Mr Wallace's evidence was sufficient on its own to establish the Crown case. The fact that the Crown later stated it did not "hang its case" on Mr Wallace is not determinative of whether the wrongful admission of his identification evidence amounted to a fundamental error.

230 The closing address then continued to deal with Mr Wallace's evidence in a detailed fashion for a number of pages. After that considerable detail, the prosecutor links Mr Wallace back to the montage identification of April 1998. The prosecutor said:²⁵²

And so dealing with this issue of identification, Mr Wallace was shown a montage later in April 1998 and he was asked by the Police if he could see and identify amongst the group of people whose photographs were on that montage the man who had been, he'd been talking about, who he interacted with on New Years Eve. Now remember he had already made statements describing the man, he made a series of statements to the Police describing his appearance, and he'd already been asked to assist the Police in the preparation of an identikit picture which he'd done as early I think as the 9th of January, exhibit 154.

231 The prosecutor then used the positive identification of Mr Watson from Montage B to undermine another plank of the defence case, namely that he had not identified Mr Watson in a media video. The prosecutor continued and said:²⁵³

So in April 1998 he was shown this montage B and he identified, in my submission to you, number 3, a picture of Mr Watson as the man he had dropped off with Ben and Olivia. Now the photograph as you know wasn't taken on New Years Eve, that is the photograph of Mr Watson on montage B, it was taken in January, several weeks after, a couple of weeks after, so it was contemporary in one sense but it wasn't entirely contemporary was it. In the photograph Mr Watson's hair is shorter than Mr Wallace's recollection of the man's hair on the night. In the photograph the man does not have the same amount of stubble as Mr Wallace recalled Mr Watson had on the night. But Mr Wallace said his eyes are similar, the partially closed look was familiar to him, and you might think that the photograph wasn't taken or was unlikely to be taken when Mr Watson was affected by alcohol. So in the photograph, which was presumably taken when he was sober and he's got this sort of slightly semi-closed eye look about him, and that's something that Mr Wallace recalled from the night. Mr Wallace said that when he looked at montage B he was initially attracted to photo 5, but discovered that and concluded having looked at it that he was "pretty definite" that the man in photo 3 is the man on his water taxi.

232 There are, of course, other passages that highlight the centrality of the Wallace identification, but what has been reproduced in these submissions sufficiently makes the point: Mr Wallace's identification was integral to the Crown case.

233 The Judge, in his summing up, also said:²⁵⁴

Now was it Watson who was on Wallace's boat. Was it Watson who was being driven by Wallace in the naiaid. Wallace says it was. He identified Watson from a photograph and then identified him as the person drinking at the garden bar and, apparently had

²⁵² Crown closing address: **CB 02 page 188.**

²⁵³ Crown closing address: **CB 02 page 189.**

²⁵⁴ Judge's summing up: **CB 02 page 276.**

some liquor stored there on behalf. That was the person also that Mr Cronin identified as Watson.

234 Mr Wallace’s identification was the first key aspect of the Crown case that the defence focussed on in its closing address.²⁵⁵

235 The final reliable indicator of the fundamental nature of Mr Wallace’s identification is its treatment by the Court of Appeal in 2000. The Court said:²⁵⁶

[...] in closing the Crown placed considerable weight on Mr Wallace’s identification of the appellant, analysing his evidence in some detail.

[...] It therefore becomes apparent that the Crown, defence, and the trial Judge all regarded Wallace as having made a visual identification of the appellant. It is beyond question that the case against him depended substantially on the correctness of those identifications, because if they were incorrect the Crown case was seriously undermined. 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 (in some cases weakened) by other evidence. In those circumstances it was incumbent on the Judge to direct in accordance with s344D, notwithstanding an indication from the defence such a direction was not desired.

236 The fact that the Judge attempted to give a warning regarding Mr Wallace’s identification evidence (the criticisms of the directions in relation to the identification evidence are dealt with below), reinforces that Mr Wallace’s identification was central to the Crown case. The warning in s344D of the Crimes Act 1961 (as was applied at the time of trial) was only triggered when the case against a defendant depended “wholly or substantially on the correctness of one of more identifications.”

237 The Crown strategically integrated Mr Wallace’s identification of Mr Watson (especially his “pretty definite” and “very sure” identification of Mr Watson’s eyes and face in Montage B) to bind several other strands of circumstantial evidence.

238 In relation to the hair evidence, the prosecutor said:²⁵⁷

And if you get to the point of saying well those hairs didn’t get there by some indirect means of transfer, they were there from Olivia’s head, then Olivia was on his boat and the Wallace identification was right, and he must know what happened to her. And he must have killed her, that’s what that all means.

239 This highlights the way in which the inadmissible identification was intractably merged with other Crown evidence.

240 The prosecutor also linked the identification with the prisoner informant evidence when he said:²⁵⁸

²⁵⁵ Defence closing address: **CB 04 page 527.**

²⁵⁶ *Watson v R* CA384/99, 8 May 2000: **CB 02 page 328.**

²⁵⁷ Crown closing address: **CB 02 page 247.**

²⁵⁸ Crown closing address: **CB 02 page 250.**

Well as I say, don't look at this in isolation. You know from other evidence that there is evidence which clearly indicates that Olivia was seen with this man. If she was with him on his boat, then that's an obvious way and means by which her hair got there. Now it's not just the hairs which of course are incriminating on this boat. Mr Watson seemed to be concerned about the fact that the Police had found the hairs on his boat. Do you remember the evidence of the first of the witnesses from, had been in prison with him. He said that Watson had said to him about the Police having found a piece of hair and that sort of freaked him out. He would have been freaked out wouldn't he, because he thought he'd tidied everything up, he didn't want to leave anything behind, no wonder he was going to get "freaked out."

241 In addition to highlighting the centrality of Mr Wallace's identification to the prosecution case, this passage illustrates the way in which the Crown integrated Mr Wallace's identification with other evidence of dubious reliability and admissibility.

242 The passage that follows underscores the fundamental nature of Mr Wallace's evidence and the Crown integration of it through the other strands of its case:²⁵⁹

Now I suppose that all means, when you put Mr Wallace and Amelia Hope together, that if Mr Watson wasn't the man on the Naiad, then the man on the Naiad just happened to be a man alone, like Mr Watson. Just happened to have a boat, a yacht, like Mr Watson. Just happened to have moored his yacht out off the jetty, like Mr Watson. Was the same age range, late twenties, early thirties, as Mr Watson. Had an appearance which was so like Mr Watson's and had misled Mr Wallace into thinking it was the same man, and also had this distinctive hairline that Amelia Hope recognised. Doesn't that also mean something else? It means that two men, because this is where it takes us doesn't it, two men with those features must have been moored out alongside one another, or pretty close to it. Were they twins or something? How can you explain it in a commonsense sort of way and still allow for this person to be someone other than Mr Watson. That is what the defence is asking you to swallow.

243 The rhetoric employed by the prosecutor when he opined that the Crown had not "just hung its case" on Mr Wallace's identification was a rhetorical flourish. Prosecutors routinely downplay reliance on any single piece of evidence, whether or not it is actually load-bearing, because conceding that a case turns on one item invites the defence to focus all its fire there. Saying that the Crown has not "just hung its case" is a standard hedge that protects the argument regardless of the evidence's real weight. It is advocacy positioning, not a factual concession about materiality. This Court should not take the prosecutor's proviso added to his submission about the centrality of Mr Wallace's evidence as neutralising in its effect, as the Court of Appeal did.²⁶⁰

244 The Crown relied upon the evidence of Mr Wallace's identification because it placed Mr Watson, Ms Hope and Mr Smart together on *Blade*. The identification was utilised by the Crown to support the hair evidence and the other key aspect to its case. Not all circumstantial strands are created equal. The identification evidence of Mr Wallace was prominent in the Crown case, and it should not have

²⁵⁹ Crown closing address: **CB 02 page 196**.

²⁶⁰ Court of Appeal judgment at [1068].

been admitted. It is a logical conclusion that the jury must have prominently relied upon it in its decision making because, simply put, if it were not Mr Watson with Ms Hope and Mr Smart in the water taxi, then the appellant would have been acquitted. “[E]nd of story”, to adopt the phrase used by the prosecutor in his closing.

Strength of the Crown case without the inadmissible identification evidence

- 245 Defence counsel apprehended that the Crown case was, in essence, about three matters: Mr Wallace’s identification, the two hairs and the prison informant evidence. There was other evidence discreditable to Mr Watson, but it was equivocal and, whilst invoking suspicion, could not do more than modestly improve the Crown’s position and none of the other evidence placed Ms Hope or Mr Smart on Mr Watson’s boat
- 246 None of the remaining evidence is, in the words of *Southon* (as cited in *Tamihere*), “effectively unanswerable.” The appellant’s trial was a real contest. There was no inevitability of verdict.

Cogency and prejudice

- 247 There were frailties in Mr Wallace’s identification evidence, which were explored by the defence. It is readily accepted that "the effect of the evidence has to be considered in the context of the overall trial." As already submitted, the unfair prejudice arising from the wrongful admission of Mr Wallace’s identification of the appellant is profound. That evidence was, in and of itself, capable of proving the Crown case. Although the Court of Appeal noted that there were other strands of evidence, the fact remains that inadmissible evidence was capable of proving the Crown case on its own. Further, the jury needed to accept Mr Wallace’s evidence as correct in order to convict Mr Watson. There was no alternative theory leading to conviction that did not depend on acceptance of Mr Wallace’s identification.
- 248 The Crown linked the inadmissible evidence to the other two crucial strands of the Crown case, namely the hairs and the prison informants. This cross-corroboration is a factor that also led the Court of Appeal to say “the above analysis is generally corroborative of his identification evidence and supports the admissibility of his identification of Mr Watson from Montage B.”²⁶¹

²⁶¹ Court of Appeal at [844]: **CB 01 page 245.**

- 249 The closing address clearly positions Mr Wallace’s identification as an important part of the Crown case. Considerable time was taken to carefully analyse the circumstances of the identification. The prosecutor emphasised that Mr Wallace had numerous, prolonged opportunities to observe the suspect’s face throughout New Year’s Eve, laying the groundwork for the submission that Mr Wallace’s identification was reliable.
- 250 The prosecutor also spent time discussing the circumstances of the montage identification. The prosecutor spent time repeating key identification phrases by Mr Wallace that he was “pretty definite” and ultimately “very sure” about photo three, pointing out that the eyes in the photo had a “very mistrusting look” that matched his memory of the suspect. The cumulative effect of such statements is obvious.²⁶²

Impact on defence

- 251 This heading refers to whether the inadmissible evidence was met by defence evidence, the impact on the conduct of the defence and how counsel handled the matter.²⁶³
- 252 It is accepted that trial counsel were able to expose, both through cross-examination and in closing, some of the frailties of Mr Wallace’s identification evidence. Their efforts, however, were not sufficient to have fatally undermined the identification. As has been repeated, jurors place disproportionate weight on identification evidence. There is nothing to dispel the risk the jury gave Mr Wallace’s evidence dispositive weight.

Did judicial directions cure any defect?

- 253 Directions were given.²⁶⁴ However, the directions in relation to the identification by Mr Wallace were inadequate. The way in which the prosecutor pre-emptively watered down those directions has already been addressed.²⁶⁵
- 254 When assessing the adequacy of the directions, it is submitted that the persuasive nature of identification evidence must be kept in mind. Also, the manner in which

²⁶² In addition, the confidence of an identification is a very poor indicator of reliability. See, for one example, Brandon L Garrett, Chad Dodson, Karen Kafadar, Alice Liu and Joanne Yaffe “Factoring the Role of Eyewitness Evidence in the Courtroom” (2020) 17 Journal of Empirical Legal Studies 556.

²⁶³ *Tamihere* at [114].

²⁶⁴ Judge’s summing up: **CB 02 page 271 – 272.**

²⁶⁵ Above at paragraph [75].

the trial Judge specifically drew the jury's attention to the evidence that enlivened the need for a direction:²⁶⁶

Now was it Watson who was on Wallace's boat. Was it Watson who was being driven by Wallace in the naiaid. Wallace says it was. He identified Watson from a photograph and then identified him as the person drinking at the garden bar and, apparently had some liquor stored there on behalf. That was the person also that Mr Cronin identified as Watson.

As Mr Bruce Davidson has said, he has criticised strongly the identification, saying it is a poor identification. Well it is the identification I suppose, at the catamaran, at the Hoby Cat, that is important. But of course relevant to that, is the opportunity that he has had of seeing him, if you find that he did, earlier in the bar and as someone who drew attention to himself in one way or other, and you may think that he certainly did draw attention to himself. Not so much perhaps to Mr Wallace but certainly to other people and perhaps, through this, be seen by virtue of that alone by Mr Wallace, and his identity noted accordingly.

You might think that a barman and a barkeeper no matter how busy they might have been, you might think was someone that would have had the opportunity of seeing people at close range, and that is what the Crown says, when they brought drinks in good light and an opportunity of observing them clearly they would be busy, but busy all the time the Crown says - not likely. An opportunity of seeing them and there were fights and scuffles and so on that would attract attention and require some sort of overall surveillance, I suppose, of a barman in the position that Guy Wallace was occupying that night.

In any event, I think Mr Davidson said it was some three months really before he was shown the photographs. Some difficulty about his identification but he did finally identify him through the montage. He characterised him by his eyes and calling them untrustworthy. That is not a terribly confident description I suppose, but nonetheless he identified him with a photograph which others had found that was suitable and satisfactory to identify him by. You will recall the Ollie Perkins group of events as part of that. And of course people have hooded eyes. He is photographed in that Police photograph with hooded eyes. Sometimes it is regarded as a feature, regarded as bedroom eyes I think they are sometimes called, but you may think the photograph is a legitimate one or you may think that it carries its own identification. If it was out of character with Mr Watson you may think that its unlikely that he would be recognised but he has been recognised by a number of people from the photograph, and I suppose you can have some regard to that in what you may think of Mr Wallace's identification. But of course, not only his identification there, his identification at the Hoby-cat and thereafter no doubt on the well lit wharf that he walks down with him depending on what opportunity he had for seeing him there and so on. Getting into the boat, having some sort of conversation with him it seems.

- 255 In this lengthy passage, the Judge did not, with precision, identify the actual criticisms made by the defence. The Judge highlighted numerous points favourable to the Crown, such as the opportunity that Mr Wallace had to see the suspect at the bar; the quality of the light; and that Mr Wallace was not busy all night. The Judge failed to point out any of the shortcomings with Montage B. The Judge did say "that is not a terribly confident description I suppose" but then added "but nonetheless he identified him with a photograph which others had found that was suitable and satisfactory to identify him by." The Judge further supported the Crown case by saying that the eyes, or bedroom eyes (a very unfortunate descriptor given the Crown's assertion of a sexual motive), carried its

²⁶⁶ Crown closing address: **CB 02 page 276 - 277.**

own identification. Finally, the Judge returned to the time that Mr Wallace spent with the suspect when he went down the jetty and into the Naiad, including that he had a conversation with him. Far from being a warning, this passage lent weight to the prosecutor's submission that the jury should not be afraid to rely upon Mr Wallace's evidence.

- 256 In *R v Ruscoe*,²⁶⁷ another single photograph case, the Court of Appeal was faced with a situation where the summing up had directed on the weakness of dock identifications, "but not at all in connection with the inherent weakness of the single photograph identification in respect of what has been crucially referred to as "displacement effect".²⁶⁸ The Court of Appeal held that the combination of the witness being shown a single photograph; being told the name of the person in the photograph; and identifying the defendant in the dock some five months after the incident, required that "the jury should have been directed in terms of the description in *R v Tamihere* [...]."²⁶⁹ The Court specifically noted that "a possible identification weakness to bring to the jury's attention was the possibility that the dock identification may have been an association of the accused with the photograph at which [the identifier] had "had to look hard" rather than a recognition of the accused in Court as the person whom he had seen [...]."²⁷⁰
- 257 Like *Ruscoe*, the jury needed assistance from the trial Judge about the dangers of identification evidence, if it was admissible. The jury was not warned, with the imprimatur of the Judge, of the risks associated with the single photograph (they, of course, were unaware of it); the pressure placed on Mr Wallace to identify Mr Watson as the suspect (again, about which they were unaware, given the obvious risks associated with drawing to the jury's attention Detective Fitzgerald's opinion about Mr Watson's guilt); the general publicity nominating Mr Watson as the suspect (which the Court of Appeal accepted was a topic amenable to expert evidence); and the frailties of Montage B. With respect, the digressive nature of the Judge's summing up failed to properly sheet home the salient issues for the jury's consideration. If anything, as already submitted, the Judge pointed out factors in support of the correctness of the identification, as opposed to properly warning the jury.

²⁶⁷ *R v Ruscoe* (1997) 14 CRNZ 669 (CA).

²⁶⁸ *Ruscoe* at 675.

²⁶⁹ *Ruscoe* at 675.

²⁷⁰ *Ruscoe* at 675.

258 As far as appellate counsel are aware, no warnings were given to the jury when it asked to have aspects of the evidence of Mr Wallace read back to it during the deliberations.

Conclusions on fundamental nature of the error

259 The key issue in the trial was who was with Ms Hope and Mr Smart when they got off the Naiad. Mr Wallace gave the most direct evidence available to the Crown in relation to that point in time. It was capable of proving the entire Crown case and was used to coalesce the other important strands of evidence, namely the hairs and the prisoner confessions. The Crown knew it was critical and the Judge treated it as such.

260 The cross-examination and defence counsel's closing address were admirable but, as in *Tamihere*, this was "no antidote to such persuasive and powerful unfair evidence."

261 It is simply wrong to suggest that Mr Wallace's identification did not materially contribute to the convictions of Mr Watson. The admission of the evidence caused the trial to go awry in a fundamental manner. Consequently, the appeal must be allowed, as the proviso can have no application.

Even if not fundamental

262 The nature of this trial, its size and complexity, all point away from any application of the proviso. When a Court comes to assess the inevitability of the verdict, it must of course take full account of the disadvantage it may face in making an assessment of the honesty and reliability of witnesses on the sole basis of the transcript of the oral evidence. This is a case where that disadvantage is manifest. It is a case where the satellite issues turned on assessments of witnesses. As *Matenga* makes clear, "[i]n a case turning on such an assessment the court will often be unable to feel sure of the appellant's guilt and will therefore be unable to apply the proviso."²⁷¹ This was such a case. This is especially so when the issues surrounding the science, the two-trip theory and the jailhouse confessions enter the mix, as well as the paucity of cross-examination on some important matters.

²⁷¹ *R v Matenga*, above n 224, at [32].

Retrial?

- 263 Section 385(2) of the Crimes Act requires the Court to consider whether or not it should make an order directing a retrial. The applicable authorities are well-known to the Court, being *H (SC 49/2021) v R*²⁷² and *Reid v The Queen*.²⁷³ The Court is required to undertake a factual inquiry regarding where the interests of justice lie.
- 264 The primary argument on behalf of Mr Watson is that after Mr Wallace's identification is removed from the available evidence, that which remains would be insufficient to justify a conviction by a reasonable and properly directed jury. A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the defendant was guilty.²⁷⁴
- 265 Excluding the prisoner admissions for a moment, when one examines the circumstantial case absent the hair and identification evidence, the evidence, taken as a whole, does not lead to the necessary surety of guilt. There are circumstances that make it more likely that the appellant is guilty of the murders, but there is nothing that moves it from that point. Nothing else can place the appellant in the company of the deceased couple. Nothing else can place them on the appellant's yacht.
- 266 The prisoner evidence is insufficiently reliable to support guilt. Indeed, through a modern lens that evidence would be, it is submitted, inadmissible. The lack of specificity, the lack of any forensic corroboration for the purported admissions and the inherent unlikelihood all point against that evidence being sufficient to move this to a case where a jury could, on any view of matters, still convict the appellant.
- 267 There are also a number of well-known issues with the hair evidence, including the risk of laboratory contamination, poor practice in the handling and testing of samples, and the possibility of innocent transfer. The hair evidence is, on its own, insufficient to convict the appellant.
- 268 The secondary position of the appellant is that the case against Mr Watson is very close to the "insufficient evidence" of guilt end of the spectrum meaning that no retrial should be ordered.

²⁷² *H (SC 49/2021) v R* [2022] 1 NZLR 21 (SC).

²⁷³ *Reid v The Queen* [1980] AC 343 (PC).

²⁷⁴ *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

- 269 It is accepted that the offences are serious. However, the trial was a very lengthy one and it was also complex. Further, there is likely to be even more evidence now, given the science issues regarding the hairs.
- 270 The identification of the appellant during other incidents has been so tainted by pre-trial and post-trial publication that the appellant would be faced with an impossible task if he were to attempt to undermine any purported identifications of him relevant to the circumstantial Crown case. Cross-examination is, in and of itself, insufficient to confront all of the matters that would need to be explored by the appellant in his defence. Cross-examination cannot undo those taints. There is an inability to present an effective defence because of all that has gone on in relation to this case.
- 271 The defence will be required to cross-examine witnesses for the first time on quite important matters, given the two-trip theory. The two-trip theory is not a ground of appeal, but it is clear that the defence did not explore this, for whatever reason, at the original trial. How Mr Watson got back ashore will be of considerable importance. It will be immediately remembered that in his closing address the prosecutor said:
- Nobody saw how he got ashore, was it just hitching a ride with a passing boat, who knows? There was a dinghy attached to the back of his boat, there were other dinghies around, it was a short row, it was a short trip in any boat. Does it matter? Because if he was there at around 4 o'clock, 3.30, some time 3.30ish or thereafter, then he couldn't be tucked up on his boat. And so it doesn't matter that we can't fill in the gap as to how he got there, he didn't just materialise, he had to have gone one way or another.²⁷⁵
- 272 Every witness will need to be asked questions for the first time (and such matters were not covered in Police statements). That will require them to recall events from around 30 years earlier for the first time against a backdrop of years of publicity and commentary. The improper taints will be enormous and difficult to expose through cross-examination.
- 273 The ketch evidence – or public ignoring of it – also places the defence at a distinct disadvantage given the passage of time.
- 274 There is also the passage of time and resultant ordeal for Mr Watson. He has, largely because of his steadfast maintenance of innocence, remained in custody for the entire time since his arrest. He has, however, served the punishment aspect of his sentence.
- 275 It is well-known by this Court that witnesses forget, misremember, or unconsciously reshape their accounts, and physical evidence can be lost,

²⁷⁵ Crown closing address: **CB 02 page 229**.

degraded, or contaminated, making it much harder to test the reliability of what is presented at any retrial. In addition, three decades of media coverage, documentaries, prior court rulings and public commentary to which future jurors and witnesses have likely been exposed makes it impossible to guarantee a fair trial. Together, these factors risk a verdict shaped more by degraded recollection and pre-formed public opinion than by the facts as they existed at the time. This undermines the sense that justice is being done on the merits rather than on residue and reputation, which has a negative effect on public perception and confidence of the criminal justice system.

- 276 Mr Wallace is now deceased. This is a major factor and deprives the appellant of the ability of drawing from him evidence that points away from the appellant's involvement. Other witnesses are also deceased, (for example, Chey Phipps, another barman.)
- 277 Shortly put, the ordinary course of ordering a retrial should not occur because of the circumstances of this case, the appeal process and the centrality of the disputed evidence to the Crown case. It is for essentially the same reasons as given in *Haig*²⁷⁶ that no retrial should be ordered. The Crown should not be given the opportunity to recast its case, if that is even possible.
- 278 While it is ordinarily for the Crown to determine whether to retry an appellant, this Court is empowered to make that decision. The facts of the case mean that no retrial should be ordered.

Conclusion

- 279 Mr Watson is the victim of a miscarriage of justice through the wrongful admission of Mr Wallace's identification evidence. That identification was inadmissible. It was central to, and permeated, the Crown case. It was fundamentally important evidence capable of proving the Crown thesis on its own. Its admission and the failure to sufficiently warn the jury about its dangers resulted in an unfair trial and as such the proviso has not application to this matter. No retrial should be ordered.

²⁷⁶ *R v Haig* (2006) 22 CRNZ 814 (CA) at [108] – [109].

1 September 2026

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To: The Supreme Court

And To: The Crown