NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 12/2023
[2023] NZSC Trans 13

SOLICITOR-GENERAL'S REFERENCE

(NO 1 OF 2023) FROM CA636/2021 ([2022] NZCA 504)

Referrer

Hearing:	16 August 2023
Court:	Winkelmann CJ O'Regan J Ellen France J Williams J Kós J
Counsel:	E J Hoskin and T C Didsbury for the Referrer F E Guy Kidd KC and K H Cook as Counsel to Assist

---

SOLICITOR-GENERAL'S REFERENCE

MS HOSKIN:

E ngā Kaiwhakawā, tēnā koutou. Ko Hoskin ahau. Kei kōnei māua, ko Didsbury mō te Karauna. May it please the Court, counsel's name is Ms Hoskin. I appear together with Ms Didsbury. We appear for the Crown.

WINKELMANN CJ:

5 Tēnā kōrua Ms Hoskin and Ms Didsbury.

MS GUY KIDD KC:

Tēnā koutou katoa. Counsel assisting are Ms Guy Kidd together with Mr Cook.

WINKELMANN CJ:

Tēnā kōrua Ms Guy Kidd and Mr Cook. Nau mai, haere mai to all of you
10 students, some of whom have been elevated into the ranks of counsel. Welcome to this sitting of the Supreme Court of New Zealand.

Ms Hoskin. So, timing, are you confident you'll be completed by morning tea?

MS HOSKIN:

15 Subject to the questions from the Court your Honour, I would certainly hope so.

WINKELMANN CJ:

Well there is one preliminary question we have, which is in Ms Guy Kidd's submissions. She addresses an alternative ground upon which the Court of Appeal decision could have been based, and just we would like to
20 know the Solicitor-General's attitude is to the Court considering that issue.

MS HOSKIN:

The Solicitor-General is resistant to that, your Honour. Obviously, a Solicitor-General's reference is not often brought, and it is brought because of a specific question rising from a lower court decision. The question here was
25 the question that was put forward to the Court, obviously with Ms Guy Kidd's assistance, and leave was granted on that basis.

In the Crown's submission the alternate question raised by my learned friend doesn't arise on the question it's an entirely different question. It is a matter that the court below, the Court of Appeal, didn't specifically determine Mr Darling's appeal on. We've obviously considered whether it would be
5 something that the Court could amend the question of law on pursuant to s 319 of the Criminal Procedure Act 2011, and in my submission it wouldn't amount to either a restatement or an amendment of the question. It would, effectively, be entirely deleting the question that has been put forward by the Solicitor-General with leave granted and replacing it with an entirely different
10 one.

WINKELMANN CJ:

In any case would you submit it's relevant that it makes no difference to Mr Darling?

MS HOSKIN:

15 Absolutely. Yes, your Honour. It's an entirely factual question and any justice concerns that the Court might have about the circumstances of Mr Darling's plea have been adequately answered by the outcome in the lower court decision.

KÓS J:

20 I think we would want to hear that evaluated by the Court of Appeal before we consider it in any depth.

MS HOSKIN:

Yes, certainly, Sir. It would be the Crown's position that it's not appropriate for this court to determine it effectively as a court in first instance, and by way of
25 illustration that it doesn't arise on the question it obviously wasn't something that's addressed at all in the Solicitor-General's submissions. None of the cases that we would wish to be put before the Court dealing with question of pressure are before the Court and it really would have been something that would have been something that would need to be well argued, well ventilated

in the Court of Appeal with a decision given. Then there would be an appropriate vehicle if this court were concerned to consider that.

WINKELMANN CJ:
Thank you.

5 **MS HOSKIN:**
By way of brief introduction and at the risk of stating the obvious the Solicitor-General has brought this reference with the Court's leave because of a strongly held view that the Court of Appeal incorrectly quashed Mr Darling's conviction as a consequence of Mr Anderson's acquittal. The Crown contends
10 that the two outcomes arrived at via different pathways for two different defendants were perfectly capable of standing independently of each other and that one did not invalidate the other.

The approved question of law is whether Mr Anderson's acquittal meant that
15 Mr Darling could not in law have been convicted of the offence with which he was charged despite his guilty plea, and the Crown contends that the answer to that question is no. Mr Darling's conviction, his admitted guilt, was undisturbed by Mr Anderson's acquittal and the Court of Appeal decision to the contrary was wrong.
20
I intend to speak more generally to my written submissions rather than to follow them through by way of format or order, and I intend to divide my address into three general paths. My intention is to begin by outlining how it is that the Crown says that the Court of Appeal went wrong, to outline those contributing factors
25 that the Crown says led the Court into error in this case and I will submit that there are four contributing factors. That is to say that there are four ways in which the Court of Appeal decision is demonstrably wrong. Thereafter, I propose to give a brief overview of how the Court of Appeal should have approached Mr Darling's appeal and the different result that the Crown says
30 would inevitably have resulted had the Court done so. Third, I wish to outline the consequences if the judgment is left uncorrected, and those are the consequences as the Crown sees them, not to Mr Darling personally of course,

but rather to the wider criminal justice system. Finally, I was proposing to address the alternate question posed by my learned friend but if the court is content with the answers already given then I will leave that one there.

5 The first two contributing factors leading to the Court of Appeal's erroneous decision are similar. Both of them amount to a failure to give sufficient weight to a salient fact, and the first fact is that the Court of Appeal gave insufficient weight to Mr Darling's guilty plea, to the fact that he had pleaded guilty, and the Crown says that Mr Darling's guilty plea was the lens through which his entire 10 appeal should have been viewed and should have been approached but it was not.
1010

Pausing to state the obvious, a guilty plea is the most cogent admission of guilt 15 that can be made. Guilty pleas are central to the administration of justice. The credibility of the system as a whole depends upon guilty pleas retaining their validity and being faithfully observed in all but the rarest of circumstances. As set out in one of the authorities put before the Court, and that is *T v R* [2022] EWCA Crim 108, [2022] 2 Cr App R 1, an English authority which appears at 20 tab 13 of the Crown's bundle, and it is a quote from an older case, *R v Asiedu* [2015] EWCA Crim 714; [2015] 2 Cr. App. R. 8, it says: "A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. … ordinarily, once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his 25 conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court." It is because of the significance of guilty pleas that the law has developed as it has, both here and elsewhere.

WILLIAMS J:

30 So you say that's always the case?

MS HOSKIN:

I say that it is something that the Court has to approach, so yes, I say –

WILLIAMS J:

This decision that you've cited seems to indicate there's no wriggle room at all. Once you've pleaded guilty in open court, informed of consequence, game over.

5 **MS HOSKIN:**

No, no, I don't accept that, Sir. There is –

WILLIAMS J:

I thought that's what you were saying.

MS HOSKIN:

10 There's wiggle room in the sense – as the cases have developed here in New Zealand and elsewhere and as set out in the bundle, there are wiggle room. What the Court looks for is the vitiating elements, so whether the plea was in fact voluntarily, whether it was properly informed, whether the proceedings themselves might be an abuse of process, whether the admitted 15 facts in law can make out the offence, and, of course, as we can see in that very case, *T v R*, there is, as they recognise there and as has been accepted in Australia, there's this residual category that in some instances where you can see, despite a voluntary, informed, appropriate plea that makes out the guilt of the offence on the admitted facts, there's that residual category where 20 nevertheless an offender can show that they are demonstrably innocent which is the circumstance where in *T v R* they talk about where somebody has, in fact, accepted their guilt and their fingerprints have been found, notwithstanding another person's prior conviction.

WILLIAMS J:

25 And you say Mr Darling's facts don't make it into any of those categories?

MS HOSKIN:

Any of those categories. Absolutely.

WILLIAMS J:
Including the residual one?

MS HOSKIN:
Absolutely, Sir. That is the Crown position.

5 **O'REGAN J:**
I don't know that you need to say that for the purposes of the question of law, do you? The question of law really is just did the later acquittal automatically mean that Mr Darling's guilty plea had to be set aside because –

MS HOSKIN:
10 Yes, that's certainly correct, Sir.

O'REGAN J:
Whether he had other – there were the potential for other vitiating factors doesn't really arise on that question of law, does it?

MS HOSKIN:
15 No. No, you're right, it doesn't, Sir, and I suppose what I'm endeavouring to do there is to show you that because – had the Court of Appeal approached it with Mr Darling's guilty plea firmly in the forefront of mind and given it the significance that it warrants, then they would have approached it in the way of looking first to see whether there are any factors which vitiate that plea. So 20 considering first whether it was properly informed, whether there was an error of law, whether there's any – just working through.

WINKELMANN CJ:
Whether he was under some oppressive oppression to enter it.

MS HOSKIN:
25 Indeed, your Honour, whether there were any of those circumstances which have been recognised and which we can see in the cases to date concerning successful conviction appeals pos –

O'REGAN J:

So to answer the question of law we don't necessarily have to say the Court of Appeal was wrong to set aside its conviction? We just have to say they were wrong to find that it automatically followed from the acquittal of his
5 co-offender that that conviction had to be set aside?

MS HOSKIN:

Yes, Sir, I would accept that.

O'REGAN J:

Otherwise, I think otherwise we do have to address Ms Guy Kidd's arguments
10 and –

MS HOSKIN:

Yes, I take your Honour's point.

WINKELMANN CJ:

So Ms Guy Kidd says that you shouldn't get too technical, that the fundamental
15 issue in the appeal is whether there has been a miscarriage of justice, and these categories you are talking about are simply convenient ways of analysing that a miscarriage has occurred, and it would wrong to be rigid, to create rigid categories.

MS HOSKIN:

20 I accept that, your Honour. I accept that the categories do not replace the test. Absolutely. *R v Le Page* [2005] 2 NZLR 845 (CA) hasn't sort of deleted section 232. The question is whether there's a miscarriage. What the cases do is they helpfully demonstrate those circumstances to date which have been recognised by the courts where a miscarriage of justice has been found
25 notwithstanding the entry of a guilty plea.

WINKELMANN CJ:

There is – Ms Guy Kidd suggests that you say in your submissions, and I can see why she might think that, that there is a special approach required where a

guilty plea has been entered. Are you saying there's a special test that applies or do you accept that basically the fundamental thing is – I think actually I thought it was quite a good quote from the High Court Australia decision, which I don't think any counsel referred to, but is in the Court of Appeal judgment
5 where they're – in *R v Darby* (1982) 148 CLR 668, the High Court of Australia said: "In our opinion, such a determination will focus upon the justice of the case rather than upon the technical obscurities that now found the subject." I think Ms Guy Kidd's saying against you you're taking too technical an approach to guilty plea situations.

10 **MS HOSKIN:**
Well then perhaps that may be the error in my phrasing in the submissions, your Honour, because that's certainly not what I intend to do. I accept that the rule, or the test that must be met, is the miscarriage test. But, in practice, that is a very difficult test to make out for someone who has admitted their guilt and
15 that's why you consider first of all the circumstances in which they've admitted their guilt. Is there something which vitiates that plea? Is there some reason where when that defendant entered their guilty plea, they either didn't intend it to be a guilty plea, they didn't understand the laws that applied. The facts didn't actually make out the offence in law with which they were charged. The
20 proceedings themselves were abusive such that the person shouldn't have been a defendant in any event. You're looking at what the circumstances were.

WILLIAMS J:
How do you factor in system delay in a post-COVID era?

MS HOSKIN:
25 Well I think your Honour that's the sort of thing that can be approached by an application to stay proceedings for example.

WILLIAMS J:
Irrelevant in this context? Isn't that a pretty technical approach to a big issue?

MS HOSKIN:

Well it may well be your Honour but I would submit it doesn't arise on the question of law. We're not – the –

WILLIAMS J:

Yes, but your argue – I mean, it does seem to me you're having a dollar both
5 ways.

MS HOSKIN:

Well, I'm not intending –

WILLIAMS J:

I mean, either it's available and could have been argued on these facts or, on
10 your much more stringent approach, it was never going to be available at all.

MS HOSKIN:

And I say, your Honour, it was never going to be available at all because there's not a circumstance that vitiates his plea.

WILLIAMS J:

15 There you go.

MS HOSKIN:

If this court was to consider that there were circumstances that were not the subject of the Court of Appeal decision, because the Court of Appeal sort of held that he was under considerable pressure. It was an observation. They did
20 not find that his plea was not a valid plea because of that pressure.

WINKELMANN CJ:

I mean, your response to Justice Williams is inconsistent with something you said to me earlier, which you accept that oppression might be a ground, one of the categories, which would justify vacating a guilty plea, and under pressure
25 on further investigation might be at such a level that it's actually compelling a guilty plea.

MS HOSKIN:

And your Honour there are. I suppose that falls within one of the categories that has been recognised.

Whether a plea is voluntary and willingly made. But my – I suppose what I'm
5 saying here is there wasn't a finding –

WINKELMANN CJ:
Yes.

MS HOSKIN:
– in the Court of Appeal that Mr Darling's plea was anything other than
10 voluntary.

WINKELMANN CJ:
Yes.

MS HOSKIN:
The Court observed that he was under considerable pressure. Had the
15 Court of Appeal then made a decision that Mr Darling was under such pressure both systemic and internal that it vitiated his plea, then that would have been an entirely separate decision, and I suppose my –

WILLIAMS J:
This is Ms Guy Kidd's argument essentially on –

20 **MS HOSKIN:**
It is Ms Guy Kidd's, but this is the Solicitor-General's reference.

WILLIAMS J:
Right.

MS HOSKIN:
25 And the Court of Appeal didn't make that decision and if the Court of Appeal had made that decision I venture to say it's probably not a decision that the Solicitor-General would have sought a reference on.

WILLIAMS J:
Right.

MS HOSKIN:
And had the Solicitor-General sought a reference on, I suspect it may not have
5 been one that this court granted leave on. It would have been particular to
Mr Darling's circumstances.

But if I may, we're sort of speculating here because it is not the reason that the
Court of Appeal quashed Mr Darling's conviction. They didn't do it because
10 they found that his plea was invalidated because of pressure; they did it
because –
1020

O'REGAN J:
Well, they didn't need to on their approach, did they?

15 **MS HOSKIN:**
No, they didn't need to, but it's their approach that the Solicitor-General has
referred to this Court.

WILLIAMS J:
What makes this murky is it clearly informed their perspective. It's hard for it
20 not to really, given the circumstance, even if the reasoning may well have been
incorrect, even Ms Guy Kidd says so, and if your concerns are systemic, as you
say, because your third point is what are the consequences for the wider
system, it's going to be important that you carve out that ability to deal with
oppression, particularly in a post-COVID world.

25 **MS HOSKIN:**
And the Court of Appeal is routinely considering cases where defendants are
seeking to appeal against their conviction notwithstanding their guilty plea and
suggesting that they've received incorrect advice from trial counsel or improper
comments from a trial judge which have led to pressure upon them.

WILLIAMS J:

Well, those ones are easy. I'm talking about ones where if you don't plead guilty you will have served your time before you get a trial.

MS HOSKIN:

5 And what I would say, your Honour, is when that case arises and that case is taken and decided in the Court of Appeal for that reason then it may well be one that should be referred to this Court and will be a matter for consideration.

WILLIAMS J:

Quite.

10 **MS HOSKIN:**

But in my submission it was not the reason. It wasn't even the prin – it wasn't a ground advanced.

WILLIAMS J:

So what's important, I think, is the careful circumscription about how wide the 15 principles are you wish to apply, because even you don't say that those sorts of cases, if they do arise, if and when they do arise, shouldn't be considered on their merits.

MS HOSKIN:

No, your Honour, I don't. I say it is always open to the Court to consider 20 whatever grounds are put forward as –

WINKELMANN CJ:

So to take you back to that quote from the High Court of Australia that we're really looking for the justice of the situation, not getting too bogged down in technical categorisation, and therefore the justice of the situation takes us back 25 to the statutory test.

MS HOSKIN:

It does take us back to the statutory test, your Honour. What I would say is that the cases which discuss guilty pleas against the framework of that statutory test provide a useful illustration of the exceptional circumstances, the rare situations
5 which may arise, and I suppose I'm putting that before the Court as a starting block really just to illustrate that those circumstances for good reason are not readily found and that is because of all of the situations that come into play with a guilty play, the finality, the fact that it brings investigations to an end, the need for a justice system to be able to rely on admissions of guilt from defendants,
10 and…

WINKELMANN CJ:

And your fundamental point is that a guilty plea is a powerful thing because it's a confession or an admission of guilt and the person who's making that admission is the person best placed to know what they did.

15 **MS HOSKIN:**

Absolutely, your Honour, absolutely, and before I move on to –

WINKELMANN CJ:

And what Justice Williams is saying against you is, well, it's going to be a powerful thing; we had better be pretty sure it's voluntarily given.

20 **MS HOSKIN:**

And I absolutely accept that. I understand why your Honour is saying that and –

WILLIAMS J:

I'm not sure that it's of voluntariness because obviously it's voluntary, someone's making a rational choice, and frankly if I were in that position I'd
25 make the same choice. It just doesn't necessarily mean I did it. That's the problem the system now has to deal with because of the last half –

O'REGAN J:

We believe you.

WILLIAMS J:

Thank you. I've got Justice O'Regan only on one side.

MS HOSKIN:

At the risk of taking the argument off in a direction that I really maintain we don't
5 need to go today, I would say that there have always been other features in play as well and that's been recognised in the case of *R v Merrilees* [2009] NZCA 59, that people will make a pragmatic decision for a variety of reasons, and I think there's a paragraph there about often they'll make it to limit publicity or to bring closure to their own family or for financial reasons. So yes,
10 your Honour, I accept that this post-COVID world has different factors and different things which may also come into play.

There is still a real need that appropriate consideration be given to whether that plea was an appropriate, voluntary, informed plea, and I submit the reason I've
15 taken your Honours to those cases is simply to show that it should have been in the forefront. The Court should have approached Mr Darling's appeal with, as a first place, he has pleaded guilty. Is there some reason why we look behind the plea in these circumstances?

20 The reason that was ventured in the Court of Appeal was because of Mr Anderson's acquittal. But the Court of Appeal having said well let's look at the circumstances when that miscarriage test which applies has been made out in the past in situations of a guilty plea, and the Court should, having identified that this case there was no trial counsel where a – the vitiating circumstance
25 being advanced was Mr Anderson's acquittal, the Court considered whether it fell within that general second category discussed or set of circumstances discussed in *Le Page*, whether the admitted facts made out the offence charged.

30 But what the Court didn't then do is conduct an analysis of those admitted facts. The Court didn't discuss Mr Darling's admitted facts in the analysis section of its judgment at all.

WINKELMANN CJ:
Is this your second error?

MS HOSKIN:
No, your Honour, this is still the first one. This is just showing you that had the
5 Court of Appeal given sufficient weight to Mr Darling's guilty plea they would
have –

WINKELMANN CJ:
Yes.

MS HOSKIN:
10 – after identifying which category it was in they would have put appropriate
focus on that so they would have considered the admitted facts.

I can move to my second fact now, which is that the Court of Appeal failed to
adequately recognise that Mr Anderson had been tried separately and on a
15 different stand alone charge. So by that I'm emphasising here that Mr Anderson
was charged under section 235(a) requiring the Crown to prove different
essential elements against him than were required against Mr Darling, who was
charged under section 235(b). So, one of them is facing a charge of robbery
causing grievous bodily harm, and one is facing charge of robbery by two men
20 acting in concert.

So when Mr Darling was acquitted of robbery causing grievous bodily harm –

KÓS J:
Mr Anderson.

25 **O'REGAN J:**
Mr Anderson.

MS HOSKIN:

Sorry, Mr Anderson, that determined nothing in the Crown's submission in respect of Mr Darling's conviction.

5 The two charges against these two men were, if I can put it this way, interdependent, and by that what I mean is that Mr Darling's guilty on a section 235(b) offence was not dependent upon Mr Anderson having committed or having been convicted on a section 235(a) offence.

WINKELMANN CJ:

10 Do you mean they were independent?

MS HOSKIN:

Independent, yes, thank you.

WINKELMANN CJ:

Oh.

15 **MS HOSKIN:**

So the fact that the jury not find the charge against Mr Anderson proved to the requisite standard did not say anything at all about Mr Darling's culpability. I want to illustrate that, if I may, by talking about the New Zealand case of *McIntyre v R* [2017] NZCA 579, [2018] NZAR 43, because it's a decision that 20 obviously the Court of Appeal referred to and relied upon. In my submission, *McIntyre* is a very different sort of case from that which was confronting the Court of Appeal in Mr Darling's case.

So first and foremost, Mr McIntyre was charged as an accessory after the fact 25 of murder, and the assistance that he provided and the assistance that he admitted giving by way of his guilty plea was that he disposed of the bloodstained clothing of the man alleged to be the principal and he admitted his guilt as accessory after the fact.

His co-defendant then took his charge of murder to trial and was acquitted, and his defence was self-defence. The consequence of that was although Mr McIntyre's admitted facts remained unchanged in the sense that he still admitted that he'd taken those bloodstained clothing and he had destroyed it in
5 the incinerator, the culpability attaching to those actions was changed as a consequences of Mr Ford's acquittal. That is because the assistance that he gave to Mr Ford was no longer assistance after the fact of murder. So Mr McIntyre's charge was, and I've used the term in my submissions, "parasitic", upon Mr Ford's charge in a way that Mr Darling and Mr Anderson's
10 charges simply were not.
1030

So that is a factor that I think needed far more… significance in the Court of Appeal decision, a recognition that Mr Darling's culpability stood
15 independently of Mr Anderson's charge.

WINKELMANN CJ:
There's another way of analysing *McIntyre*, that it was a case where his plea was vitiated by a mistake. He mistakenly entered the plea on the basis this man had murdered someone but in fact he hadn't.

20 **MS HOSKIN:**
Yes, absolutely your Honour. Another thing that I think is quite interesting in terms of contrasting and comparing the *McIntyre* case with Mr Darling's circumstances is that the assistance Mr McIntyre provided was remote in time and place from the actions of the principal. So, although he knew what he had
25 done he was operating to a degree with a sort of an assessment of what the preceding events were. Mr Darling, of course, was present at all times relating to the facts he admitted. He was in full possession of the knowledge of what happened in that car, who did what to who, and I think that's another important distinction.

WINKELMANN CJ:

It seems to me that that's a better distinction than "parasitic" because you could make an argument that aggravated robbery is parasitic on – when you know who the person he's alleged to have combined with to rob a person, is there not 5 an argument that it is parasitic on the other person?

KÓS J:

Assuming there are only two.

MS HOSKIN:

Assuming there are only two. Well, I think, your Honour, that would come into 10 them having to be tried together and the evidence having to be the same against both, so –

WINKELMANN CJ:

It's like conspiracy charges?

MS HOSKIN:

15 Yes, but, of course, we know from the cases of *DPP v Shannon* [1975] AC 717, (1974) 59 Cr App R 250 (UKHL) and the others that it's not parasitic. It's perfectly capable for one to be, or perfectly appropriate, for one to be convicted of conspiracy even where it's a two-man conspiracy and the other to be acquitted.

20 **WINKELMANN CJ:**

It's parasitic only in the sense that you must have combined with somebody?

MS HOSKIN:

Yes, absolutely.

ELLEN FRANCE J:

25 Does the not knowing what the other person had done, your alternative base, the alternative you were talking about other than parasitic, he didn't know what

he'd done or he thought he knew but it turned out not to be right, does that go to voluntary, voluntariness?

MS HOSKIN:

I think it more naturally fits within his understanding or his assessment of
5 whether – or the advice given to him about whether the facts made out the law rather than voluntariness.

WILLIAMS J:

Well, the advice, there was no one in a position to give that advice at that point. It's really just a simple impossibility, isn't it? It's impossible for the parasitic
10 offence to have been proved, given the outcome in the primary case. Do you really need to worry about vitiation and voluntariness there?

MS HOSKIN:

No, I wouldn't put it under the voluntariness, no, your Honour.

WILLIAMS J:

15 Did the killer, assuming that was the result in *McIntyre*, admit the killing?

MS HOSKIN:

Yes. Yes, he did. So it was a street altercation.

WILLIAMS J:

So there was no doubt that self defence was the ground?

20 **MS HOSKIN:**

Absolutely no doubt, yes, that it was a killing between the two of them. They'd been seen having an argument. The man who died went back and got a knife from some nearby premises and came out and it resulted in him being the one who was killed. So it was – self defence was very much a live and I suppose –

25 **WILLIAMS J:**

The only live issue.

MS HOSKIN:

Well, it was the only live issue and I think that's another factor, and I'm sort of overlapping here onto the third error that I wanted to talk about which is relying on authorities that could be distinguished. But yes, in this case it was the only
5 defence advanced for Mr Ford so there was some certainty that all parties felt able to have about what the acquittal of Mr Ford meant, and they accepted that it was an acquittal and that the jury had accepted self defence, so they had accepted that the killing was not culpable, that it was not murder, and that obviously informed the approach that was taken as a consequence with the
10 Crown I believe inviting Mr McIntyre to file an appeal and the appeal was obviously conceded and dealt with on the papers. That is very different, obviously, from this case where the Crown maintains that Mr Anderson's acquittal, it's simply incapable, we cannot know what his acquittal means.

KÓS J:

15 Well, there's obviously a fundamental difference between primary and second parties.

MS HOSKIN:

Yes, absolutely, your Honour.

KÓS J:

20 And that's the distinction you're really focusing on here.

MS HOSKIN:

Yes. Mr Anderson and Mr Darling are both principals. Mr McIntyre was very much a party to Mr Ford's offending.

25 The Court – I'll move onto my third error which is reliance on authorities that were readily distinguishable but I will start that, if I may, just with some further observations on *McIntyre* before I move to the next case, and that is because the Court of Appeal in their reasoning in the Darling case have taken the reasoning in *McIntyre* and given it an extension. They've effectively interpreted
30 it as where there's an acquittal it means the offence wasn't committed and in

my submission we need to be very careful about that analysis of *McIntyre*. That was appropriate on the facts *McIntyre* for all of the reasons we've just discussed, not least because there was some way of sort of interpreting Mr Ford's acquittal, but where we don't have that it is simply not appropriate to
5 consider that Mr Anderson's acquittal is synonymous with there having been no robbery committed.

I sort of just want to underline that that *McIntyre* decision being the product of a concession judgment that was on the papers, it goes to some six paragraphs.
10 It is a very short judgment confined to its facts and in my submission we need to be very mindful of the fact that an acquittal means that the Crown has not proved the charge. It doesn't provide in other cases a sort of badge of innocence, the fact that this offence was not committed. For example, had the *McIntyre* facts, had Mr Ford's acquittal been an identity defence then obviously
15 Mr McIntyre's conviction as an accessory after the fact would be perfectly sustainable on appeal because he's still provided assistance after a murder. It was very particular to the facts of Mr Ford's acquittal, the assistance provided Mr McIntyre – by Mr McIntyre, and the limited facts there the decision was reached in the way that it was.
20

So I just sort of emphasise that the Court of Appeal said at paragraph 54 of their decision: "Applying the reasoning in *McIntyre* to this case, Mr Darling cannot be found guilty of committing an aggravated robbery together with Mr Anderson if there is no proof that a robbery was committed."

25 **WILLIAMS J:**
What if you do if there's an identity and self-defence?

MS HOSKIN:
Well that really illustrates the same difficulty, I think, with *McIntyre*. If you've got that situation, then you simply don't know what the basis for the acquittal
30 was and so it would be a different situation I –

WILLIAMS J:

That wouldn't make it on your approach.

MS HOSKIN:

No, your Honour, it wouldn't.

5 **KÓS J:**

But that happens in joint trials all the time.

MS HOSKIN:

Absolutely.

O'REGAN J:

10 Or the later court might have to make a judgment about that.

O'REGAN J:

Anyway, that's not before us, let's not get distracted.

MS HOSKIN:

It's – yes.

15 **WILLIAMS J:**

That's my third distraction.

MS HOSKIN:

The next case that the Court of Appeal considered and applied and, in my submission, did so erroneously was the case of *Stewart (Lynette) v R* [2011]
20 NZSC 62, [2012] 1 NZLR 1 because the Court –

KÓS J:

Sorry, just to go back. I mean, what really happens in that situation is a later acquittal wipes out, erases, a fact on which the first conviction is dependent. So it actually has a rubbing out effect. It wipes out that – now, in the situation
25 where you have an acquittal and you're not sure whether it's based on identity or self-defence you don't necessarily have that fact wiped out.

MS HOSKIN:
Absolutely you're right.

KÓS J:
But if it's a single defence then you do because you know that effective
5 self-defence is there wasn't a murder. Therefore, the dependent fact which that
he was an accessory after the fact to a murder, the murder's wiped out.

MS HOSKIN:
Yes.

KÓS J:
10 Plainly a miscarriage of justice.

MS HOSKIN:
And I accept that your Honour.

KÓS J:
Yes.

15 **MS HOSKIN:**
I think that's why we end we were – I suppose there's always the argument in
some cases there might have been a situation where it's not possible to
speculate that the acquittal actually means self-defence was accepted. There
might have been other failings in the Crown case but clearly from the approach
20 that was taken in this one we know that wasn't such a case. The parties
accepted, as the Crown clearly did in their submissions to the Court of Appeal,
that the basis of the acquittal was that self-defence had been accepted, and so
that did have the effect that your Honour has mentioned.

WILLIAMS J:
25 The difference is if there were identity plus self-defence and the primary
defendant wins possibly on identity or self-defence you still don't know whether
you've got a murder, but you can't be sure you haven't.

MS HOSKIN:

Then I think you – again, we're in slightly difficult circumstances with *McIntyre* facts because obviously what Mr McIntyre knew is somewhat dependent on what other people have told him or how the position's been represented to him.

5 1040

But one of the cases that the Court does reference which is the case of *R v Zaman* [2010] EWCA Crim 209, [2010] 1 WLR 1304, the UK case, we do actually have a situation where we have an accessory after the fact whose

10 conviction is maintained on appeal despite the principal's acquittal and that's because of the factual circumstances of that case, the Court were perfectly content that Mr Zaman would have had more knowledge about what actually transpired than the prosecution were able to prove against the principal.

WINKELMANN CJ:

15 Yes. So if it was self – if it was identity and Mr McIntyre had assisted this person to dispose of bloody clothing and then admitted that he had helped him conceal the murder and then the principal is acquitted, that's not necessarily a ground to vacate the conviction and that – so it's the – the decision of the jury doesn't negate the fact –

20 **MS HOSKIN:**

No, so –

WINKELMANN CJ:

So that's not the basis on which that there's been no murder. It's not saying there has in fact been – that's not the reason why the guilty plea is vacated. It's

25 simply an enquiry as to the justice of the situation, and sometimes overanalysing it might be problematic, but it's really what the Australian High Court's driven at, which is you're looking at the – don't get too technical. Looking at the justice of the situation, it's plainly unjust that a man who thought he was helping someone conceal a killing, he knew it was a killing and it turns

30 out the killing was in fact – so even if you analyse it that way it's problematic, so.

MS HOSKIN:

Yes. And I suppose just to underline the reason that we've discussed that in such detail is really just an attempt to explain various reasons why *McIntyre* ended up where it did and those reasons don't apply to Mr Darling and
5 Mr Anderson's case.

WINKELMANN CJ:

Yes. So what I suppose I'm aiming at is that the jury verdict doesn't wipe away the fact of a murder necessarily.

MS HOSKIN:

10 Yep, yes, absolutely, your Honour. I totally accept that and endorse it, and that, I think, is where one of the real errors in the Court of Appeal reasoning is highlighted because they seem to have taken *McIntyre* as a broader proposition that an acquittal equals no offence, and that's really problematic when we look at Mr Anderson's case.

15

If I may, I'll just briefly touch upon the other cases that the Court of Appeal relied on and it's interesting to note that before they begin this discussion of cases, and the two I'm wanting to talk about briefly are *Stewart* and *Jones v R* [2014] NZCA 613, both New Zealand authorities, but before the Court does it, it has
20 identified this second circumstance or second category in *Le Page* where on the admitted facts an offence can't be charged, can't be proved, and then they go on to discuss an example of these cases is *Stewart* and then that begins the Court's discussion of *Stewart*, and that was an error because what *Stewart* doesn't involve is any guilty plea. *Stewart* is a very different case. So we've
25 got the Court of Appeal deriving sort of authority and relying on cases to inform their approach which involve very different considerations.

So in the case of *Stewart*, Ms Stewart and Ms Oliver had been tried together and both were convicted at the end of the trial, Ms Oliver with sexual violation
30 and Ms Stewart with encouraging. So again we've got the party principal thing that your Honour, Justice Kós, mentioned before, so that's another factor. But we have that both women advanced their appeal separately. Ms Stewart's was

first and hers was on grounds which didn't succeed and her appeal was dismissed. Ms Oliver, so the principal of the offending, then advanced her appeal against conviction relying on fresh evidence, and it was fresh medical evidence, so it was a sort of dual ground of trial counsel error for not having
5 adduced this evidence and that the evidence should have been before the Court, and that medical evidence was that the evidence by the complainant was inconsistent with the injuries that she had received, and as a consequence of that the Court of Appeal allowed her conviction appeal and so Ms Stewart brought a second conviction appeal to this Court. Now because they had been
10 tried together on the same evidence and there was evidence that was inconsistent with the complainant's evidence, this Court, with again a Crown concession, accepted that Ms Stewart couldn't be convicted of assisting Ms Oliver with an offence that she was no longer deemed to have committed, and I say it in that way because not only was her conviction appeal allowed but
15 also the Crown offered no evidence against Ms Oliver at her retrial. So, effectively, they didn't proceed against her as a principal.

KÓS J:
So might be different if they'd simply overturned the conviction, if they had –

MS HOSKIN:
20 Yes, yes, your Honour, it might be.

KÓS J:
Because of the point you make that an acquittal is not a finding of innocence.

MS HOSKIN:
Yes, absolutely your Honour.

25 **KÓS J:**
So it doesn't have the effect necessarily of erasing a fact.

MS HOSKIN:

No, no. Absolutely, I accept that Sir. I think for present purposes the real distinction I think in this case, why the Court of Appeal was wrong to rely on and consider *Stewart* is we're dealing with a case where Mr Darling has admitted his guilt. He hasn't been tried together with Mr Anderson and both have been convicted on evidence and then the Court is later considering all the implications on both of them from some credible appeal point. You know, we've got a very different circumstance, and so the key difference is I guess I can just list them, which none of which the Court focuses on in the Darling conviction is complete absence of a guilty plea or any of the considerations that arise in *Stewart*, the fact that both were tried together by the same finder of fact on the same evidence, party and principal relationship, the charges were interrelated, and Ms Stewart's offending was dependent on the commission of a substantive charge, she was encouraging it, and no retrial of the principal.

That is actually quite similar to the next case that we talk about which the Court of Appeal also relied upon which is the case of *Jones*, because again it's a case not involving a guilty plea. So, Mr Jones was tried together with Mr Clutterbuck on an offence of blackmail. Both were convicted and Mr Clutterbuck subsequently appealed his conviction successfully on fair trial grounds so effectively he had wanted to give evidence and had been prevented from doing so.

Because Mr Jones had been tried and convicted at the same time, and the Court considered that as a secondary party he would not have been acquitted in the absence of the conviction of Mr Clutterbuck, the appeal was allowed.

So the key differences, none of which were mentioned by the Court in the *Darling* decision were again no guilty plea, both defendants tried together by the same jury hearing the same evidence, the appeal point that impacts upon Mr Clutterbuck's case equally impacts upon Mr Jones' case given they were tried together and –

WILLIAMS J:

That difference comes down to the plea itself, doesn't it, really? Of course, with a guilty plea they will never be tried together.

MS HOSKIN:

5 Yes.

WILLIAMS J:

So you're really saying guilty plea is different because the factual basis upon which the decision is made, one in accordance with the autonomy of the individual making the choice, the other in accordance with the fact finder in a
10 jury trial, may well be different.

MS HOSKIN:

Yes. Yes, indeed, because by virtue of the guilty plea the Crown has never deployed its case against that defendant.

WINKELMANN CJ:

15 And there may also be advantages in them not being tried together which is a point you make in this case, for the defence.

MS HOSKIN:

Yes, absolutely, for the defendant, yes.

20 So basically, the three cases that the Court of Appeal draws sort of support for its approach to Mr Darling's conviction appeal should not have been followed in this case. In my submission, they're all clearly distinguishable.

WINKELMANN CJ:

So *Jones*, however, is not necessarily a finding because the principal's offence
25 is wiped away. There's actually prejudice to Mr Jones, isn't there? There was actually prejudice in the conduct of the trial for Mr Jones.

MS HOSKIN:

Yes. Yes, there was.

O'REGAN J:

Was there a retrial ordered in that case?

5 **MS HOSKIN:**

No. No, there was not, your Honour, and thank you, that was a point I meant to mention. No, no retrial ordered. So again a significant point.

By relying on those cases where the Court is considering a conviction appeal
10 by reference to the evidence that's emerged at trial and what the significance of various factors are, I suggest that led the Court of Appeal into error here because they started considering the trial of Mr Anderson and what the impact of his acquittal was and how that would have played out had Mr Darling been there, whereas to draw on the first error that I mentioned they should have been
15 firmly focused upon the facts that a properly advised Mr Darling had admitted and pleaded guilty to and whether those amounted to a, supported his conviction, and then considered Mr Anderson's acquittal and whether there was anything arising from that which could impact upon his conviction, and I'll come to how that might have worked when I get to the next part of my address, if
20 that's all right with the Court. Just advising how I say after we've discussed the errors the Court should actually have proceeded.
1050

So the only other two decisions that the Court of Appeal refer to is the *Darby*
25 case that your Honour Justice Winkelmann has referred to. That is actually – again, it's distinguishable. They rely on it from a principal point of view but that is distinguishable in the sense, again, there's no guilty plea in that case. It's two men who were tried together and convicted with different results. Different ultimate result and the reasoning in that case actually supports the proposition
30 that two different outcomes can be consistent with each other, because the Court says, and this is at page 157 or tab 12 of the bundle of authorities: "The conviction of a conspirator whether tried together with or separately from an

alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person."

WINKELMANN CJ:
5 What page is that sorry?

MS HOSKIN:
That's at page 157, your Honour.

WINKELMANN CJ:
Thank you.

10 **MS HOSKIN:**
So it has slightly different considerations arising again because the Court's considering the pool of evidence against them having been tried together, but it does just show that there's not this immediate inconsistent outcome that that means the conviction cannot stand.

15

The final case that the Court refers to is that case that I mentioned before, the case from the English Court of Appeal, *Zaman*, and that is the only case interestingly that is cited by the Court of Appeal other than *McIntyre* which actually involves a guilty plea, and that –

20 **KÓS J:**
Sorry, is this *Shannon* or *Zaman*?

MS HOSKIN:
Zaman.

KÓS J:
25 *Zaman*.

MS HOSKIN:
Z-A-M-A-N.

KÓS J:
Thank you.

MS HOSKIN:
That's at tab 19, your Honour, of the Crown's bundle.

5 **KÓS J:**
Thank you.

MS HOSKIN:
That has, and I'm referring to a short quote from page 286 here of the bundle, it's the quote I referred to a little earlier where the Court held that Zaman would
10 inevitably have "knowledge over and above what the prosecution were able to adduce" at the principal's trial, and by his plea he conceded not that the principal "may have committed the offence, but that he had in fact done so: the threshold condition." So that's really just showing a different set of factual circumstances to the ones in *McIntyre* where notwithstanding a guilty plea the principal's
15 subsequent acquittal doesn't invalidate the conviction.

WILLIAMS J:
What paragraph are you referring to there?

MS HOSKIN:
It's on page 286 your Honour.

20 **WILLIAMS J:**
Yes, I've got that.

MR COOK:
Twenty.

WILLIAMS J:
25 Twenty, thank you.

MS HOSKIN:

Thank you, your Honour.

KÓS J:

I mean just to think of a very practical example which arises sometimes in separate trials, the reason why the acquittal of the second offender, alleged
5 offender, may occur is because witnesses fail to appear. Now, acquittal in that situation does not wipe out the fact on which the first conviction is dependent.

MS HOSKIN:

Absolutely, your Honour.

KÓS J:

10 It's a forensic outcome.

MS HOSKIN:

Indeed, in subsequent trials where for example one defendant has failed to appear at the first trial or there has been a reason severance in two separate trials often by the time of the second trial there's the delay, memories are not
15 as fresh. There's also the record from the first trial that can give fertile fodder to inconsistent statements. There are all sorts of reasons why a second trial might be less successful than the first and it simply doesn't work, in my submission, for the ultimate outcome to be whatever the final verdict is against one defendant.

20

The way, in my submission, we can really see that the Court of Appeal has misapplied those authorities and been led into error is by their question in paragraph 51 of their judgment where they talk about whether Mr Anderson's acquittal can be reconciled with Mr Darling's guilty plea. That is not the test.
25 They needed first to consider whether the aggravated robbery to which Mr Darling had pleaded guilty was made out on the facts and then come to consider whether there might be anything arising from Mr Anderson's charge which in any way impacted on that, and in my submission as I will come to, it didn't. The final –

WILLIAMS J:

Can I just –

MS HOSKIN:

Sorry Sir.

5 **WILLIAMS J:**

Sorry to hark back to the issue we were discussing earlier, but does that analysis mean there is no point therefore in assessing the contextual reasons for the guilty plea? The COVID issue. If there is no overlap or no sufficient overlap between the charge in relation to Person A and the charge in relation 10 to Person B then, the circumstances which led to a plea of guilty on that reasoning would never be enough, because the prerequisite that you've just been talking about can never be made out. Perhaps I'm being a bit oblique.

MS HOSKIN:

I don't think I understand your Honour's question, because obviously when 15 somebody who has been convicted because of a guilty plea seeks to appeal their conviction then the Court's focus is necessarily on the circumstance of their guilty plea, which will involve consideration of whether any of those factors vitiate their guilty plea.

WILLIAMS J:

20 Yes. At the outset we talked about the circumstances, the overall circumstances of a guilty plea that might be relevant when you sought to set it aside on appeal, and you agreed that they may be relevant factors. Your analysis is fairly black and white on the elemental question that you're now dealing with. So that unless there is complete identity of elements or one is 25 completely parasitic on the other that context will be irrelevant, won't it, on your analysis?

KÓS J:

No, that can't be right.

MS HOSKIN:

No –

KÓS J:

That can't be right. The argument as I understand it you were advancing is that
5 there's already two separate arguments entirely.

MS HOSKIN:

Absolutely, your Honour.

KÓS J:

The difference will be that in each case the conviction might be set aside in the
10 situation where it's a vitiated plea because of oppression, a retrial would be order.

MS HOSKIN:

Absolutely, Sir.

KÓS J:

15 In the other situation a retrial will not be ordered because a critical dependent fact has effectively been eliminated, it's been erased by the subsequent acquittal.

WILLIAMS J:

So the problem –

20 **KÓS J:**

Do you agree with that?

MS HOSKIN:

Yes, I do, Sir.

WILLIAMS J:

25 The problem with that though is – thank you for your answer, Ms Hoskin, it's very useful. The problem with that is if there is – if the vitiation point is not

satisfied on your approach, then a person in Darling's position would have to go to the Court of Appeal in hindsight and say although the acquittal of Anderson is entirely irrelevant, I actually pleaded guilty just to get out of jail. Can you please set aside my conviction. And I can tell you what the chances
5 are of succeeding in that. If your suggestion is that the two are not in any way related and cannot be called in aid.

MS HOSKIN:
They are two different things, Sir, if I may. So the first is whether if Mr Darling wished to advance a ground that he pleaded guilty because he was pressured
10 into it. So, the pressure upon him was such or the –

WILLIAMS J:
No I'm talking about the problem was the system breakdown. It's not pressure from anything else, just the fact that if you don't plead guilty, you're going to serve the sentence before you get your trial anyway.

15 **MS HOSKIN:**
If he wanted to advance that appeal, that as an appeal ground, is separate from saying my conviction cannot stand because Mr Anderson was acquitted.

WILLIAMS J:
Of course it's separate. But that's a separate ground, but I'm just a little troubled
20 that you might be saying that in the context of what you might call a wriggle room category for people in the circumstances of Mr Darling that analysis means that the acquittal of Mr Anderson will be irrelevant to –

MS HOSKIN:
For the –

25 **WINKELMANN CJ:**
Can I just –

WILLIAMS J:

For the second – can I just get –

WINKELMANN CJ:

Oh, okay, sorry.

WILLIAMS J:

5 Can you just grapple with the answer to that?

WINKELMANN CJ:

Can I just – perhaps I might be able to be helpful because there is a thread running through most of the authorities that you have regard to the merits of any proposed defence. So, and that's – it might fit into that framework. So 10 perhaps if you could address that.

WILLIAMS J:

What do you say?

MS HOSKIN:

And I accept that, absolutely, that that would be the way. So if Mr Darling was 15 to say I appeal against my conviction and I didn't meant to plead guilty or I pleaded guilty for this reason and this is the reason why my guilty plea should be set aside and you now have to consider the merits of my case whether it would have led to a different outcome. You can see from Mr Anderson who was charged out of the same incident, he took it to jury trial, and he was 20 acquitted, so I suggest that my defence has merit.

1100

I would still, say, your Honour, there are real issues with that reasoning in this case because again the straight answer to that in my submission is he has been 25 charged with a different offence. His acquittal does not determine anything in respect of the charge that you were facing.

WILLIAMS J:

So you would say that was irrelevant?

MS HOSKIN:
I would say –

WILLIAMS J:
A co-lateral acquittal is essentially irrelevant to the analysis.

5 **MS HOSKIN:**
Yes, your Honour.

WILLIAMS J:
Right.

MS HOSKIN:
10 Unless it could fall – unless something happened at Mr Anderson's trial that could be said to fall – say, something fell, it fell into that residual category of *T v R* where it was so clear that Mr Darling could not be guilty of that charge. So –

KÓS J:
15 The com –

WINKELMANN CJ:
On the facts of this case you say it's irrelevant.

MS HOSKIN:
Absolutely, your Honour.

20 **WINKELMANN CJ:**
But although on the facts of this case Mr Darling would no doubt make the point that the prosecution witnesses didn't come up to brief. But in any case, we don't really need to consider that, do we.

MS HOSKIN:
25 No, and I would say we don't. But just to answer that, one of the prosecution witnesses I would say didn't come up to brief, but I would say the real problem

with Mr Anderson's acquittal, the way if we are going to spend time considering what Mr Anderson's acquittal on these facts mean, it is far more likely in my submission to be tied to the grievous bodily harm component of the charge he faced because he was acquitted of the alternate charge of wounding with the
5 intent to cause GBH.

WINKELMANN CJ:
Well can I just – taking it to the level of principal though.

MS HOSKIN:
Yes, yes.

10 **WINKELMANN CJ:**
Because that's what we're really concerned with.

MS HOSKIN:
Yes.

WINKELMANN CJ:
15 I think your answer to Justice Williams is that yes it could be relevant because when – the courts always looks to the proposed merits of any, you know –

MS HOSKIN:
At the –

WILLIAMS J:
20 That's the point.

WINKELMANN CJ:
And then so your answer is yes, it could be relevant to that, and it would depend upon the facts of the case.

MS HOSKIN:
25 And it would depend upon the facts, and yes, I accept because the ultimate test is miscarriage of justice.

WILLIAMS J:
Yes.

MS HOSKIN:
And I don't seek to suggest it's anything other than that.

5 **WILLIAMS J:**
Right.

MS HOSKIN:
Then obviously in the context of appeal it is something that Mr Darling can pray in aid. My response to that is on these facts and in these circumstances, it is
10 not something that he can successfully pray in aid.

KÓS J:
So Mr Bamford, who seems to have sprinkled magic dust in the Anderson trial on the jury and then sprinkled magic dust on the Court of Appeal in the Darling appeal, if he had persuaded the complainants in the Anderson trial to confess
15 that they had made the whole thing up, that would plainly be a relevant factor which would indicate a real prospect of miscarriage of justice.

MS HOSKIN:
Absolutely, and I don't seek to say anything other than that, your Honour. I accept that entirely.

20 **WINKELMANN CJ:**
So which is why it's best not to try and make too rigid a watertight category type analysis and rather to go with the statutory test?

MS HOSKIN:
Yes, yes, I accept that your Honour, but I also accept, as I have in the written
25 submission, that the category of circumstances is not closed.

MS HOSKIN:

I've never sought to suggest it's anything other than that. All of the authorities are very clear that it is not closed. What those cases are is they provide a useful illustration of where conviction appeals have succeeded, notwithstanding a guilty plea.

5

If I may, I seek to move onto my next point which is just to acknowledge the authorities that weren't before the Court of Appeal at the time of its judgment and that had they been I suggest we would have had a different outcome in Mr Darling's case, and that is the first and foremost – the House of Lord's
10 authority from 1975, *DPP v Shannon*.

Interestingly, it is concerned with exactly this case. The charges are different. It's a two-man conspiracy, but what was interesting is Mr Shannon pleaded guilty. Mr Tracey took his matter to trial and was acquitted, and it was on the
15 basis of his acquittal that Mr Shannon sought to have his conviction appeal allowed. The Court of Appeal did allow it and really interestingly, they allowed it in a very similar way to the Court of Appeal allowed Mr Darling's conviction, because they, and this is quoted in the House of Lord's decision at page 232, and the House of Lords says that the Court of Appeal gave this reason for their
20 decision. So this is the reason they gave when they quashed Mr Shannon's conviction.

They said: "It has always been accepted since 1907 that, subject to well defined limits, an accused person who pleaded guilty might nevertheless appeal against
25 his conviction if upon the admitted facts he could not in law have been convicted of the offence charged." So it was the same reasoning, it was the same category, if I can call it a category, that led the Court of Appeal to consider a co-offender's acquittal and validated the conviction of the one who pleaded guilty.

30

It was referred to the House of Lords as a question of law, very much in the same way that the Solicitor-General has referred this question of law to this Court, and the House of Lords considered whether Mr Shannon's conviction could stand notwithstanding his co-offender's acquittal, and they were

unanimous that it could. They said that otherwise, and I'm quoting here from page 230, they said that –

KÓS J:
This is 230 of the case?

5 **MS HOSKIN:**
Of the bundle, your Honour. They said otherwise –

KÓS J:
So this is Lord Morris? Yes, Lord Morris.

MS HOSKIN:
10 – otherwise "the law will be producing a strange result. No one could know better than A whether he did or did not agree with B to do something wrongful and if, fully understanding what he was doing, and having skilled advice to guide or assist him, he acknowledged by way of confession to the Court that he had so agreed, the law might seem to be artificial and contrary-wise which required 15 that because the charge against B failed A must be held to be not guilty when he himself knew and had admitted that he was guilty."

The House of Lords went on after referencing that quote that I cited to you a moment ago about the reason for the Court of Appeal decision, so whether on 20 the admitted facts he could in law have been convicted of the offence, the House of Lords said at page 232: "In the present case not only was there on March 22," which is the day of Mr Shannon's guilty plea, "no question of law and no decision on any question of law; there were no facts which made an acceptance of the plea of guilty unwarranted or which involved that such 25 acceptance constituted a wrong decision on a question of law," and so the House of Lords concluded that Mr Shannon's conviction was perfectly capable of standing, notwithstanding his co-conspirator's acquittal, and that is in my submission exactly on all fours with the decision before this Court.

I have also referred to in the Crown authorities other slightly more recent authorities which are all to the same effect. At tab 16 there's the case of *Reedie v HM Advocate* [2005] HCJAC 55, [2005] SLT 742, and it's at paragraph 11 of that decision which is page 266 of the Crown bundle. It
5 says: "A plea of guilty constitutes a full admission… It is not a conditional admission that is subject to reconsideration in the light of a subsequent decision of the Court; nor, in our view, in the light of a subsequent verdict in the trial of another party on the same charge."

10 Then I wanted to quickly read one more quote which is from tab 15, a more recent UK case, *R v Arshad* [2018] EWCA Crim 2206, and this can be found at page 254 of the Crown bundle. It's another case where one of the defendants had pleaded guilty. The other co-conspirator went to trial and was acquitted, and the Court said: "The issue raised by this application is whether, having
15 pleaded to conspiracy … following professional advice, the applicant's conviction is inconsistent with the later acquittals of his co-conspirators. We say at the outset that we consider it to be a surprising and unfortunate outcome if a person in the applicant's position could vacate his guilty plea, freely made and with the benefit of professional advice, simply because the co-conspirators
20 named in the indictment had been acquitted at a later trial; or argue on an appeal that the conviction consequent on his plea of guilty was, therefore, unsafe."

What I had neglected to put in the submissions or in the bundle but I have a
25 copy for the Court should you require it, but there's a similar decision, and I've provided one to my learned friend this morning, a similar decision from the Supreme Court of Canada which reaches the same decision which simply says: "The acquittal of the co-accused determines nothing in respect of the conviction of the accused. The jury verdict is only conclusive as between the
30 Crown and the accused at trial." That's a 1991 decision of the Canadian Supreme Court in *R v Hick* [1991] Carswell BC 425.
1110

KÓS J:

In what, sorry?

O'REGAN J:
Which should get handed up.

MS HOSKIN:
5 *R v Hick*.

WINKELMANN CJ:
Have you got – have we got that?

MS HOSKIN:
Yes, yes I've got his – yes.

10 **WINKELMANN CJ:**
It's a long trip over.

MS HOSKIN:
And I'm sorry, it's entirely my oversight that it wasn't in the submissions or the bundle.

15 **WINKELMANN CJ:**
Thank you.

MS HOSKIN:
Doesn't provide anything inconsistent with the authorities that are all set out.

WILLIAMS J:
20 Thanks.

MS HOSKIN:
It's at page 3. Final paragraph: "The acquittal of Marshall determines nothing in respect of the conviction of the accused." There's nothing groundbreaking in that decision, it simply followed *DPP v Shannon* and in my submission, had
25 those lines of very persuasive authorities from senior courts been before the

Court of Appeal, the reasoning would have been different. All of those cases are supportive of the Crown position in this appeal which is the answer to the question of law is no.

5 I think we've largely traversed much of the material that I was wanting to talk to you about in terms of my next section which was just talking about how the Court of Appeal should have approached the appeal and I don't wish to repeat myself. It obviously, had an appeal ground been advanced that Mr Darling's plea was vitiated for other circumstances then the Court would have considered 10 that and that I suppose is, to answer your Honour Justice Williams' concern, it wasn't ground of appeal. The ground of appeal was that his conviction should be set aside because Mr Anderson had been acquitted, and had the Court placed due emphasis on the admitted facts they would have gone through those and seen that he had pleaded guilty to aggravated robbery and indeed the 15 admitted facts do make out the charge as my learned friend accepts in her submissions at paragraph 29.

I suggest then that they would have considered the impact of Mr Anderson's acquittal given that was the ground of appeal but following the lines of authority 20 from the House of Lords in *DPP v Shannon* they would have said that of itself that was not sufficient to vitiate Mr Darling's conviction. It didn't – there couldn't been seen to be this inconsistency such that the fact that Mr Anderson decided to try his luck at trial and was acquitted, that did not invalidate Mr Darling's conviction.

25 **WINKELMANN CJ:**

What do you – does that depend upon the – because you run several lines, and one of the issues you take is it's a different offence he's acquitted of. Would it be different if he was acquitted of exactly the same offence?

MS HOSKIN:

30 No, your Honour. I think there would be real difficulty with that in this case because, for the simple reason that he hasn't faced trial and for the reasons that – in the same reason that we have the –

WINKELMANN CJ:

What do you mean there would be real difficulty? You mean that it still wouldn't be an available argument for Mr Darling?

MS HOSKIN:

Yes, I would.

MS HOSKIN:

Because on the face of it we still wouldn't know what Mr Anderson's acquittal meant. So say Mr Anderson went to trial and was acquitted of section 235(b) offending rather than section 235(a) offending if that's, as I understand it, your Honour's question. Then the fact that he is acquitted of that doesn't – we don't know what that means. Now, maybe in some circumstances we could extrapolate that oh well that clearly is because for the example that your Honour Justice Kós gave, if the complainant said oh look we made it all up it didn't actually happen, obviously in those sorts of circumstances it would have a direct bearing on Mr Darling's conviction. But where you've simply got a case where the Crown has deployed its full case against Mr Anderson and not Mr Darling we can't accept, we take the jury's verdict from Mr Anderson and say that it is determinative of anything against Mr Darling.

Now, I certainly accept that the argument would be stronger had he faced the same charge. There would be more arguments that could be made in support of that having possible impact upon Mr Darling if the evidence was exactly the same, but I still draw upon this this court's reasoning in *Weenink v R* [2017] NZSC 4 that all that says is that the jury who were charged with hearing the case against Mr Anderson did not find it proved.

WINKELMANN CJ:

So say a defence was run that these two had made it all up, and the two complainants had made it all up. Mr Anderson is acquitted. Then Mr Darling makes an application simply on the grounds it's an inconsistent – you'd say that wouldn't be successful, but if he made the application on the grounds that he was – his free will was effectively overborne by the oppressive circumstances

he found himself in, then that might be relevant material the Court could consider. That at the trial of his co-offender there was a reasonable case run that these people had made it all up. That's a hypothetical.

MS HOSKIN:
5 That's a hypothetical. Yes, I mean –

WINKELMANN CJ:
That how you say it would come in.

MS HOSKIN:
That's –

10 **WINKELMANN CJ:**
But it's not the fact – the verdict itself is not the grounds to vacate the guilty plea.

MS HOSKIN:
Yes, that's right your Honour.

15 **O'REGAN J:**
I mean that might be a reason why you would not order a retrial.

MS HOSKIN:
Absolutely, because the outcome for that would be a retrial and then the evidence against Mr Darling could be tested if the Crown proceeded and
20 depending on what the complainants had said at trial it may well be that a pragmatic – or a decision was made that that was no longer appropriate.

I think sort of – I am at the risk of repeating myself, but here when we do consider the impact of Mr Anderson's acquittal on Mr Darling's conviction there
25 is, and in some circumstances, it would be entirely appropriate to deploy the reasoning of the sort in *T v R* in the UK to say look, what emerged at this trial

is good evidence that I'm demonstrably innocent of this offence. So, that would be another way that he could endeavour to make out a miscarriage.

What the Court also could have done in this circumstance, and I suppose if they
5 were going to go on and consider exactly what Mr Anderson's acquittal might mean and in some circumstances depending on what the evidence was that might be easier to do than it is here.

They can sort of – the court could sense check itself by considering an
10 inconsistent verdict type reasoning. So here, because that's effectively what the Court isn't it? I mean here it didn't look at a guilty plea. It effectively considered, well, is his outcome inconsistent with Mr Anderson's acquittal? Here, had they followed that reasoning which is not the reasoning I say they should have, but had they – would have provided a quite a useful sense check
15 because there are differences there that can justify, and the first is the charge. The second is that he gave evidence, Mr Anderson gave evidence. We've got, you know, Mr Darling has confessed to the offence. We've got – Mr Anderson has put forward a separate narrative.

20 There is also, and I'm sort of not seeking to rely on this in any significant way, but I do think it's interesting the way in which the Judge addressed the jury about Mr Darling and were told – they told – he specifically told the jury that Mr Darling faced no charges. Which is an interesting way of wording that. I mean obviously judges often advise, he does not face charges before you or
25 Mr Darling's not before –

WILLIAMS J:
Yes.

MS HOSKIN:
But that wording could have provided some assistance to the defence narrative
30 which is that Mr Darling's the victim here, and so in any event, if the Court were to consider inconsistent reasoning, I submit that on these facts there are plenty there to justify the different outcomes.

That brings me – I am hoping to finish by the morning adjournment. That brings me to the consequences if the judgment is left uncorrected, and these in my submission could also be characterised as reasons why the judgement is, in
5 the Crown submission, demonstrably wrong. The first is that it, and the Crown submission devalues guilty pleas, and that it effectively regards and unequivocal plea as equivocal in cases of joint enterprise. An otherwise unequivocal plea becomes equivocal simply because there is someone else who has decided to plead not guilty and try their luck at trial. It effectively means
10 that that guilty plea waits until the outcome of a connected party, their proceedings, and in my submission that simply cannot be right.

I noticed just very quickly in the New Zealand Herald this morning they had an article about a guilty plea yesterday in a charge of murder and the opening
15 statement from the victim's family was to say: "The good thing about a guilty plea is we can move forward and it won't be a long drawn-out process with the trial and that in itself is a godsend," and in my submission if we deploy this kind of reasoning where a guilty plea waits until anyone else is – or effectively waits until all connected proceedings end before people can know that that is the end
20 of the case, then that simply – it just takes credibility away from the system. It erodes the principle of finality with all of the consequences that has for all affected parties.
1120

WILLIAMS J:
25 It's not just finality though: it's autonomy.

MS HOSKIN:
Yes. Yes, absolutely, your Honour, yes, it is, and it cuts across that principle of individual criminal justice as well that trial judges always say, you know, you decide against party A on the evidence that's admissible against them and then
30 you consider party B. You can find one guilty, you can find – it's not that, well, you might find him guilty but if you find B not guilty then they're both in that together so you acquit. It's simply it's autonomy, it's finality, it's…

WILLIAMS J:
Mabo.

KÓS J:
The vibe.

5 **MS HOSKIN:**
It's the vibe, your Honour. I've always wanted to say that.

It also, I think it broadens the scope of – and here actually I'm probably in difficulty of bringing it back to closed categories and I'm not meaning to do that,
10 but if you can consider that someone's guilty plea can be vitiated by decisions made by someone other than them and what happens to them on evidence that is deployed against only them and if that can impact and they face a different charge then really where's the line draw that a fact is not relevant to someone's decision to plead guilty.

15 **WILLIAMS J:**
Part of it must be about whether this is a true exercise in autonomy, to go back to the thing I've been harping on about.

MS HOSKIN:
Indeed, Sir, but again I'd say that simply it's a different question. It is a different
20 question, yes.

WILLIAMS J:
I realise that, but I mean I'm not taking you to say anything other than take into account the entire context, including finality because of – and autonomy, system integrity, and so on. But the entire context doesn't require you to think
25 about the circumstances where the system might be the problem.

MS HOSKIN:
And if the Court decided that the circumstances were the problem in the Court of Appeal then we would be having a very different discussion here.

WILLIAMS J:

Quite, well, we probably wouldn't be here I think on your indication.

MS HOSKIN:

I think there's also an argument that it broadens the scope of inconsistent
5 verdict reasoning because if a separate trial and the outcome of that separate trial can impact on someone who has pleaded guilty then inevitably a separate trial must be able to impact on someone who has not pleaded guilty but has taken their connected matter to trial. So it cuts across the reasoning in *Weenink* and *McMaster v R* [2016] NZCA 612 and those other cases, in my submission.

10 **ELLEN FRANCE J:**

The Court does in setting out their approach on appeal from paragraph 40. You wouldn't presumably take issue with 40 to 42?

MS HOSKIN:

No, absolutely not, your Honour, and in those paragraphs it looks exactly like
15 we are going to have the reasoning that you would expect. What I think is glaringly obvious is that after they talked about, in paragraph 42, the category of "on the admitted facts", we then go on to have a discussion of cases, none of which involve guilty pleas or any admitted facts, and then we have discussion about Mr Anderson's trial. So from those early paragraphs which suggest we
20 are going to have the sort of analysis one would expect where the conviction follows a guilty plea, we don't. We simply have a different discussion as if we have had two people who have had a trial and as if we're doing inconsistent verdict, unreasonable verdict, reasoning.

WINKELMANN CJ:

25 So you say they got it wrong because they really didn't fail to – they failed to grapple with the fact this is a guilty plea but you accept that even where there's a guilty plea sometimes it is possible that a subsequent acquittal of a co-offender or principal offender will negate the safety of the guilty plea conviction and the facts just have to be addressed very carefully on each case
30 but it is not the case that an acquittal on its own is sufficient.

MS HOSKIN:

Absolutely, your Honour, it is not enough that there's an acquittal. If –

WINKELMANN CJ:

On its own? It has to be in –

5 **MS HOSKIN:**

Yes. If the Court is going to consider that a separate trial against a separate defendant has some significance or some impact, is capable of impacting on a guilty plea, then there needs to be a very good reason why and that would bring us back to the miscarriage and there simply isn't in this case, and here what 10 they seems to have accepted is it's simply the fact of an acquittal with also this erroneous reasoning that an acquittal must mean there's no robbery or no common intention to prove robbery irrespective of the fact that wasn't the charge that Mr Anderson faced.

15 It's quite interesting – I think in four minutes I can make this point – it's quite interesting to think that on the law as it currently stands we've got Mr Darling has pleaded guilty for a section 235(b) offence, Mr Anderson has been acquitted of a section 235(a) offence. Had they been tried together, and I appreciate this is theoretical and wouldn't really happen, but let's say for present 20 purposes they had faced trial together on those two different charges, if Mr Darling had been convicted and Mr Anderson acquitted there is still a prospect of maintaining Mr Darling's conviction on appeal. Okay? Because we've got different evidence, we don't know what the acquittal of Mr Anderson means, we've got different charges, et cetera. If both of them had faced trial 25 on those separate charges separately, and Mr Darling had been convicted and Mr Anderson acquitted, we've also got a chance of sustaining Mr Darling's conviction on appeal because they're different finders of fact. So they've made different value judgements and they've accepted different evidence and they've reached a different outcome and the fact that those two different outcomes don't 30 match doesn't impugn the reasoning of the jury because it's two different juries.

So on the reasoning of *Weenink* and things, Mr Darling's conviction can still be sustained, and then we've got this, on the Darling case as it currently stands, this outlier that Mr Darling can admit his guilt and plead guilty but his conviction cannot be sustained on appeal simply because Mr Anderson chose to take it to
5 trial and was acquitted, and if that's the law then I would hark back to the wording of *DPP v Shannon* and say that that would be producing a strange result.

Now unless the Court have any other questions for me or wishes me to address
10 the matters raised by my learned friend in any more detail, I am content to leave my submissions there.

WINKELMANN CJ:
Right. Well, we'll take the morning adjournment at this point then.

COURT ADJOURNS: 11.27 AM

15 **COURT RESUMES: 11.47 AM**

MS HOSKIN:
Sorry, your Honour, just before the adjournment I asked if you had any further questions and you said you'd take the adjournment and let me know, so I've just remained standing in case.

20 **WINKELMANN CJ:**
Oh no. The answer was no. I'm sorry, I failed to say no. I failed to use my words.

MS HOSKIN:
Thank you, your Honour.

25 **WINKELMANN CJ:**
Ms Guy Kidd. Mrs Guy Kidd.

MS GUY KIDD KC:

May it please the Court, I don't mind which. It's really important that we keep in mind that we're actually answering a very narrow question in a reference.

WILLIAMS J:
You're looking at me when you say that.

5 **MS GUY KIDD KC:**
No. I'm sorry, it started with you, your Honour. But I did want to recognise the mana of Mr Darling in all of this in what we're discussing, because my learned friend made a comment about the outcome would have been different, and I think it's dangerous to go down that path if we're not going to fully investigate
10 it, which isn't necessary on the reference because in my submission there was powerful evidence before the Court of Appeal that this may be a situation, maybe well have been the situation, of a false guilty plea as it has been described.

WINKELMANN CJ:
15 So I mean, on that, certainly you articulated a reason –

MS GUY KIDD KC:
Yes.

WINKELMANN CJ:
– a compelling case probably for it but it hasn't been considered at a lower
20 court.

MS GUY KIDD KC:
Yes.

WINKELMANN CJ:
And it isn't within the terms of reference, so we don't need to hear you on it.

25 **MS GUY KIDD KC:**
Yes.

WINKELMANN CJ:
Having said that, I rather doubt we'll completely avoid you being asked questions about it but in some ways that's useful because it tests the scope of any rules or the appropriate articulation of any principles that are established.
5 But we don't really need to hear its application to Mr Darling.

KÓS J:
Is it correct that that wasn't actually raised as a ground of appeal in the Court of Appeal? I haven't checked that point.

MS GUY KIDD KC:
10 I actually don't know because I didn't see the notice of appeal.

KÓS J:
Right.

MS GUY KIDD KC:
My learned friends will be able to assist on that.

15 **KÓS J:**
Well I'm sure it's raised.

MS GUY KIDD KC:
It – and on that issue of false guilty pleas, just the Canadian case at 466 of our bundle has a really powerful discussion around that, but I don't think we need
20 to go there.

WINKELMANN CJ:
It seems like quite a bid must have been run in the Court of Appeal because counsel gave evidence.

MS GUY KIDD KC:
25 This is the grounds of appeal, my learned friend has found it. The: "Principal offender acquitted at trial on the basis of independent witness, as well as evidence given by the principal offender, which couldn't have been anticipated."

So, nothing about the circumstances, at least in the notice of appeal that was filed there, where –
1150

WINKELMANN CJ:
5 But the circumstances of his guilty plea were fully traversed in the evidence, weren't they?

MS GUY KIDD KC:
They were with the evidence, and I suppose the other – just matter on that is that this is a situation where Mr Darling throughout was adamant that he was
10 not guilty of this until he entered his plea.

WILLIAMS J:
The Court of Appeal didn't need to grapple that because of the view it took of step 1.

MS GUY KIDD KC:
15 Correct. So turning to that and the narrow focus then of the reference, you will appreciate that we are saying, yes, the Court of Appeal was wrong. The answer to the reference is no. The reference being did Mr Anderson's acquittal mean that Mr Darling could not in law have been convicted of the offence with which he was charged despite his guilty plea?
20
That is principally just in a nutshell because they actually were facing different charges so there wasn't a nice marrying of the same mens rea or elements, and his – I'll just get my learned friend to put up the charging notice now before the Court, which is Crown charge notice 20 and 21 of volume 2. So we have
25 firstly, the charge again Mr Anderson there that went to trial, that he robbed the female complainant of her handbag. At the same time of such robbery, caused grievous bodily harm to the male complainant. Not – found not guilty on that.

Charge 3, it's not apparent on the face of this but the direction was that was an
30 alternate charge, the wounding with intent to cause grievous bodily harm. Also

found not guilty on that charge, which in my submission supports the submission that it may have been something other than the absence of a robbery which was concerning the jury or which led to their result on charge 1.

5 Then if we go to charge – and of course though with the key thing with charge 1, the jury had to be satisfied on that causing grievous bodily harm to the male complainant and that was really the key issue at trial seemed to be, was this an intentional wounding that occurred? That's what Mr Anderson gave evidence about that he didn't intentionally wound.

10 **WINKELMANN CJ:**
He suggested actually it was someone else who stabbed him, including possibly his female partner.

MS GUY KIDD KC:
Yes, yes, or described a mechanism where he was holding and perhaps the
15 male complainant was slashing around at –

WINKELMANN CJ:
Stabbing himself.

MS GUY KIDD KC:
Yes. That was what was put forward. Just to note on that though of course,
20 Mr Darling in his instructions to counsel had said that the male complainant did have the knife, so that wasn't completely out of left field. But then looking at charge 6 which is the comparison that Mr Darling pleaded guilty to didn't have that element, any elements relating to the wounding with intent to cause grievous bodily harm.

25

The other point that I wish to raise, we see it marked up on charge 6, if you could just go down. When Mr Darling came to plead guilty the reference to section 66(1) was taken out, so he was pleading guilty on a principal basis. So, this isn't a party situation. Then, similarly, it was taken out of Mr Anderson's bit.

30

I just wanted to address the *McIntyre v R* case that my learned friend has already spoken to. An accessory after the fact charge is quite a unique situation in that often the person who is charged as the accessory wasn't there, is only relying on what they've been told by the person involved, and so they can only
5 rely on – so if someone says: "I killed him", that could actually mean it's culpable homicide or it's not culpable homicide. Really, my analysis of *McIntyre* is that that's one of the situations where it would be an affront to the integrity of the justice system to let his conviction stand despite his guilty plea.

10 I think it's important that we do look at – there was sort of discussion we had about what if they had faced the same charge and I won't get too deeply into it but I think there is a line of authority that's important to reference. The first is that High Court decision of *Darby* and the passage that has already been mentioned at page 157 of the Crown's bundle, because it's important that the
15 fact that a co-accused is acquitted is not totally irrelevant. These cases don't say that it's totally irrelevant. What they do say is, well, that doesn't mean that you necessarily should be acquitted yourself.

So that passage at 157: "In the light of the wealth of both academic," that
20 passage there we've got up, where the Court redirected it: "It should now determine that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person. In our opinion
25 such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject." So that's where we go back to our big overriding submission of miscarriage of justice has to be the lens that we view these cases. My learned friend took the Court to the decision in *Shannon* of the House of Lords. I'd like to take the Court to the speech of –

30 **WILLIAMS J:**

Just before you do, in that passage, the question seems to be consistency with the acquittal or inconsistency with the acquittal.

MS GUY KIDD KC:

Yes.

WILLIAMS J:

And we're all agreed that that's not a problem here. So how do you fit your
5 justice into that?

MS GUY KIDD KC:

Well, I just want to – we started to talk about what would be the situation if they did face the same mens rea, the same charge, and the point I'm making here is the point I think your Honour raised. The acquittal of Mr Anderson, in our
10 submission, is not irrelevant if they had been facing the same charge, and if a court was looking at the matter that is something they would have to consider.

WINKELMANN CJ:

It's neither irrelevant nor determinative.

MS GUY KIDD KC:

15 Correct, your Honour, yes.

WINKELMANN CJ:

Well, it might be on the particular facts but it's not always determinative.

MS GUY KIDD KC:

Yes, yes, and similarly supportive of that approach is the speech of
20 Lord Salmon at page 251 of the Crown's bundle where again they said, okay, so just because a co-conspirator is acquitted doesn't mean that your conviction is wrong, but he said, and it starts with: "In the case which I have postulated," yes, "B's acquittal will no longer, of itself, give A the right in law to have his own conviction quashed. A should however," subject to procedural points they had,
25 "be able to seek leave to appeal against his conviction upon the ground that B's acquittal makes A's conviction unsafe or unsatisfactory," which is their test. "Whether or not A would succeed would depend, not upon technicalities but

upon all the relevant facts and circumstances which the Court of Appeal would be in a position fully to investigate." So –

WINKELMANN CJ:
What page is that, sorry?

5 **MS GUY KIDD KC:**
That's page 251.

WILLIAMS J:
Of our bundle.

MS GUY KIDD KC:
10 Of the Crown's bundle of materials.

KÓS J:
I think there's another point that's important, just going back to *Darby*, which is that the real issue in *Darby* was whether the rule in *Dharmasena v R* [1951] AC 1, the old Privy Council rule, which was that if two persons were
15 presented for trial on a single conspiracy the acquittal of one necessitated the acquittal of the other. This was what was directly in issue in that case and the High Court said time to review that rule and retreat from it.

MS GUY KIDD KC:
Correct, yes. So I suppose where we're getting to is it doesn't determine it. It's
20 not determinative but it could be relevant because we can never foresee all the situations that might arise. So just for the Court's knowledge, an example of that situation, that test being applied, is the case of *R v Burke* [2006] EWCA Crim 3122 that my learned friends put forward at 289 where they cited that, at 295 they acknowledge that the Court needs to "… investigate the relevant facts
25 and circumstances to determine whether an appeal should succeed." So that's the approach that they went through ad looked at, whether the acquittal in that case affected matters.
1200

So we are then, and just to conclude that sort of submission, there is supporting approaches in New Zealand law. My learned friend talked about the inconsistency of verdicts decisions, will he get into this sort of reasoning, and one is if we look at the *McMaster* decision, which is at page 32 it starts, that's a decision of the Court of Appeal, and what's important is paragraph 72 and 73 the Court spoke about the concept of factual inconsistency at paragraph 73: "Factual inconsistency occurs where, given the evidence, two verdicts cannot stand together. Inconsistency of that kind may arise either between verdicts involving the same accused or between verdicts involving different persons charged in connection with related events."

Also further down in that paragraph citing the Supreme Court of Canada in *Pittiman v R* 2006 SCC 9, [2006] 1 SCR 381, "… authority for the proposition that inconsistent verdicts may be held to be unreasonable 'when the evidence on one count is so wound up with the evidence on the other that it is not logically separable.'"'

So I think that's important to understand that acquittals in these cases may in some situations be of significance, and we put in our submissions, and in the bundle, an old case of Justice Hardie Boys in a different situation, *Ferris v Police* [1985] 1 NZLR 314 (HC), it's at page 252 of our bundle. That was the unique situation where serious drugs charges had to go off to one court and we had cannabis charges going to another court. The same body of evidence. One judge making one decision on the same evidence about possession in the lower court, a different outcome. It's a different situation but I think what is important here is citing Justice Richardson if an unappealed or unsuccessfully appealed final decision of one court may be reopened by another court, any resulting inconsistency can only bring the administration of justice into disrepute. So sometimes it may be that the outcome for one, the acquittal of one co-defendant might actually bring the justice system into disrepute or may indicate that there's a miscarriage of justice.

So we would say that if you are, if this appeal had its time again, the focus may well have been on the circumstances of the –

WINKELMANN CJ:
Was *Ferris* two, were they two jury trials or was it a…

5 **MS GUY KIDD KC:**
I think it was two judge-alone trials.

WINKELMANN CJ:
Because in those days the judge-alone trials were probably without a transcript. They'd have been without a transcript.

10 **MS GUY KIDD KC:**
Yes.

WINKELMANN CJ:
Which would've had a bearing upon the whole thing.

MS GUY KIDD KC:
15 I think the essence of what you're hearing from Justice Hardie Boys is that this on its face looks wrong and –

WINKELMANN CJ:
Where two judges, when a jury and – is it a judge and a jury, or two judges come to different outcomes.

20 **MS GUY KIDD KC:**
They basically said the District Court judge should have exercised his inherent power to prevent the abuse of process of the Court.

WINKELMANN CJ:
Okay, so it was a jury trial?

25 **KÓS J:**

No reference to a jury in it.

MS GUY KIDD KC:
No.

WINKELMANN CJ:
5 Yes, and a jury trial in the High Court I assume, and the District Court judge…

MS GUY KIDD KC:
Yes.

ELLEN FRANCE J:
These are in a slightly, like *McMaster* and *Ferris*, they are in a slightly different
10 context in that you're not dealing with a guilty plea are you in one case?

MS GUY KIDD KC:
Yes.

ELLEN FRANCE J:
So you are more in the unreasonable, potentially leading to unreasonable
15 verdicts aren't you?

MS GUY KIDD KC:
I think the point I was just going to make is if this appeal have been dealt with again it may well have been that the – I agree with my learned friend, the guilty plea should have been the thing that was the focus and looking at was there a
20 miscarriage of justice in that guilty plea being entered and in part of that and looking at the circumstances of was there a miscarriage of justice, I would submit that the Court could have then looked at well what happened in the Anderson trial in coming to that view about whether there was a miscarriage of justice.

25 **WILLIAMS J:**
I don't think there's any disagreement from the Crown on that.

MS GUY KIDD KC:
No.

WILLIAMS J:
Although you might disagree on the result.

5 **MS GUY KIDD KC:**
Yes, yes. So unless the Court –

WINKELMANN CJ:
In our discussions with Ms Hoskin we raised with her your points I suppose that in written form the Crown seem to be articulating a kind of a category –

10 **MS GUY KIDD KC:**
Yes.

WINKELMANN CJ:
Finite category approach in that the guilty plea suggests a different approach in appeal than others and we put her the single statutory test, the *Darby*,
15 High Court of Australia approach and she accepted that. I think that's really what you're arguing for as well.

MS GUY KIDD KC:
Yes, yes. I didn't – I had written submission about that to speak to.

20 But that is our critical submission that this court has recognised the categories aren't closed and really there is a risk with categories and we really need to go back to that inherent was there a miscarriage of justice and looking at all of the circumstances and we have the underlying – the directions that this will be an exceptional case, but –

25 **WINKELMANN CJ:**
The authorities you've taken us to have usefully highlighted the point I think at which again arose in discussion with Ms Hoskin that you really do need to look,

you need to look at the significance of the acquittal and it may be sometimes an acquittal may suggest there's a miscarriage of justice.

MS GUY KIDD KC:

Yes. I mean, one could imagine a situation where the witnesses came along
5 and said yes I did make that up. You know, that's where we're probably getting into an abuse of process there but it would be unfair to allow, you know, if that's genuine you know that's where the Court's going to have to exercise that judgment which is inherent and would it have affected the trial, so an error or an occurrence that would be the result –

10 **WINKELMANN CJ:**

Something like this suggests something – also tends to suggest, to go back to Justice Williams' point, that something like that would suggest that in some way the guilty plea was the result of oppression or something.

MS GUY KIDD KC:

15 Vitiated, or yes, yes.

WINKELMANN CJ:

Another thing might be if there's forensic evidence, DNA evidence which is conclusive that it couldn't have been, couldn't have occurred as the person has admitted.

20 **MS GUY KIDD KC:**

Yes, yes. I suppose when I was thinking about it as a trial counsel it's all very well to say oh well someone will know if they've done it or not. Often you have a client who is affected by drugs or alcohol, mental illness, perhaps not to an extent where they can say well I was so effected I'm not guilty, and they actually
25 don't know the facts. So we have to keep in mind there are those situations.

KÓS J:

That has to be the situation in gang-related offending for instance where someone is simply nominated to take the rap regardless of actual culpability. Well, there has to be an opportunity for them to repent of that.

MS GUY KIDD KC:
5 Yes, and it's not to say it will be easy.

WILLIAMS J:
The ones that trouble me are the ones where the defendant knows they didn't do it but makes a judgment call for reasons unrelated to their guilt.

MS GUY KIDD KC:
10 I mean, and that is interesting if – how calculated that decision was, whether they should be allowed to address it, that Canadian case I pointed you to says well that's an affront to justice to allow false pleas to remain. But that's where the Court will have to look at it, maintaining that balance of finality versus the justice of the situation.

15 **WILLIAMS J:**
It does seem to be the things need to be protected against are system-driven guilty pleas.

MS GUY KIDD KC:
Yes.

20 **WILLIAMS J:**
We mustn't allow the system to become a driver for guilty pleas.

MS GUY KIDD KC:
And the concerning feature in this case of a young man, 21, in prison awaiting trial and so – and then with the impact of his actual custodial experience on him
25 as well, which was so key here, but – and with looking to the future and he was told there are no trial dates available. So, yes. It is really concerning and I think

what we have here is a combination of those factors which make it quite compelling.
1210

5 My learned friend was going to address you but…

MR COOK:
There seems to be quite a lot of agreement so it's going to be very brief because our unifying concept was miscarriage of justice 232. That was our unifying concept, our theme throughout all of our submissions, but it seems that that 10 point has been conceded, or at least accepted, and the reason for that is not merely 232 but it's because miscarriages of justice have a corrosive effect on the integrity of the justice system and public confidence in it. The Court's obviously grappled with finality recently in the *Ellis v R (Continuance)* [2022] 1 NZLR 239 continuance decision and talked about finality not being 15 determinative there, and –

WILLIAMS J:
Although your quote should be "justice is a better" –

MR COOK:
Yes. I think there are a couple of gremlins that actually got into it but that one's 20 a bad one, I accept that. And your Honour, Justice Kós, in a Court of Appeal decision, talked about miscarriage of justice being a "protean concept", because it is, with our legislature's desire to have everything written down, we've got the common law. It's constrained by the words, although they are very elastic words, in 232. The only point is that if Lord Morris' submission, or, 25 sorry, Lord Morris' speech in *DPP v Shannon*, the "strange result" quote, with respect to His Lordship, that cannot be an absolute or mutable proposition because it could, there could be conceivably circumstances which to use your Honour, Justice Kós' phrase, could wipe out the fact of a conviction. It could be a judge-alone trial, A and B charged, no others, no difference in factual 30 scenarios. A pleads guilty because of whatever reasons, they may be systemic, they may be other reasons, and at the judge-alone trial there is one crucial

witness, and indeed the whole Crown case rests upon that witness, and the Judge in a decision where there's a transcript and a judgment in accordance with this Court's decision in *Sena* (citation 12:12:10) says that the Judge found that witness to be thoroughly unsatisfactory, so much so that it's difficult to tell
5 the exaggerations from the half-truths, and that was the crucial witness, then A who pleaded guilty because of say COVID delays or whatever, in my submission, could utilise that fact to fold it in to the miscarriage of justice.

WINKELMANN CJ:

But if they were out on bail or were remanded on their own recognisance and
10 there's no time delay and they've pleaded guilty and there's no suggestion that they've got any kind of disability when they plead guilty and they're fully advised, that Judge's finding won't necessarily be a ground for vitiating a guilty plea.

MR COOK:

That highlights the point that I'm trying to drive at which is a purely factual
15 assessment on the basis of miscarriage of justice, but there could conceivably be a point when even someone has, to use a phrase that the Supreme Court of America has used, decided to go to hell in a hand-basket on their own autonomous decision, that the system's interest in getting it right could override that person's individual interest because a miscarriage of justice transcends the
20 individual case and it affects the integrity of the system as a whole, because this Court's authority, morals, derived from the public confidence that we have in pronouncements, which is exactly what your Honour said in *Ellis (Continuance)*.

WINKELMANN CJ:

25 Yes. But Ms Hoskin would say but when we make that assessment don't forget the person who was there knew what they did.

MR COOK:

Again, depending on the facts. They may have, which probably brings to the final point which is…

WINKELMANN CJ:
But if there was, say, DNA evidence again, some forensic evidence, which showed that it was completely wrong, their admission, then you're right, the system might…

5 **MR COOK:**
Yes, DNA –

WINKELMANN CJ:
I don't know if there's ever been such a case.

MR COOK:
10 Well, DNA evidence definitely has focused appellate courts much more because we can say factually there is innocence and that tests all these principles we have about finality and other aspects. But the point – the Solicitor-General said that the lens through which this appeal should be looked at is a guilty plea. With respect, we say the lens through which this appeal 15 should have been looked at is 232. The guilty plea is a tint on that lens, but no more than that because the focus must singularly be on miscarriage of justice, and we risk that slippage which – it's not cited but when the Bench and Bar discussion was going on I thought about *Sungsuwan v R* [2005] NZSC 57 which was the counsel incompetence where through *R v Pointon* [1985] 1 NZLR 20 109 (CA) and all of the other decisions we've got this radical departure and that became the phrase and that started to be the focus, whereas his Honour, Justice Tipping, in his decision said, well, no, no, look back in miscarriage of justice, which I think was 385(1)(c) at that point.

WINKELMANN CJ:
25 For whatever reason.

MR COOK:
Yes, that's exactly right.

WILLIAMS J:
That's the danger of lists.

MR COOK:
It is a convenient –

5 **WINKELMANN CJ:**
And lawyers love them.

WILLIAMS J:
They replace thinking.

WINKELMANN CJ:
10 So do judges.

MR COOK:
I think that that's right because it enables someone quickly who's got a busy practice to be able to go: "Well, this fits into this box therefore…" We criticise bureaucrats regularly for boxes in public law decisions yet we seem to like to
15 put them in.

WINKELMANN CJ:
Clever minds like to analyse and create categories, but the law has to respond to the justice situation.

MR COOK:
20 Unless there's anything further…

WINKELMANN CJ:
No. Thank you, Mr Cook.

Ms Hoskin, did you have anything by way of reply?

25 **MS HOSKIN:**
I don't. I –

WINKELMANN CJ:

Everyone seems to be in violent agreement on the test.

MS HOSKIN:

Indeed. The only point I wanted to make was the, as your Honour,
5 Justice France, noted, a couple of the decisions my learned friend relied on didn't involve guilty pleas. There was one other which was *Burke*. *Burke* also didn't rely on a guilty plea. It was two separate trials. I just wanted to draw that to the Court's attention.

WINKELMANN CJ:

10 Yes.

MS HOSKIN:

Other than that, I have nothing further in reply. Thank you.

WINKELMANN CJ:

Thank you. Well, thank you, counsel, for your submissions. They have been
15 very helpful. We will take some time to consider our decision. We will now retire.

COURT ADJOURNS: 12.16 PM

20